BOOK REVIEWS
REVUE DES LIVRES

Criminal Law. By J. C. SMITH and BRIAN HOGAN. London: Butterworth & Co. (Publishers) Ltd. 1965. Pp. ixxix, 609. ($17.50)

In the ensuing paragraphs, I intend to discuss English teaching materials in general rather than the particular merits of this book. A short examination of the text shows that the authors, who are two of the most capable commentators in the field, have a firm grasp of their subject and have provided an excellent guide to the black-letter law. I am fully aware of the excellent work done by Professor Smith in helping readers understand the cases reported in the *Criminal Law Review* and the imaginative editing carried out by Mr. Hogan in his capacity as an editor of *Medicine Science and the Law* and, more recently, of the *Criminal Law Review*. My criticism stems from the very fact that the authors should feel that there is a pedagogical justification for a new criminal law text book in this format. In the Preface, they explain that it will fill a gap between the old student standby, Kenny's *Outlines of Criminal Law*[1] and Glanville William's analytical and exhaustive *Criminal Law: The General Part*.[2] This is probably an accurate assessment of the present state of English legal education and teaching materials. If so, it is an unfortunate state of affairs. The authors also declare in the Preface that they "have endeavoured to provide the undergraduate with as complete an exposition of the substantive Criminal Law as he has to guide him in other fields of study". They have excluded procedure unless its discussion was necessitated by the discussion of criminal law. Evidence, "now commonly regarded as a worthy subject of academic study in its own right", is similarly avoided by the authors. They seem to have achieved their purposes in stating the substantive law if the fifty-six pages[3] containing tables of statutes and cases is any guide. In addition to this vast use of bibliographical material, the text of the book covers almost six hundred pages. How is space used? The print is small and the footnotes are of a terse, bibliographical nature, at least compared with those in American texts. Even on the author's own terms, I find the relative weight given to topics a little per-

[1] (18th ed., by Turner, 1962).
[2] (2nd ed., 1961).
[3] Pp. xxiii to lxxix.

plexing. For instance, only ten pages are assigned to a very cursory examination of "The Aims of the Criminal Law". This topic has been the subject of frequent and illuminating study in recent years.[4] These discussions emanated from a dissatisfaction with the narrow view of criminal law which the book under review is perpetuating. This new approach gives consideration to "the nature of the limitations imposed upon the use of the criminal law for attaining its primary purpose of pervading values and principles of the general democratic social order in which it functions".[5]

The criminal law has been re-examined with a view to a planned use of the law to achieve social ends. The "doctrinal apparatus" of the relevant law must be perfected and this could only be done by relating it to other social processes. The drafting of the Model Penal Code was predicated on the assumption that the substantive criminal law was chaotic, encrusted with legal anachronisms and took little account of anything outside the narrow, and confining concepts of *mens rea*, *actus reus*, possession, "taking", "malice aforethought", and so on. The task of the American Law Institute did not end with a re-organization and rationalisation of the case law. The Chief Reporter of the Model Penal Code, Professor Herbert Wechsler, makes this very clear when he says:

> . . . we shift our focus from the courts and their decisions to the legislatures and the task of legislation; and we concern ourselves with our subject as we think it should be viewed by those with ultimate responsibility for making law, not merely the subordinate responsibility for its interpretation or its application, . . .
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> A shift of this kind in our focus or perspective, works enormous change in our pre-occupations. For, our interest moves at once from the peripheral issues that give the largest trouble to the courts, working within existing systems, to the basic and intrinsic problems of the field, the questions as to ends and means that ought to be confronted in the building or appraisal or improvement of a system geared to serve its proper functions in the government of men. The target necessarily becomes to order all the problems in their right relation to each other; to explore their possible solutions, estimating, in so far as possible, both their advantages and cost; to marshal, articulate, and weigh values, knowledge, judgment, and experience that bear upon the choices to be made.
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> To say this is not to say that it is unimportant that we know and understand existing laws.[6]

[4] *E.g.* Williams, The Proper Scope and Function of the Criminal Law (1958), 74 L.Q. Rev. 76; Michael and Wechsler, Criminal Law and Its Administration (1940), pp. 4-20; Cohen, Moral Aspects of the Criminal Law (1940), 49 Yale L.J. 987; Devlin, The Enforcement of Morals (1959); H.L.A. Hart, Punishment and the Elimination of Responsibility (1962); Allen, The Borderland of Criminal Justice (1964); Mewett, The Proper Scope and Function of the Criminal Law (1961), 3 Crim. L.Q. 371.

[5] Paulsen and Kadish: Criminal Law and Its Processes (1962), p. 3.

[6] Wechsler, Legal Scholarship and Criminal Law (1957), 9 J. Leg. Ed. 18, at p. 20.

The authors also discuss punishment in the most pedestrian way, dividing the various "theories" into nicely separated categories without establishing their relationship to the underlying policy of the criminal law or the implications of penology. This section is altogether too thin. Why not quote from some of the more thoughtful works of recent years on the inter-relationships of crime, corrections and sentencing?[7]

Similarly, Chapter 2 which discusses "The Definition of a Crime" is equally shallow, skimming across the surface of the subject ensuring that English law students will never get their feet wet.

Let me repeat that the authors are, of course, victims of a system rather than creators of it. My major problem in reading the text is that I find the orientation to be diametrically opposed to the approach which I think a law student should be encouraged to take. In Chapter 5 on Negligence, for instance, there is a three-page statement which is of limited value as it tries to state in a short space what should be developed in a more general discussion of responsibility. Admittedly the authors discuss negligence in relation to manslaughter[8] but here their approach is to give chapter and verse of the cases in the text and to use one or two sentences to describe (with footnote citation) the arguments of men such as H. L. A. Hart, Glanville Williams and Jerome Hall who have thought deeply on the subject and have points of view which deserve elaboration and exposure to students.

What is the pedagogical aim of the English law teacher? Is he simply content with turning out successful LL.B. candidates who have temporary knowledge of literally thousands of cases illustrating some questionable principles? Alternatively, is he hoping to mould the mind of his law student, who is a potential legislator, law reformer as well as lawyer, so that he will take a constructively critical view of his laws so that he can improve them rather than blindly follow or glibly distinguish them in a legalistic manner? I submit that law teachers who believe that we should cram the students' heads with black-letter law in the vague hope that the students will give some later thought to "policy", the rationale of these laws, and so on, have the cart before the horse. How can one possibly be in a position to assess the efficacy of the present criminal law when one is so preoccupied with the more sophisticated absurdities of *mens rea*? While on this point, I must applaud Messrs. Smith and Hogan for not succumbing to the temptation of devoting numerous pages to the discussion of impossibility in attempt. They limit this topic (and related problems) to a mere ten pages.[9] Coincidentally, this is precisely the space devoted to the

[7] *E.g.* Crime and Corrections (1958), 23 Law & Contemporary Problems 583. [8] Pp. 223-229. [9] Pp. 152-161.

problem of insanity as a defence in the criminal law (including unfitness to plead). A further four pages describe the defence of diminished responsibility. In the discussion, the word "psychiatrist" is *never* used although one half page discusses "Proposals for Reform".[10] In this section the critics of the *M'Naghten* Rules[11] are cited as believing that the Rules are based on "outdated psychological views".[12] The Royal Commission on Capital Punishment of 1953 is also referred to; the commissioners "thought that the question of responsibility is not primarily a matter of law or of medicine, but of morals and, therefore, most appropriately decided by a jury of ordinary men and women".[13] While law students must understand that the insanity defence is subject to definition by law, surely they should have some inkling of the psychiatrist's viewpoint. Unlike many sections of the book, the discussion of insanity cites only one inconsequential law review article and no learned treatises. I also find it very surprising that the *Durham*[14] rule is not mentioned. No one suggests that the rule laid down by the Federal Court of Appeals of the District of Columbia is perfect but it was the first serious judicial effort to provide an alternative to the *M'Naghten* Rule. Canadian readers will also be disappointed to find no reference to the excellent *McRuer Report*.[15]

Drunkenness, as it is commented upon in this book,[16] is another area where the English law teacher is missing an excellent opportunity to discuss the implications of the current views on responsibility. The discussion is narrowly based on the leading cases of *Meade*[17] and *Beard*.[18] I am not suggesting that a text book on criminal law should include an exposition on the Jellinek studies of alcoholism[19] or the psycho-social aspects of the problem; it should, however, stimulate a questioning attitude toward the present state of the defence, as well as a reassessment, in the context of drunkenness, of *mens rea* and the so-called presumption of intention. In this context, the omission of *Stones*,[20] *Hornbuckle*,[21] *George*[22] and *Boucher*[23] robs the discussion of a viability which these cases, particularly the first named, would have provided.

There is a singular lack of Commonwealth or United States materials. Why this parochial view? Outside the discussion of a few areas peculiar to the Commonwealth (such as excessive self-defence), few Australian or Canadian sources are cited. Why are

[10] Pp. 107-108.
[11] *Daniel M'Naghten's* Case (1843), 10 Cl. & Fin. 200.
[12] P. 107. [13] Pp. 107-108.
[14] *Durham* v. *United States* (1954), 214 F. 2d 862, 45 A.L.R. 2d 1430.
[15] Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases (1956).
[16] Pp. 116-120. [17] [1909] 1 K.B. 895. [18] [1920] A.C. 479.
[19] For instance, Haggard and Jellinek, Alcohol Explored (1942).
[20] (1955), 56 S.R. (N.S.W.) 25.
[21] [1945] V.L.R. 281. [22] [1960] S.C.R. 871. [23] (1962), 39 C.R. 242.

Proudman v. *Dayman*[24] and *O'Grady* v. *Sparling*[25] ignored? In a discussion of necessity why should students not be invited to consider the Case of the Speluncean Explorers?[26]

What then is such a book as the one under review trying to achieve? I am frankly mystified. The comments I have made above make it perfectly clear that this is not meant to be a book which will stimulate the student to broaden his perspective of the phenomenon we call "crime". If this were so, we would find, for instance, greater attention paid to the theory of punishment, the concept of crime and criminal law, and to take particular examples, the rationale of conspiracy,[27] or the socio-economic aspects of property offences. This last omission is one of the most glaring. Surely Hall's *Theft, Law and Society*[28] is one of the most important contributions to this area of *law* (*not* sociology, economics, or psychology). Similarly, how could one ignore criminal or quasi-criminal "business practices", such as those which relate to white-collar crime, price-fixing, anti-trust or the duties and liabilities of company directors.

If the English law teacher is not planning to educate (in its purest sense) in the law, what is he aiming at, as exemplified by the law stated in this book? Is he planning to train the student to be a practitioner in the criminal courts? Presuming for the moment that such an aim is capable of achievement, which is doubtful, do the contents of this book, the substantive law "stated as at April 30, 1965", help him in this task? Can he, for instance, justify a mere twenty pages devoted to *actus reus* and *mens rea*, the very bases of criminal law, while more than four times that space is devoted to the atypical and relatively uncommon crimes of homicide?

The approach of this book is such that a student will complete his study with a super-saturated knowledge of the intricacies of the law relating to property offences (amounting to one quarter of the entire book) with all its legalistic warts. The student will, however, have no idea what will happen to a client who is illegally arrested, illegally searched, subjected to procedures which test his sobriety, whose communications are subjected to eavesdropping, who confesses under coercion, who wishes to be released on bail, to impugn evidence (on the basis of its relevancy to the rules of substantive law or otherwise) or to appeal. The student will have no knowledge of the operation of the legal aid system. The student will also be ignorant of the sentencing process, the use of presentence investigations, the types of punishments which may be

[24] (1941), 67 C.L.R. 536. [25] [1960] S.C.R. 804.

[26] Fuller, The Case of the Speluncean Explorers (1949), 62 Harv. L. Rev. 61.

[27] *Cf.* the cursory discussion at p. 144 of the implications of *Shaw* v. *D.P.P.*, [1962] A.C. 220.

[28] (2nd ed., 1952).

imposed on the potential client. These matters could not, of course, be dealt with at length or in depth, but they deserve attention if the student is to be something more than a mere repository of narrow legal rules laid down by a positivistic judicial system and which are divorced from the disciplines which have a kindred interest in the community problem of crime and the treatment of the criminal as a deviate from the norms of society.

If the English teacher of criminal law does not intend to achieve these ends, an intensive study of the rules of the criminal law are likely to rob the law student of the greatest attractions of this field of law. The resulting course in substantive criminal law will be something less than a stimulating intellectual experience.

I cannot help comparing this type of book with the casebooks compiled in the United States. The most radical casebook is that of Goldstein, Donnelly and Schwartz[29]; a short perusal of its table of contents will convince the reader of the truth of this statement. The editors discuss very little "substantive" law but examine the problems of criminal law and punishment from the viewpoint of a few illustrative cases. Such an approach would no doubt be too extreme for all but a select body of students in the rarified atmosphere of the Yale Law School or some similar institution. Paulsen and Kadish, *Criminal Law and Its Processes*[30] provides a more moderate teaching tool. This book embodies the best combination of theory and practice, policy and black-letter law, of ambiguous issues and pragmatic solutions.

I intend no disrespect to Messrs. Smith and Hogan when I suggest that a collection of the best academic writing, governmental and commission reports, perceptive and well-reasoned judgments, garnished with stimulating editorial comment and questions provides the best "text" book for the law student. I do not believe it is absolutely necessary, although no doubt desirable, for such a book to be used under the case method of teaching. It provides tools which are not available (or in short supply) in most law libraries and places before the student rules, concepts and arguments which he would not otherwise bother to consider or pursue.

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[29] Criminal Law: Problems for decision in the promulgation, invocation and administration of a law of crimes (1962). Professor Schwartz is a sociologist.

[30] See footnote 5, *supra*. See also Book Review (1964), 42 Can. Bar Rev. 350.

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Collective Bargaining Law in Canada. By A. W. R. CARROTHERS. Toronto: Butterworth & Co. (Canada) Ltd. 1965. Pp. lxxxix, 544. ($21.50)

Unlike their American and English counterparts, Canadian law students and teachers must do without adequate Canadian textbooks and authoritative works in most fields of law. One of the most critical omissions has been in labour law, especially that part dealing with trade unions and collective bargaining. It is fortunate that as eminent an authority as Dean Carrothers has now provided us with a book that not only meets that need, but will certainly be indispensable to anyone involved in reforming or urging reform in collective bargaining laws, as well as to anyone involved in administering these laws or representing trade unions or employers before courts and boards.

Dean Carrothers postulates as the basis of an effective system of collective bargaining that employees be free to engage in three kinds of activity: 1) to form themselves into associations: 2) to engage employers in bargaining with these associations; and 3) to invoke meaningful economic sanctions in support of the bargaining. These three constituents of collective bargaining are discussed from four different points of view in the four parts of the book.

In Part One, Dean Carrothers traces the history of collective bargaining law in Canada from the latter part of the nineteenth century when all three constituents of collective bargaining were illegal, through the uneven progression to the present when all three are recognised and more or less effectively protected. It becomes clear from a reading of this part that most of the federal and provincial labour relations legislation was copied initially from English Acts, but without any recognition that in England such legislation "grew out of voluntary practices that already existed without the crutch of legislation", whereas in Canada it "was imposed as government policy". Indeed, the courses of action in the two countries diverged: in England the trend was "away from legalism in industrial relations", whereas in Canada it was towards "a tightly operated statutory scheme".[1] Later legislative schemes were inspired by the American Wagner Act,[2] but as Dean Carrothers points out, Canadian policy still "carries a degree of state intervention that is more extensive in its application to run-of-the-mill disputes than is the machinery for intervention in emergency disputes in the United States".[3] Attempts were made by the federal government and various provincial governments to deal with labour disputes. Although the issue of legislative juris-

[1] P. 33.
[2] The National Labor Relations Act, 1935, 49 Stat. 449.
[3] P. 32.

diction was in doubt, there was a centralizing tendency which was rudely halted when the *Snider* case[4] decided that labour relations were essentially within provincial jurisdiction. This decision "destroyed the policy of centralization of legislative authority in the area of labour relations", and produced another important feature distinguishing Canada from the United Kingdom and the United States, that is, "the balkanization of labour policy".[5]

Part Two of the book is a detailed analysis of collective bargaining legislation in Canada and of its interpretation and application by courts and Labour Relations Boards. This systematic comparison of collective bargaining legislation points up the growing lack of uniformity and, indeed, should encourage the various governments to consider whether such divergence is really necessary, or whether it could be minimized. The problems of national trade unions and national employers in adjusting to eleven different legislative schemes can hardly add to efficiency in labour relations, and very likely exacerbates tension at the various collective bargaining tables.

The second part is really the core of the book. It deals exhaustively with the relevant reported decisions of courts and tribunals. Because it covers the law in eleven jurisdictions, with a minute and careful comparison of any similarities and differences, it makes somewhat less inspiring reading than the other three parts. Moreover, because this is a rapidly changing field, parts of Dean Carrothers' painstaking analysis are already out-of-date. In the year since he finished writing the text, there have been amendments to labour relations statutes in Manitoba,[6] Nova Scotia,[7] Ontario,[8] Prince Edward Island,[9] Quebec,[10] and Saskatchewan;[11] in addition the *Freedman Report*[12] has been published, and more recently the Ontario government has announced a study into the use of injunctions in labour disputes.

Part Three deals with the third constituent of collective bargaining, that is, the invocation of economic sanctions in support of bargaining—principally the strike and the picket. This is a field in which Dean Carrothers has written extensively before, and it is in this part that he is most eloquent. With recent talk of growing labour unrest, with growing criticism by trade unionists of the use of the injunction, with increasing realization that the law on striking, on picketing and on injunctions needs rethinking and revising, it is pertinent to quote from the author's own indictment:

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[4] *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396.
[5] P. 40. [6] S.M., 1966, c. 33. [7] S.N.S., 1965, c. 53.
[8] S.O., 1966, c. 76. [9] S.P.E.I., c. 19. [10] S.Q., 1965, c. 50.
[11] S.S., 1966, c. 79. More recently the Essential Services Emergency Act, S.S., 1966, 2nd Sess., c. 2.
[12] The Industrial Inquiry Commission Relating to Canadian Railways "run throughs" (1966).

> The principle causes of uncertainty in the law seem to be found in inconsistency in the perception, or absence of perception, of the nature of the legitimate interests in conflict, and the failure of the common law to accept or discharge responsibility for developing an appropriate and durable concept of tort law for the resolution of the conflicts. At one extreme the common law tries to pour the comparatively new wine of industrial conflict into such old bottles as the law of defamation, nuisance and inducing breach of contract; and at the other extreme it has invented and continues to use such comparatively new and difficult containers as the tort of conspiracy to injure and unjustified interference with freedom to trade.
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> Defective perception of the nature of industrial conflict and bias against both collective action and the institutions of collective action are not difficult to document.
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> . . . when there is added blind adherence to precedent, logical fallacy and the invocation of meaningless fiction, the law which Lord Mansfield perceived as being in a perpetual state of working itself pure by rules drawn from the fountain of justice seems from time to time to degenerate into a witch's brew. . . . Logical fallacy and the misuse of fiction, often flowing from semantic inconsistency, are most clearly illustrated in the cases concerning the law of nuisance and cases requiring inference regarding intent in the application principally of the law of civil conspiracy and inducing breach of contract.[13]

Is it small wonder, then, that trade unionists have developed a suspicion of courts and judge-made law? And yet Dean Carrothers has not lost faith in "the very quality of viability in the common law which seems so lacking in the picketing cases", and he states that "the questions which present statutes create or leave unanswered demonstrate a severe limitation on the legislative process as a method of law reform in this area".[14] With respect, it seems to me that all of the author's criticisms of the law in this branch of labour relations point to the opposite conclusion. The history of collective bargaining legislation in England and Canada, the contests between courts and labour relations tribunals in the period after World War II, and the attitude of the courts to employee combinations, all illustrate that the legislative process has not only been more effective in achieving employee and trade union protection than the common law, but that often it has had to be used to override that law.

As union security is more assured, difficulties arise between the dissident individual and his union, and the dissident local and its parent. In dealing with these problems in Part Four, Dean Carrothers shows how the application of the common law of unincorporated associations to trade unions, coupled with statute law which tries to promote the union as the collective bargaining representative of all the employees in a designated bargaining unit,

[13] Pp. 419-421.

[14] p. 497.

has produced serious conflicts of policy and interest. This "ambivalence" seems to result from the attempt of both the courts and the legislatures to steer clear of a difficult field. Although the courts have not hesitated to jump in when they saw instances of union oppression of employers, they have not often intervened when there has been union oppression of individual employees. Although the legislatures have adopted a policy of promoting industrial peace through encouragement of collective bargaining and protection of unions, they have not balanced this policy by protecting the rights of an aggrieved individual. This is an aspect of collective bargaining law that urgently needs remedy. Could not one suggest that Labour Relations Boards be given supervision of this field through their powers to prohibit certain actions as unfair labour practices, and their powers to order reinstatement? Wrongful expulsion from a trade union could be designated as an unfair labour practice, and in appropriate cases a Board could order reinstatement to membership in addition to or in lieu of any fines levied.

This is a book which was urgently needed. It is thorough in providing a complete view of the law on collective bargaining in Canada, in all eleven jurisdictions. Dean Carrothers has exposed many of the anomalies and ambiguities of the law. Let us hope that his work will inspire further research into, and solutions for, the many problems posed.

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Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance. By ROBERT E. KEETON and JEFFREY O'CONNELL. Boston: Little, Brown & Company. 1965. Pp. xv, 624. ($13.50 U.S.)

Two American law professors have recently made a major contribution to the debate concerning the future of the automobile claims system in the common law world. Robert Keeton of Harvard University and Jeffrey O'Connell of the University of Illinois, in their new book *Basic Protection for the Traffic Victim*, have launched a blistering attack on the present method of loss distribution in the United States, documenting their charges with recently collected factual data.[1] After presenting their reasoned arguments for reform,

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[1] Adams, A Survey of the Economic-Financial Consequences of Personal Injuries Resulting from Automobile Accidents in the City of Philadelphia: 1953 (1955); Conard, Morgan, Pratt, Voltz & Bombaugh, Automobile Accident Costs and Payments (1964); Franklin, Chanin & Mark, Accidents Money and the Law: A Study of the Economics of Personal Injury Litigation (1961), 61 Col. L. Rev. 1; Morris & Paul, The Financial

they outline first in principle and then in statutory form their solution, the "Basic Protection Plan", which they claim is ready for adoption. Despite the fact that some of the details of the basic protection plan may be open to criticism, particularly in Canada, the authors have lifted us to a new plateau in the tortuous climb toward the ultimate solution to this vexed problem. They have devised the most complete scheme yet proposed incorporating the new concept of "Peaceful Coexistence": any automobile accident plan should include immediate economic reimbursement on a non-fault basis without sacrificing the tort claim. However, in calling for the conditional surrender of certain tort rights in order to accommodate the non-tort aspect of their plan, the authors have polluted the purity of the peaceful coexistence principle.[2]

The authors' attack on the tort system echoes the complaints made by numerous critics over the years. They begin by pointing out that the tort system leaves substantial gaps in compensation;[3] relying on the new statistical studies, they show that no tort recovery was received by 63% of the injured in the State of Michigan,[4] and 45% in the State of Pennsylvania.[5] In Ontario the number who recover nothing via tort law is 57%.[6] Moreover, they contend that the tort system is cumbersome and slow,[7] which charge is particularly true in the larger American cities like Boston, Massachussetts, where trials were delayed thirty-two months and Chicago, Illinois, where the delay was fifty-eight months.[8] In the County of York, by contrast, 36% of the trials commenced were heard in less than two years while the balance were not heard until after two years had elapsed.[9] A further criticism levied against the system is that some victims secure more than their economic losses while at the same time others receive either nothing or less than they have lost. This result is due, in part, to double recovery by some people from both the defendant and from collateral sources, and to compensation for pain and suffering. At the same time others, who are

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Impact of Automobile Accidents (1962), 110 U. Pa. L. Rev. 913. Professor Adams is currently studying the Saskatchewan system.

[2] Linden, Peaceful Coexistence and Automobile Accident Compensation (1966), 9 Can. Bar J. 5; Conard, The Economic Treatment of Automobile Injuries (1964), 63 Mich. L. Rev. 279; Morris & Paul, *loc. cit.*, *ibid.*; Keeton & O'Connell, Basic Protection—A Proposal for Improving Automobile Claims Systems (1964), 78 Harv. L. Rev. 329; Calabresi, Some Thoughts on Risk Distribution and the Law of Torts (1961), 70 Yale L.J. 499; Calabresi, The Decision for Accidents: An Approach to Non-fault Allocation of Costs (1965), 78 Harv. L. Rev. 713. See also Keeton, Conditional Fault in the Law of Torts (1959), 72 Harv. L. Rev. 401; Calabresi, Fault, Accidents and the Wonderful World of Blum and Kalven (1965), 75 Yale L.J. 216.

[3] P. 1. [4] P. 43. [5] P. 50.

[6] Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents (1965).

[7] P. 1. [8] P. 14.

[9] See Osgoode Hall Study, *supra*, footnote 6.

unable to prove fault, may receive nothing from the defendant. Next, the authors proclaim that the present system is excessively expensive because the court battles required to determine fault are costly and time-consuming.[10] In addition, they point out that fault may be impossible to determine,[11] that the ever-changing details of an unexpected accident must be recalled years later,[12] and that, therefore, there is a danger of distortion.[13] Legal costs and other administration costs have so mounted in the United States that less than 50% of the premium dollars ultimately find their way into the pockets of the traffic victim.[14] Finally, they bemoan the temptations to dishonesty inherent in the present system and the resultant ill effects on the administration of justice. They conclude their denunciation by saying that the present system provides "too little, too late, unfairly allocated, at wasteful cost and through means that promote dishonesty and disrespect for law".[15]

The authors then plead for a system of compensation regardless of fault, the cost of which is to be borne by motorists as a class. No longer does tort law choose which one of two *individuals* must bear the loss; because of the increased liability insurance coverage the choice now is which *group* in society ought to bear the loss.[16] They then suggest that it is fair for motorists, who receive most of the benefit of driving, to bear the cost of the accidents produced by their activity.[17] Furthermore, they advance a theoretical economic argument which runs as follows:

> Requiring an activity to pay its own way helps both the community and individuals to make informed choices among different uses to which limited resources may be put. If this obligation is not imposed on motoring, then both the community and individuals may unwittingly engage in motoring more than they would choose to do if motoring's full cost were known. If, on the other hand, motoring is obliged to pay its way in a manner that clearly indicates its cost so that an individual can see this when deciding, for example, whether to buy a second or a third car, his opportunity to make a wise choice is improved. Thus we might attach a price tag reflecting accident costs in the form of premiums for insurance covering the use of the car.[18]

Prior to constructing their own plan, the authors outline some of the half-way measures in existence in the United States and describe some of the plans heretofore proposed. The compulsory liability insurance laws of Massachusetts, New York and North Carolina,[19] the financial responsibility laws,[20] the unsatisfied judgment funds,[21] the impounding acts,[22] and other such legislation are examined briefly.

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[10] P. 2.
[11] P. 2.
[12] P. 18.
[13] P. 22.
[14] P. 70.
[15] P. 3.
[16] P. 256.
[17] P. 257.
[18] P. 259 *et seq.*
[19] Chapter 3.
[20] P. 102.
[21] P. 110.
[22] P. 118.

Over the last few decades various auto compensation plans have been devised, each one taking something from those that preceded it and adding some new ingredient. Professors Keeton and O'Connell, too, build their structure using the bricks of their predecessors' labours. The celebrated Columbia plan, the first of these proposals, urging compensation for all accident victims regardless of fault according to a fixed schedule of benefits was born in 1932. Although a board similar to the Workmen's Compensation Board was to administer the plan, the authors allowed that there might be room for private insurers to undertake the risk, as is now done with Workmen's Compensation in several of the United States. As in Workmen's Compensation legislation, the tort action was to be obliterated as was compensation for pain and suffering. In 1946 the Saskatchewan plan, embodying most of the recommendations of the Columbia proposal, was enacted.[23] It provided limited benefits to all those injured in car accidents regardless of fault, including $25.00 per week to persons who were totally disabled. One attractive feature of this plan was the survival of the tort action although any benefits received from the plan would be deducted from any tort recovery. The plan was and is administered by the Saskatchewan Government Insurance Office exclusively, although liability insurance above the minimum limits is written by private insurers. Two plans closely resembling the Saskatchewan solution were proposed in Ontario in 1963 and in California in 1965. Both the Select Committee of the Legislative Assembly of Ontario[24] and the State Bar Association of California[25] urged the adoption of limited accident benefits coverage regardless of fault to be written by private insurers rather than by government. The benefits provided were to be more extensive than in Saskatchewan and the tort action was to be left inviolate except for a set-off in Ontario and subrogation in California.

In addition to these non-academic plans, various professors in the United States have designed automobile compensation plans. Professor Leon Green[26] has recommended a privately-run insurance system that would supply full economic reimbursement to everyone regardless of fault under which compensation for pain and suffering would be eliminated. Professor Albert Ehrenzweig[27] of the University of California, Berkeley, upon whom Professors Keeton and O'Connell draw heavily, urged the adoption of a voluntary, non-fault compensation scheme, providing, as an incentive to motorists, an exemption from tort liability for those who purchased his "Full Aid Insurance". Professors Morris and Paul of the University of Pennsylvania suggested that 85% of the indi-

[23] P. 140. [24] P. 152. [25] P. 148.
[26] Green, Traffic Victims: Tort Law and Insurance (1958).
[27] Ehrenzweig, "Full Aid" Insurance for the Traffic Victim (1954).

vidual losses incurred over $800.00 be reimbursed by a state fund and that claims for pain and suffering below this amount be abolished. None of these academically inspired plans have yet been enacted anywhere. Because they were mostly rather sketchy, they had not been hammered out with experts in the insurance field and, most significantly, the time was not yet ripe for their reception.

In devising their plan Professors Keeton and O'Connell embraced two principles: that motoring should pay its way and that negligent motorists should pay their way.[28] The burden of providing a minimum level of protection against measurable economic loss for all accident victims is treated as a cost of motoring. All motorists, therefore, should share the cost of providing this non-fault basic compensation.[29] The mechanism to be used is compulsory automobile insurance that resembles the medical payments coverage now in use. Moreover, the tort claim would be preserved in the more serious cases for those who are able to avail themselves of it, but pain and suffering awards in the minor injury cases would be abolished. The cost of this insurance would be borne by the *negligent* drivers as is the case at the present time.

The authors have not stopped here; they have taken the next vital step and have prepared a detailed statute that purports to cover every aspect of their proposed basic protection plan[30] and have made lengthy comments upon each section.[31] In operation the plan, will be rather complicated, but unfortunately accident reparation is already a complex undertaking. Under the basic protection plan if Jones is injured in an automobile accident, he would receive up to $10,000.00 net out-of-pocket loss as it accrues, regardless of his own fault. These payments would not be in accordance with any schedule of payments, but they would just cover the actual and reasonable expenses incurred by Jones, after a deduction is made of amounts received from collateral sources, like hospital and medical insurance. There is a limit of $750.00 per month on the wages reimbursed and 15% (the amount of income tax saved) would be deducted therefrom. Additional coverage for pain and suffering and catastrophic losses will be made available on an optional basis. The plan does not attempt to cover losses resulting from property damage to vehicles nor losses of less than $100.00, which is a sort of deductible feature to cut the administrative costs of small claims. These matters are left to the ordinary courts to sort out. It must be emphasized that this basic protection coverage depends not on tort liability, but it is rather a form of loss insurance.

Professors Keeton and O'Connell claim that this Utopian plan will not be more expensive to motorists; in fact, it could be pro-

[28] P. 268.
[29] P. 269.
[30] Chapter 7, pp. 299-339.
[31] Chapter 8, pp. 340-482.

vided at a saving of between 15%-25% on present insurance premiums.[32] However, such a miraculous feat is not accomplished without some sacrifice; the authors plan to remove some of the victims' tort rights in return for the benefits paid to them. Jones, our injury victim, will be unable to collect the first $5,000.00 of his pain and suffering as well as his first $10,000.00 of economic loss from the other person, even where that other person is at fault. If Jones suffers pain and loss of over $5,000.00, however, he may recover in a tort action the amount of the excess. It is this tort liability exemption feature that makes possible the provision of the entire package at a reduced cost. The Keeton and O'Connell plan, therefore, supplies immediate compensation to all victims at reduced premium cost without sacrificing tort claims in the more serious injury cases, although the tort claims in less serious cases are removed from the courts.

The drastic surgery proposed by the basic protection plan may very well be required for the American reparation system which may be mortally infected by the soaring insurance premiums and damage awards, shocking delays, enormous legal costs of up to 50% of the award, phony claims, the lack of comparative negligence laws and the like. In Canada it is doubtful whether such medicine as the Keeton and O'Connell plan is necessary. In this country we have comparative negligence legislation, lower legal fees and awards, less delays, higher minimum limits, unsatisfied judgment funds along with broader coverage of state-assisted hospital and medical insurance. Perhaps there is also a more receptive attitude towards settlement by Canadian insurers which view may be encouraged to a degree by the requirement that he who loses a negligence action must bear the substantial costs of the other person. Moreover, Canadians are probably less claims-conscious and Canadian negligence lawyers are less aggressive, than their American counterparts. It may be that one day insurance premiums in Canada will become so high that compensation for pain and suffering will have to be limited or even abolished, but that day has not yet arrived. Prior to that time perhaps a major assault could be launched to reduce the number and severity of accidents by installation of safety features in automobiles, improved driver education, tougher licensing laws and stricter enforcement. After all, insurance costs are determined basically by the cost of accidents; they rise when accident costs go up and should decrease if accident costs are lowered. Another problem with abolishing pain and suffering claims of less than $5,000.00 in this country is that this would be tantamount to the removal of nearly all such claims because awards are so much lower in Canada, perhaps one-quarter to one-

[32] Study by Frank Harwayne, F.C.A.S. prepared for the Study of the Automobile Claims System, Harvard Law School (Jan. 1966).

third as high as in the United States. Limited accident benefits coverage, which would look after most of the expenses incurred in an accident regardless of fault, could be supplied at a cost of 12%-15% of one's present liability insurance rates in Canada. With this minor reform most of the weaknesses of the Canadian system could be remedied without the need to deprive the claimant of his claim for pain and suffering to any extent. Admittedly, if one were to raise American insurance rates by this amount an outcry might be heard across the land, but in this country, because of much lower insurance premiums generally, this coverage could be supplied for an additional $7.81 on the average policy in Toronto.[33]

There are a few other problems with the details of the basic protection plan. For example, one of the most desirable features of the plan is said to be that there is no schedule of payments; each person recovers his actual losses. As a bi-product, however, this means that individuals who carry health and medical insurance will receive less from the basic protection plan which covers only losses above the amounts recovered from ordinary insurance. Furthermore, there does not seem to be any feasible way of reducing the premiums of those covered by this insurance. Consequently, the people with foresight who insure themselves fully will have to pay the same amount for the basic protection coverage as those who do not. Admittedly, the equitable elimination of double recovery may well be impossible.

Another shortcoming of the proposal is that those who earn $750.00 per month will receive more in the way of benefits than those who earn only $400.00 per month, without paying any extra premiums for this. It appears inequitable to this reviewer that although the same premium is paid by every one, some receive more in benefits than others. It might have been preferable for the authors to arrive at a figure, sufficient for subsistence living, which could be paid to all, regardless of their individual income. The $35.00 per week proposed by the Select Committee of the Legislative Assembly of Ontario is hopelessly inadequate[34]; perhaps $50.00-$60.00 per week, subject to increase in the case of dependents, would have been more realistic. Let the person who earns more that the average working man buy his own income maintenance policy so that the plan will not be saddled by these extra costs.[35]

Another difficulty inherent in the plan is that the individual who suffers a scratch or a bruise which would entitle him to $50.00 in pain and suffering compensation is treated in the same way as the one who suffers a broken leg or a severe whiplash which would

[33] See Final Report of the Select Committee on Automobile Insurance (1963), Legislative Assembly of Ontario.
[34] *Ibid.* [35] P. 283.

entitle him to $5,000.00. No doubt such anomalies would be extant in any plan which removes tort rights. But the Ontario proposal does not suffer from such problems largely because it does not tamper in the slightest degree with pain and suffering awards. Some difficulty seems to have arisen with regard to subrogation rights under section 1.10(c)(i),[36] against persons who are not basic insureds which might be solved by providing this insurance to such people by a government-run motor vehicle accident claims fund or industry-run traffic victims indemnity fund.

In sum, Professors Keeton and O'Connell have done valuable service in gathering the data and articulating the arguments for an automobile compensation plan. They have drafted a comprehensive statute ready for adoption by interested legislatures. Although they may not have found the best solution for the situation in Canada, this much is clear—anyone interested in studying this problem in future must begin his research by analysing this fine book.

ALLEN M. LINDEN*

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Hire-Purchase and Conditional Sale. A Comparative Survey of Commonwealth and American Law. By R. M. GOODE and JACOB S. ZIEGEL. London: The British Institute of International and Comparative Law. 1965. Pp. xliv, 289. ($5.60)

This is the fourth volume in the *Commonwealth Law Series* of special publications by the British Institute of International and Comparative Law, and it is notable as the first attempt in the series to take a particular set of problems common to all the major Commonwealth countries, and compare the methods adopted in each to deal with the legal aspects of these problems.

The comparative method has many pitfalls, and Mr. Goode and Professor Ziegel deserve high praise for the skill and imagination which they show throughout the book in avoiding these snares. Their general approach is undoubtedly the right one, to start from the practical side of instalment financing, break the subject down into its different practical aspects—consumer protection, enforcement of the financer's security interest against third parties, wholesale financing, and so on—and then consider how each particular aspect is regulated in the various jurisdictions, and whether the solutions offered measure up to the practical needs of the community.

[36] P. 402.

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The materials primarily considered are the English, Canadian and Australasian. American material is referred to wherever it provides an example of how the Commonwealth jurisdictions ought to deal with the problems—the authors are particularly warm in their commendation of Article 9 of the Uniform Commercial Code.

Inevitably, in an undertaking of this size and complexity, there are omissions and inaccuracies of detail. There is a tendency to treat the Canadian materials as if the law were the same in all the provinces, which unfortunately is not the case, and even where provincial discrepancies are noticed, the statements are frequently incomplete. The law of Manitoba suffers noticeably in this manner. The authors do not record the fact that Manitoba stands among the elect by introducing a "cooling-off period" for door to door sales[1]—nor, incidentally, do they seem to be sufficiently aware of the difficulties of making such provisions workable—and they should also add Manitoba to the list of jurisdictions which require the seller to elect between repossession and suing for the balance of the price.[2] There is a total misunderstanding of section 2 of the Lien Notes Act,[3] where the cases cited[4] deal not, as the authors suppose, with the requirement of writing, but with that of affixing a decal to manufactured goods. There are also some oddities in the table of abbreviations: the *Western Weekly Reports* (*New Series*) are attributed to Australia, but by way of compensation Canada acquires the *Weekly Notes* (New South Wales).

A few of the authors' conclusions are questionable. There seems little to warrant the statement[5] that resale by the seller has "frequently" been held to constitute rescission of the contract. The discussion[6] of repairers' liens against goods held on conditional sale strangely ignores *Tappenden* v. *Artus*,[7] followed, in Professor Ziegel's home jurisdiction, in *Weir* v. *Doc Landa Trailer Repairs*[8] and fails to take sufficient account of the more modern Canadian authorities, which would uphold the result at least, if not the reasoning, in *Albemarle Supply Co. Ltd.* v. *Hind and Co.*[9] (and rightly, in my submission). Finally, the statement of the legal difficulties of block discounting in English law is somewhat exaggerated, being entirely speculative, but not entirely accurate or consistent.[10]

The message of the book comes across loud and clear: the law of the Commonwealth jurisdictions has sadly failed to meet the challenge of modern credit and financing methods in most points, and we have a very great deal to learn from the United States in

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[1] P. 53.
[2] P. 100.
[3] R.S.M., 1954, c. 144.
[4] P. 130, note 20.
[5] P. 101.
[6] Pp. 180-181.
[7] [1964] 2 Q.B. 185.
[8] (1964), 49 W.W.R. 359 (Sask. C.A.).
[9] [1928] 1 K.B. 307.
[10] Pp. 201-203.

this field. It is impossible to disagree with this thesis, and the efforts of Mr. Goode and Professor Ziegel will be amply justified if their book succeeds in creating a general awareness of the shortcomings of the law in Commonwealth jurisdictions. Judged in this light, and not merely as a kind of academic "fact-finding tour" of the Commonwealth, the book deserves every success.

A. D. HUGHES*

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Tax Planned Will Precedents. By J. C. SCOTT-HARSTON, M.A. Toronto: Carswell Co. Ltd. 1965. Pp. 443. ($17.25)

The impact of taxation on moderate to large estates has rendered obsolete and even dangerous the old reliable form books. The modern estate planner must cross-breed the old books with new legislation and then hope for the best. There are a few Canadian texts on estate taxation, such as *Jameson*[1] and *Loffmark*[2] but these tend to analyse past skirmishes in the unending battle with the revenue; they are useful in determining the tax questions raised by wills presently in existence, but are somewhat less helpful in planning and drafting a new will. Mr. Scott-Harston's book thus fills the empty space between the form book and the tax text and should both save time and improve the quality of the tax-planned will.

Mr. Scott-Harston practices law in British Columbia, and the precedents have been drafted with that law in mind. However, references have been made to the laws of Ontario and Quebec, and any Canadian lawyer should be able to adapt the book to his own provincial law. The format of the volume is unique; folded, it looks normal, but it unfolds revealing a hard back with two complete looseleaf volumes lying side by side. This means that the statutes or comments in the left-hand volume can be kept open and can be applied to the precedents in the right-hand volume without having to flip pages or lose one's place. When folded, the Siamese bond forms the spine of the volume. Two separate looseleaf volumes might have been just as convenient; time will tell.

The first volume contains a selection of sections from the Income Tax Act[3] relating to estates; the British Columbia Succession Duty Act;[4] the British Columbia Wills Act;[5] the Ontario Wills Act,[6] a "Master Will" with an explanatory summary, the notes on

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[1] Canadian Estate Tax (1960). [2] Estate Taxes (1960).

[3] R.S.C., 1952, c. 148, as am.

[4] Succession Duty Act, R.S.B.C., 1960, c. 372.

[5] R.S.B.C., 1960, c. 408, as am. [6] R.S.O., 1960, c. 433, as am.

the precedents, a table of contents and a table of cases. The second volume contains the precedents and an index. The precedents are expansions and variations on the prime clauses of the Master Will, and all three are numbered to facilitate cross-reference. My own feeling is that the statutory material should either be comprehensive (as for example the National Trust *Solicitor's Desk Book* is for Ontario) or could be omitted, and the lawyer left to his own complete statutes. However, this is a minor criticism, since the important part of the book is that containing the precedents and the notes.

It should not be assumed from the title of the book that all of the provisions are tax provisions; the precedents and notes cover all aspects of will drafting, and non-tax precedents probably outnumber those dealing with death duties. Getting down to cases, I am more worried about the teeth in the "special power of appointment" section of the British Columbia Succession Duty Act than is the author. He considers that a "special power, exercisable by an appointor in favour of his children, (not being a power originally created by such appointor) should not generally be taxable" under the section,[7] on the assumption that it would be a fiduciary power, which is generally excluded from tax. Similar statutes, however, make no specific reference to the children of the power-holder.[8] If such a power is fiduciary it would be exempt whether children were mentioned in the statute or not; the presence of these words in the British Columbia Act suggests an attempt to bring into charge one particular type of special power.[9] It would perhaps be safer to have the power for children in the hands of an independant trustee (the children are then not his) and not in the hands of the life-tenant widow. It is to be hoped that some brave testator and some avaricious collector will combine to resolve this problem in the courts.

The above criticisms are, however, trivial in comparison to the merits of the book, and no estate planner can afford to be without it.

J. M. MACINTYRE*

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[7] *Supra*, footnote 4, s. 2(2) (f).

[8] See, for example, Estate Tax Act, S.C., 1959, c. 29, s. 3(1) (a), 3(2) (a); Succession Duty Act, R.S.O., 1960, c. 386, s. 1(p) (vii); Finance Act (U.K.), 1894, s. 22(2) (a); Stamp Duty Act (N.S.W.), 1920-1956, s. 100.

[9] If the author's interpretation is followed, then a power held by a widow whereby she may appoint to her children or to some other persons would be caught, but if the testator restricts the power to his own children, then the power, being fiduciary, would not be caught. One might at least speculate that the B.C. legislation was aimed at all cases where children of the power-holder were possible appointees.

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The Canadian Yearbook of International Law. Vol. 3. Vancouver: University of British Columbia. 1965. Pp. 383. ($12.00)

The third volume of the *Canadian Yearbook of International Law* lives up to its predecessors both in standard and catholicity.

Two articles deal with specific problems, while the others tend to be related to problems in the field of international organization. Mr. Gotlieb examines some of the problems arising from space exploration, paying particular attention to those raised by the presence of nuclear weapons in outer space. He points out how difficult it sometimes is to distinguish between uses which are peaceful and those which are not. On this problem, United Nations resolutions have played no small part and the general issue of the validity of such resolutions becomes of major significance. It is therefore useful to be reminded that one of the grounds for the binding character of such resolutions has been the plea of estoppel, but "for estoppel to operate as a binding preclusion, the conduct or statement of the party estopped must be clear and unambiguous, voluntary, authorized and unconditional and there must be reliance upon the representation of the party by the other to his detriment".[1] For this reason, a state seeking to secure authoritative condemnation of a state for breach of the resolutions on arms control may find itself hard pushed to show a breach of any international obligation giving rise to an international claim.

The other non-organizational article is by Professor Bourne on the utilization of the waters of international rivers, emphasising how the irregular rate of the development of the states through which such a river flows is itself likely to create problems with regard to utilization.[2] The problem is analysed to determine the extent to which a territorial state may use the water when its user produces no injury to others; when use causes insignificant injury; when the injury is serious and to already existing rights of user; and when it affects the right of lower riparians to share in the benefits of waters already used higher up. The balance of evidence implies there is no restriction on non-harmful user, although future claims may well arise,[3] and there is some ground for arguing that if user affects the physical condition of the river prior consent of co-riparians or some tribunal might be called for. In so far as injury is concerned, Dr. Bourne maintains that, in accordance with "the rule that minor injury to existing uses does not give rise to international obligations, . . . it is accurate to say that international law protects only beneficial uses of water".[4] Where serious injury is concerned, it would appear that prior user is not the sole ground to be considered. It seems that a state exceeds reasonable and equit-

[1] P. 35.
[2] Pp. 187-188.
[3] P. 195.
[4] P. 220.

able user at its peril, and may be deprived of such excess fruits when another co-riparian needs them,[5] and a similar rule based on equitable proportionment may well be advisable for the user by lower riparians of the upper waters.

Mr. Kass is concerned with obligatory negotiations in international organizations, selecting GATT (the General Agreement on Tariffs and Trade) and OAS (the Organization of American States) as his models, pointing out that the very nature of the former and its use of the standard of reciprocity virtually demands such a procedure. In the same way the tendency of OAS not to apportion blame if this can be avoided tends to encourage the use of negotiation.

Professor McWhinney provides a general survey of federalism, biculturalism and international law, and concludes that "imaginative innovation on the existing constitutional base, rather than an eclecticism-for-the-sake-of-eclecticism borrowing from Continental Europe of the nineteenth century or from similar models, seems the answer to Canada's present and immediately foreseeable constitutional needs".[6] Both the French language contributions are similarly concerned with Canada's constitutional international problems. Professor Morin[7] is interested in the power of the provinces to enter into international agreements, while Professor Sabourin writes of their participation in (non-political) international organisations,[8] both dealing with problems, therefore, which go to the very core of the whole concept of Canadian federalism, and, as Professor Sabourin indicates, to the basis of the concept of sovereignty and its alleged indivisibility. The latter writer suggests, in the event of federal resistance to such participation, a solution somewhat similar to that operating in the old Empire might be used, at least where Quebec is concerned, that is, a greater role in the selection of Canadian delegations and in the use of observers. He reiterates, however, that as with so many problems having an impact in the field of international law, the problem is essentially political and related to the Ottawa-province "axis". Professor Morin, too, regards the problem as constitutional, rather than international, maintaining that it is not really one of sovereignty, but one of competence, and he draws attention to the 1962 view of the International Law Commission that treaty-making in federal states depends solely on the federal constitution. He points out that Canada is faced with two possibilities. In the first instance, each of the provinces may be given an equal treaty competence. He prefers, however, that Quebec be treated as a special case—suggesting that this would conform to political reality—with the other provinces subject to the centre.[9]

[5] P. 259. [6] Pp. 125-126. [7] P. 127.
[8] P. 73. [9] P. 185.

As usual, the volume contains a number of notes, including one on the legal status of Taiwan, one of the objects of which appears to be to deny any possibility of a separate Taiwanese nation. While affirming it is part of China, the author states "that the issue of the status of Taiwan . . . has both legal and political aspects which are interwoven and are so complex as to defy quick and easy solution".[10] Another note deals with state succession and its relation to Pakistan's membership in the United Nations. While one may be tempted to agree with the author's criticism of the view of the United Nations Secretariat in declining to treat India and Pakistan equally, it is even more difficult to accept a suggestion that Pakistan might have become an additional "founder" member of the Organisation.

Finally, and of major value, is the summary of Canadian practice in international law during 1964. An interesting statement is the pledge not to invoke the extradition agreement with the United States in so far as persons may be in the latter country at the invitation of the United Nations.

L. C. GREEN*

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Répertoire de la pratique française en matière de droit international public. Edited by Alexandre-Charles Kiss. Paris: Centre National de la Recherche Scientifique. Vol. III. 1965. Pp. xii, 670; Vol. IV. 1962. Pp. xii, 477. (Fr Francs 90 and 62)

In recent years there has been a growing recognition of the need to pay attention to state papers in order to ascertain the nature of international law in practice. In some countries, as, for example, the United States[1] or Great Britain[2] extracts from the state papers are interspersed with comments from doctrine in order to produce what may be described as a textbook built round the official documents. In other countries, the tendency is to print the state papers without comment, and to group them together under relevant headings. This is the method used by Dr. Kiss in his *Répertoire de la pratique française en matière de droit international public*, and each section is introduced by a very brief summary based on the documents which follow.

The preparation of a digest of this kind is a major work and often the volumes tend to appear out of sequence. Volume III of the French Digest dated 1965 deals with inter-state relations and

[10] P. 305.

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[1] M. M. Whiteman, Digest of International Law (1963-1965).

[2] British Digest of International Law (1964).

covers such matters as recognition, representation of states, including international conferences and diplomatic protection, and international responsibility. Volume IV, dated 1962, deals with international rivers, the sea and air space, as well as international commercial activity, under which rubric the learned editor has included the rights and treatment of aliens.

In a work of this kind all a reviewer is able to do is draw attention to items of special interest. Among the examples of French recognition practice are directives from the Foreign Ministry to French Ambassadors abroad concerning Rumanian recognition in 1879-1880. In this case the Minister pointed out that Rumania would have to adopt "une disposition légale qui fit passer dans la réalité des faits le principe d'égalité civile et politique entre tous les Roumains, sans distinction de religion, . . . pour arriver progressivement à la réalisation d'une entière égalité civile en ce qui concerne les israélites de la principauté"[3]. It is perhaps unfortunate that states are not so particular today when weighing respect for human rights against the advantages of recognition.

The Eichman trial in Jerusalem drew attention to the murder of Von Rath in the German Embassy in Paris in 1938. Dr. Kiss reproduces the Foreign Ministry Note pointing out that the ambassador's "hôtel" is not foreign territory and the immunity it enjoys is not enough to deny the jurisdiction of the local courts in respect of offences committed therein. In view of this, the Minister stated that a request for extradition—"ce qui parait très probable" —would not be granted.[4] In any case, there is some doubt whether extradition would have been granted even if it were the view that the "hôtel" had been German territory, for France will not extradite political offenders. A statement of the Foreign Minister in 1937 implies that the right of a state to deny such extradition stems from international law regardless of any treaty provision: "Sauf le cas d'attentat contre la personne du Souverain, il est de règle générale depuis un siècle de ne pas accorder l'extradition pour crime ou délit politique. On peut conclure de là que le droit des gens admet qu'un Etat n'est pas tenu de livrer un réfugié politique".[5]

There are two great values in works like the *Répertoire*. In the first place it enables us to see what the French view is on matters of international law and, in conjunction with similar works for other countries, to assess the extent to which French practice conforms. Secondly, at a time when new states are prone to argue that the "old" international law is uncertain and attempts at codification tend to emphasise a low common multiple, such compilations make it possible for the newcomers to see where agreement lies among existing states, and often enables them to see why a particular rule was adopted. Frequently this means showing them that inter-

[3] Vol. III, pp. 12-13. [4] *Ibid.*, p. 353. [5] Vol. IV, pp. 4, 7.

national problems tend to be the same regardless of the age of the state and that the legal rule evolved for one incident may well be suitable for the settlement of another occurring later.

L. C. GREEN*

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International Law. By D. P. O'CONNELL. Two Volumes, with a Foreword by Lord McNair. London: Stevens & Sons Ltd. Dobbs Ferry: Oceana Publications Inc. 1965. Pp. xxxv, 1434, 40. ($30.00)

Perhaps the outstanding thing about Professor O'Connell's *International Law* is that it is the first major attempt to produce a general textbook on international law in the English part of the English-speaking world since Oppenheim, and it has the advantage that it is readable, is free of unnecessary paragraph numbers and footnotes are kept to a reasonable length. This is important since the author has produced two volumes in which international organisation is incidental and there is no discussion of the law of war. Some of the work's length derives from the decision to embody in the text summaries and extracts of some of the more important cases, thus saving the reader from having recourse to volumes of law reports and enabling him to read an exposition of the law without excessive use of footnotes or interruptions to check the basis of an assertion.

There has unfortunately been a considerable time-lag between completion of the manuscript and publication of the work. Lord McNair's Foreword is dated 1964 and the Preface indicates that "the effective date of the information in the work is December 31st, 1961, but advantage has been taken during the proof stage of including references to the more important judicial decisions after that date",[1] but although there are five references to *Sabbatino*,[2] there is no indication that this went to appeal in 1962[3] or to the Supreme Court later.[4] In view of the fact that the publisher's imprint is 1965, one might have expected similar amendments to bring textual information up to date. It is a little strange to read in a work published in 1965 that "non-metropolitan territories such as Singapore have limited external competence [Malaysia

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[1] P. xv.

[2] *Banco National de Cuba* v. *Sabbatino* (1964), 84 S.Ct. 923, 376 U.S. 398.

[3] (1962), 307 F. 2d 845 (2d Cir.) affirming (1961) 193 F. Supp. 375 (S.D.N.Y.).

[4] *Supra*, footnote 2, reversing the decision of the Circuit Court of Appeal.

came into existence in 1963]. . . . Southern Rhodesia, which is a colony, and Northern Rhodesia and Nyasaland, which are protectorates, were amalgamated federally in 1953"[5]—but the Federation was dissolved at the end of 1962. Similarly, the text of the 1957 British declaration under the "Optional Clause" is reproduced without reference to the fact that the "national security" reservation was withdrawn in 1958.[6]

Many modern textbooks on international law assume there is no difference between the history of international law and the history of its doctrine. Professor O'Connell, however, is highly aware of the differing significance of these "sources" of the law, and in his account of the development of any rule doctrine tends to be reduced to its proper subordinate place. Not only this, but in keeping with his common law background he has attempted to present his account of the law or at least of that part which he regards as the "common law" of international law,[7] in the form most likely to appeal to the international law practitioner. Thus, the "work proceeds in the sequence of theory, functions, jurisdiction, responsibility and litigation".[8] There is also awareness that "international law is the discipline which gives ultimate form to diplomatic activity, and the legal adviser to a Foreign Office, and other government departments engaged in foreign activity, . . . is an indispensable element in the formulation of national policy. But he does justice to his role only when he maintains a strict juristic integrity in his reasoning, for the makers of political decisions want the lawyer to confine for them the areas of permissible action: the final decisions may owe far less to considerations of law than to considerations of politics or economics, but they are likely to be made with conviction and from positions of strength only when the cogency of the legal factors has been fully recognised. Every serious international issue crystallises in juristic form, and the value of a legal opinion is that it exposes certain of the logical difficulties and pitfalls which many political attitudes involve".[9]

Most writers of international law today are aware of the impact of new states with "revolutionary" ideas of the law and its binding force. Some authors go further than others in adjusting themselves to this phenomenon. Professor O'Connell presents a happy realism: "The very conception of the State, the attributes of statehood, the possibility of co-existence of entities with these attributes derive from the legal framework of existing international society. New states must thus accept the whole of international law or deny the basis of their own existence; they may later modify that law by contributing to changes of custom, but they may not repudiate it as a manifestation of an outmoded and alien order of

[5] P. 310. [6] Pp. 1170, 1174. [7] P. x.
[8] P. xi. [9] P. xiv.

things. If they do so, even in part, they challenge not only the system but also human society itself."[10] He is also aware of the susceptibilities of national tribunals, and the extract he gives from the decision of the Supreme Court of the Philippines in *Gibbs* v. *Rodriguez*[11] is a pleasant change from the historic quotation from Vattel: "A decision of the Supreme Court of the small Republic of the Philippines is as much a source of international law as a decision of the Supreme Court of the Great Republic of the United States of America."[12]

In so far as the sources of international law are concerned, the learned author believes that "the substance of international law is custom, together with the general principles of law . . . . treaties while they lay down the rules between the parties, are not in themselves part of the corpus of the law but are contracts which secure the endorsement of the law".[13] In other words, custom constitutes the law, while treaties are no more than sources of contract rules. He feels that it is inapt to distinguish between contract treaties and law-making treaties, for "it can never be the treaty which makes law, but a custom which adopts the treaty as the rule of law",[14] and "once treaty provisions have become law even repudiation of the treaty will not disengage the parties from liability thereunder".[15] This may be true for liabilities which have already accrued, but it is doubtful whether it would apply to executory obligations. Dr. O'Connell applies this approach to concrete issues, but this reviewer finds it difficult to agree that the law on the continental shelf[16] stems from anything but the 1958 Geneva Convention.[17]

The author's attitude to sovereignty, as well as to the position of the individual, shows an appreciation of the sociological and functional approach to legal concepts. In so far as the former is concerned, he points out that the issue is not between sovereignty and non-sovereignty, but determination of "what capacities are suitable to the political situation in which the entity finds itself".[18] Similarly with the individual. "Theory and practice establish that the individual has legally protected interests, can perform legally prescribed acts, can enjoy rights and be the subject of duties under municipal law deriving from international law, and if personality is no more than a sum of capacities, then he is a person in international law, though his capacities may be different from and less in number and substance than the capacities of states. An individual, for example, cannot acquire territory, he cannot make treaties and he cannot have belligerent rights. But he can commit war crimes, and piracy, and crimes against humanity and foreign

[10] P. 6.
[11] (1951), 18 I.L.R. 661.
[12] P. 31.
[13] P. 8.
[14] P. 23.
[15] P. 25.
[16] P. 377.
[17] U.N. Doc. A/CONF 13/38, April 28, 1958.
[18] Pp. 93, 303.

sovereigns, and he can own property which international law protects, and he can have claims to compensation for acts arising *ex contractu* or *ex delicto*. He may not be able to pursue his claims and take action to protect his property without the intervention of his own state, but it is still his claim and still his interest which the machinery of enforcement is designed to facilitate."[19] But there seems little value in asserting in an exposition of the *lex lata* that the "most telling point of all, perhaps, is the admission that the pursuit of an international claim is an assertion of the primary right of the individual, so that the national state has the *duty*, albeit an *unenforceable* one, to hand over the proceeds of litigation to the claimant".[20] The *Civilian War Claimants Association* v. *The King* might have merited a footnote.[21]

It is becoming more generally accepted that recognition is a political act which has legal consequences, "and it is clear that politics prompts the occasions when recognition is to be in the half-hearted *de facto* form. One can imagine the furore on the Labour benches if the United Kingdom had recognised the Spanish Nationalists as the government *de jure* in 1937, or that on the Conservative (*sic*) if it had recognised the Italian conquest of Ethiopia *de jure* in 1936. . . . Where two governments are competing for power the recognising government may treat the one as a title-holder, and the other as the actual administering authority, and it is a matter for political judgment which of the rivals should be acknowledged as having the superior claim".[22] But "a government which is not in control of the greater part of the country *may* not be recognised as the government *de jure*".[23] Despite this latter example of realism, Professor O'Connell's approach to China appears to seek the best of two worlds: "After the Central People's Republic had ejected the Kuomintang Government from the Chinese mainland on to the island of Formosa, the United Kingdom Government recognised it as the government *de jure* of China. Logically the United Kingdom could then have recognised the Kuomintang as the *de facto* government in Formosa, but even if it had it would still have been compelled to acknowledge the paramount claim of the *de jure* government to the island, assuming the island to be part of China. Any United Kingdom resistance to an attempt by the mainland authorities to seize the island by force would have constituted intervention in the eyes of international law. The United States' refusal to recognise the Central People's Republic as a government of any kind left that country free to contract with the Kuomintang for defence of the island, but the same result would have flowed from recognition of the Central People's Republic as the government *de facto*, provided the Kuomintang continued to be recognised as the government *de jure*."[24]

[19] Pp. 118-119. [20] P. 121, italics mine. [21] [1932] A.C. 14.
[22] Pp. 175-176. [23] P. 180, italics mine. [24] P. 176; *cf.* pp. 204, 514.

Reference to the problem of intervention draws attention to the issues in Vietnam and the concept of domestic jurisdiction, especially in the light of Article 2 (7) of the Charter. Professor O'Connell only mentions Vietnam to point out that Britain's agreement to partition did not amount to recognition of the North,[25] that both parts have been the victim of political suspicions with regard to admission to the United Nations,[26] and for a somewhat confused reference to observance of the laws of war: "It would be difficult to argue that the Hague Convention for the Protection of Cultural Property simply restated established principles of law. The insurgents in Laos and Vietnam have not indicated whether they consider themselves bound by Article III, and their treatment of prisoners rather indicates the opposite."[27] In fact, the activities of the South Vietnam forces with regard to prisoners also leave much to be desired, despite the fact that both sides have indicated their willingness to abide by the Geneva Conventions.[28] The author's general comment on outside aid to a government is of interest. "Invitations from the legitimate government to assist in subduing rebels give an excuse which may well be sufficient in law for interfering; invitations from the rebels may not; a great deal may thus depend upon which regime is recognised as the *de jure* government, and *such a cloud of legalism can be created that the real issues are lost sight of.*"[29] A similar "cloud of legalism" frequently assails issues affecting human rights, for "the question of the boundary between domestic and non-domestic jurisdiction is much less the subject of objective judicial determination than the prey of political debate. It is all too easy to argue that a situation existing internally in a State which is offensive to other States is a threat to international peace and security so as to bring into play the enforcement articles of the Charter".[30] This awareness of the danger and ambiguity in the use of words is constantly reflected in Professor O'Connell's *International Law*.[31]

In relation to jurisdiction it is perhaps surprising that there is a bare reference to the *Eichmann* case,[32] while the incident relating to the *Santa Maria* does not appear under piracy[33] or insurgency.[34] It is also difficult to understand why, in dealing with the extension of the civil law of a port to a ship in harbour, the learned author seems to consider Canada part of the United States.[35] It would also be interesting to know whether international lawyers at large

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[25] P. 167. [26] P. 308. [27] P. 1055.
[28] The Geneva Convention of August 12, 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 and for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85.
[29] P. 323. [30] P. 338. [31] *E.g.* pp. 93, 303, 319, 605.
[32] P. 907, n. 74. [33] Pp. 714-720. [34] Pp. 164-166.
[35] P. 676.

would agree with the statement that ADIZ and CADIZ "have gone unchallenged because their reasonableness is of a compelling character".[36] International lawyers may also be surprised to learn that the International Court "spends most of its time trying to gain jurisdiction over unwilling litigants".[37] Too often it appears to be seeking ways to assist such unwilling litigants. They would probably also be surprised to learn that "apart from the usual machinery of treaty enforcement there is specific I.L.O. machinery designed to secure conformity with the provisions of a convention, and at least to bring pressure to bear on governments which do not ratify. There is, in addition, a submission to the International Court under the I.L.O. Constitution in any matter concerning the interpretation of a convention, either *in contentious proceedings* or by way of advisory opinion . . .".[38]

In a work of this size and of this nature it is not surprising that there are matters with which others will disagree. Perhaps it is one of the values of O'Connell's *International Law* that it is written so directly as to bring points of difference clearly into focus. Regardless of criticisms, there is enough realism and novel approach to lead one to express the hope that it will not be too long before we also have O'Connell on the law of war and on the law of international organisation.

L. C. GREEN*

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The International Law of Fisheries. By DOUGLAS M. JOHNSTON. New Haven: Yale University Press; Montreal: McGill University Press. 1965. Pp. xxiv, 554. ($12.50)

What has become known as the McDougal-Lasswell policy-oriented approach to international studies is now becoming increasingly popular in the doctrine and literature of international law and Professor Johnston's *International Law of Fisheries* is intended as a framework for policy-oriented inquiries. As Myres McDougal has consistently done in his recent writings, Professor Johnston aims at showing the way in which it may prove possible to harmonize the over-all interests of world society with those of the national state in such a way as to evolve a system of law that will prove acceptable to the state, while serving the purposes and needs of the world at large.

The impact of the population explosion and the potential run-

[36] P. 709. Professor I. L. Head's article entitled International Law and Contiguous Airspace (1960), 2 Bull. of Harv. Int. L. Club 28 is ignored.

[37] P. 29. [38] P. 832, italics mine.

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down of food supplies, at least those to be found on land, emphasises how important it is to evolve a legal system which is oriented to satisfying demands while preserving long term interests. Thus, the author suggests that "in the actual appraisal or adjudication of competing claims over a fishery resource, whether to shared, unshared, or modified authority, it will be useful to recognise an order of priorities in the values invoked. In advance of conflicts, this procedure might be regarded as arbitrary, but a rational and neutral course can be adopted at the stage of anticipation by invoking primary criteria which are related to the resource itself rather than to the users. . . . With the exclusion of any a priori preferences related to the claimant, the first problem is that of resource capacity".[1] In his view, international law with regard to the preservation and exploitation of fisheries must be based on certain principles: 1) facilitation of the development of the world's marine resources; 2) practices impairing the productivity of particular stocks are contrary to the interest of the world community; 3) physically shareable resources in non domestic domains should be shared on an inclusive basis; 4) the recognition that some states may possess a special interest in a particular resource and therefore be entitled to some prior right; 5) solutions to disputes should be sought through negotiation by way of normal diplomatic channels; and 6) some ultimate method of solution on a compulsory basis for unsolved disputes must be accepted.[2]

Dr. Johnston points out the extent to which, already, though usually in return for temporary privileges, there is some surrender of historic fishing rights, showing some acknowledgement of a right other than one's own. At the same time there is a measure of acceptance of a functional as distinct from a strictly legal attitude to "rights", leading to acceptance of fishing as distinct from territorial limits and "the divorce of unshared exploitation authority from the concept of the territorial sea must surely facilitate a more rational use of the sea's resources".[3] While this may well be possible, it is doubtful whether the certainty shown by the learned author would be generally acceptable among other commentators. However, there will probably be little quarrel with his view that fishery conservation and its law should not, like the general law of the sea, be dealt with on a universal basis with uniform regimes, although there may well be room for general principles to be established with regard to such matters as the settlement of disputes.[4] Professor Johnston favours regional solutions taking into account special interests when necessary, and recommends that "the future interests of non-user states should be protected by a nonnegotiated scheme supervised by a world community organ"[5].

[1] Pp. 145-146. [2] Pp. 149-153. [3] P. 448.
[4] P. 458. [5] P. 457.

An approach which is policy-oriented must, in a field like fishery conservation and utilisation, pay due regard to scientific and socio-economic considerations. Care must be taken, however, that acknowledgement of these extra-legal factors does not result in proposals which are completely impractical because they disregard the prejudices, emotions and vested interests of the states which will be called upon to observe and enforce any legal regime which is established. While those who belong to this school are undoubtedly correct in their desire to make use of all the modern tools of knowledge and in their assertions that the law must not be allowed to stand still, especially when such issues as the future food potential of mankind are concerned, it perhaps is an oversimplification of a situation and an excessive disregard of practical possibility to assert that "the needs of one state are substantially the same as those of others. By understanding this, governments can adopt a world community perspective that in no way impairs the national interest. . . . Jurists should eschew the old concepts of absolute authority, shared and unshared, and encourage the innovation of procedures to settle disputes by reference to . . . principles and procedures . . . based on a value system which can be adopted by all nations for the purpose of improving the quality of life on this shrinking globe".[6] It would be interesting to learn the attitude of some of the more "forward-thinking" states as illustrated by the views of the Committee on the Legal Bases of Friendly Relations towards such a proposal, especially in view of their insistence on the right of exclusive exploitation of natural resources—and the reaction of Professor Johnston to some of their proposals.

L. C. GREEN*

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The Use of Experts by International Tribunals. By GILLIAN WHITE. Syracuse: Syracuse University Press. 1965. Pp. xv, 259. ($8.95 U.S.)

The recent decision of the International Court of Justice rejecting the claim brought by Ethiopia and Liberia against the Republic of South Africa in connection with the latter's administration of its mandate over South West Africa has produced a reaction among laymen, politicians and lawyers alike which, at times, suggests a feeling of despair and almost of wonderment whether there is any future for international judicial processes. On the other hand, the increasing scope of international economic relations tends to em-

[6] P. 463.

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phasise the need for some form of judicial authority to deal with such "non-political" matters and the increasing complexity of international economics will emphasize the shortcomings of the ordinary international legal practitioner faced with such problems.

Already, such tribunals as the World Court and the European Court recognise that they may have to make use of expert witnesses and Dr. White has placed firms and their lawyers deeply in her debt by producing the first monograph dealing with *The Use of Experts by International Tribunals.* She points out how municipal courts in France, Germany, Italy, the United Kingdom and the United States make use of such witnesses, and then looks at various international tribunals and their attitude to them and their evidence, paying particular attention to the function that experts can fulfil in connection with delimiting boundaries, determining facts which, if established, would give rise to international responsibility, evaluating damage and damages, and even settling a regime for the future as in the *Trail Smelter Arbitration.*[1]

As a result of her study of the practice, Dr. White finds that, subject to the limitations imposed by the constituent instrument or *compromis* concerned, international tribunals will use every means open to them to ascertain the facts, and only in the unusual circumstance of the "relevant instruments expressly forbid[ding] it will the tribunal be unable to resort to independent expert assistance"[2] In view of this, her appendix outlining draft model clauses on the use of experts suitable for incorporation in bilateral agreements acquires added significance[3] particularly in view of her emphasis that there must be no delegation of the judicial function, so that the task of the court always remains the evaluation of the evidence given by the experts to the exclusion of blind acceptance.

Dr. White's book will prove of inestimable value to the practitioner appearing before tribunals which may have cases to be presented with expert testimony. It has, however, a pedagogical value. It serves as a brilliant example for the good graduate student of the value of research from original materials and may encourage them to seek for further fields to conquer, while the form of presentation and the facility of the language themselves constitute examples worthy of imitation.

L. C. GREEN*

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[1] (1931-1941), 3 U.N.R.I.A.A. 1906.
[2] P. 7.
[3] P. 242.
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Jesting Pilate and Other Papers and Addresses. By THE RIGHT HONOURABLE SIR OWEN DIXON, collected by HIS HONOUR JUDGE WOINARSKI. Melbourne: The Law Book Company Ltd. 1965. Pp. 275. (No price given)

Since the confederation of the settlements, colonies and provinces of the Australian continent sixty-five years ago, the Commonwealth of Australia has been very fortunate in the lawyers who have presided over that country's highest legal tribunal, the High Court of Australia. Sir Owen Dixon, the recently retired Chief Justice, whom many have described as the Commonwealth's greatest common lawyer, is the brightest example of the judicial quality of the High Court.

The supreme courts of the six states and of the Northern Territory have also enjoyed judicial appointments of high calibre. Why should this be? I cannot believe that the lawyers of Australia are better trained or more lavishly endowed with intellectual gifts than, say, Canada's legal profession. Sir Owen Dixon in one of the essays in *Jesting Pilate*, suggests that the separation of the profession into barristers and solicitors has made a substantial contribution. At first sight, this seems an unlikely explanation as less than half of the states have a split profession. On the other hand, of course, the High Court of Australia has been manned almost exclusively from the most populous and powerful states, New South Wales and Victoria, where a clear distinction is drawn between barristers and solicitors. Admittedly, too, the state supreme court of Victoria has always had a very strong bench. Furthermore, in those states where the profession is merged, the judges are chosen from those men who have practised as counsel rather than solicitors.

There must, however, be deeper reasons for the high quality of the Australian judiciary. The judges are chosen, with very few exceptions, from lawyers who are Queen's Counsel under a system where that title is only granted to men of proven ability and many years of experience. The judicial office in Australia still holds more prestige and honour both inside and outside the profession than is the case in Canada or the United States. Lawyers seem to be more willing to make financial sacrifices so as to be elevated to the bench. The judicial appointments are less blatantly political than is the case in some other countries and the legal profession has some influence over the appointments made by the state governments (and the federal government in the case of High Court and federal judicial appointments). By convention, the government would seek the advice or tacit approval of a state law society before making an appointment. Some states have adopted a system similar to that existing in England so that only the better or "approved" lawyers are on the "short list" of potential judicial ap-

pointees. Of course, it would be naive to think that the political party in power would not favour the man more sympathetic to their policies if two men of otherwise equal quality were in the running for a judgeship.

In this collection of essays, Sir Owen Dixon makes reference to many judges before whom he has appeared or who have been colleagues on the High Court bench in his judicial career of thirty-four years, during the last eleven of which he was Chief Justice. Among these men we find Sir Isaac Isaacs, a Chief Justice of the High Court and the first Australian-born Governor General, Sir Samuel Griffith, Sir Adrian Knox, Sir Frank Gavan Duffy and Sir John Latham, all of whom were Chief Justices before Dixon C.J. In addition, he mentions Sir George Rich, Edmund Barton and Sir Hayden Starke. The Australian Constitution, which was modelled to some extent on the United States Constitution, has been subjected to the unusual experience of being interpreted by judges who had had taken part in its drafting. Some of the most interesting essays in this book describe the personalities of these men and the concepts of federalism which have been formulated by the High Court of Australia.

Dixon C.J. also shows his acute understanding of federalism and constitutional law in his paper to the Law Club of the University of Toronto[1] and in his comparative studies of the American Constitution[2] and the American scene.[3]

Sir Owen Dixon's love of the classics is well illustrated in the amusing, if pedantic essay, "The Teaching of Classics and the Law"[4]. His love of literature and deep knowledge of equity is shown in "Sir Roger Scatcherd's Will in Anthony Trollope's "Doctor Thorne"[5]. His interests are certainly not limited to the humanities as is shown in the papers delivered to scientific bodies. One of these, "The Law and the Scientific Expert"[6] is an enlightening essay on the law of evidence and the court's reception of expert evidence.

Anyone who has read Dixon C.J.'s judgements would appreciate the clarity of his style and the intellectual quality of his legal reasoning. For instance, his judgement in *Cardy* v. *Commissioner of Railways*[7] is a good example of his lucidity and learning. Although he is a lawyer who has profound faith in the common law, he has not placed blind reliance on precedent. The High Court of Australia, under his guidance, has not hesitated to give modern meaning to the Constitution or allowed the principles of Australian law to become stagnated by an reverential adherence to the law

[1] Pp. 113-122. See also his essay "The Law and The Constitution", pp. 38-60 and his comments in "The Statute of Westminster, 1931", pp. 82-100.

[2] *E.g.*, pp. 100-105, 106-112, 166-179, 180-187 and 198-202.

[3] *E.g.*, pp. 135-148. [4] Pp. 226-229. [5] Pp. 71-81.

[6] Pp. 24-37. See also pp. 11-23. [7] (1960), 104 C.L.R. 274.

laid down by the more conservative House of Lords. His well-known dictum in *Parker* v. *The Queen*,[8] after the High Court had refused to follow *Smith* v. *D.P.P.*[9] in *Smyth* v. *The Queen*[10] is a clear mandate for Australian courts to develop a distinctive and developing common law of homicide for Australia. In *Parker* v. *The Queen*, he said:[11]

> Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's* case I think that we cannot adhere to that view or policy. There are propositions laid down in that judgement which I believe to be misconceived and wrong. They are fundamental and they are propositions which I could never bring myself to accept. I wish there to be no misunderstanding on the subject. I shall not depart from the law on the matter as we have long since laid it down in this Court and I think that Smith's case should not be used as authority in Australia at all.

Dixon C.J.'s breadth of legal knowledge is shown to full advantage in his essays and judgements in the field of criminal law. The essay, "The Development of the Law of Homicide"[12] is the best short history available. Similarly, the essay, "A Legacy of Hadfield, McNaghten and Maclean" expresses the views which he made clear in *Stapleton* v. *R.*[13] (in which he rejected the legal wrong test of *R.* v. *Windle*[14]) and *Brown* v. *The Queen.*[15] In the latter case, he recognized that the *McNaghten* rule should be used in accord with modern scientific knowledge while remaining a legal test of criminal irresponsibility[16]. He took a broad view of "defect of reason from disease of the mind" which he describes in the essay on insanity as meaning:[17]

> . . . no more than to exclude drunkenness, conditions of intense passion and other transient states attributable either to the fault or to the nature of man . . . the words "disease of the mind" were chosen because it was considered that they had the widest possible meaning. (Sir Nicholas Tindal) would hardly have supposed it possible that the expression would be treated as one containing words of the law to be weighed like diamonds. I have taken it to include, as well as all forms of physical or material change or deterioration, every recognizable disorder or derangement of the understanding whether or not its nature, in our present state of knowledge, is capable of explanation or determination.

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[8] (1963), 111 C.L.R. 610.
[9] [1961] A.C. 290.
[10] (1957), 98 C.L.R. 163.
[11] *Supra*, footnote 8, at p. 632.
[12] Pp. 61-70.
[13] (1952), 86 C.L.R. 358.
[14] [1952] 2 Q.B. 826.
[15] (1959), 33 A.L.J.R. 89.
[16] But see the narrow interpretation of the Judicial Committee of the Privy Council, *sub. nom.*, *Attorney General for the State of South Australia* v. *Brown*, [1960] A.C. 432.
[17] Pp. 223-224. For an illustration of a judicial application of these words, see Dixon C.J. in *Sodeman* (1936), 55 C.L.R. 193 and *Porter* (1936), 55 C.L.R. 182.

His statement of the principles of strict liability in *Proudman* v. *Dayman*[18] is the most succinct and clear statement to be found on the subject and is found in many American casebooks in criminal law.

Any lawyer who has even attended a bar dinner must have suffered advanced stages of boredom while listening to some highly respected member of the judiciary deliver a superficial and soporific speech on the glories and subtleties of the common law, the magic of precedent or the metaphysical art of judging. Sir Owen Dixon's essay "Concerning Judicial Method"[19] should provide a ready and welcome cure for any bout of forensic indigestion. This essay is the text of an address delivered at Yale University eleven years ago. It shows the author's subtlety of mind, his keen perception of the judicial process and a delicate "feel" for the law.

I hope that Sir Owen Dixon will favour us with some more extra-judicial thoughts which he can collect in the leisure of his retirement.

GRAHAM E. PARKER*

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[18] (1941), 67 C.L.R. 536. [19] Pp. 152-165.

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