BOOK REVIEWS
REVUE DES LIVRES

Delict. By D. M. WALKER. Two Volumes. Edinburgh: W. Green and Sons Ltd. 1966. Pp. cxxxvii, 1108. (£12/12/-)

This voluminous work treats of the Scottish counterpart of the law of Torts. Dr. Walker discusses his subject in a general way and he has a modern approach, although he does find it necessary to include interesting historical information. Questions incidental to, but not forming a central part of, liability in delict are discussed by the author. For example, he discusses conflicts problems and distinguishes delict from contractual remedy. The analytical approach of the author and his desire to include everything of relevance to the subject is probably what makes the book so long.

Since Scots law has been exposed to the influence of both the Roman law and the English common law Dr. Walker is concerned to demonstrate from which system each principle developed. In accordance with his modern approach the author devotes considerable space to negligence. In Scots law the term "negligence" does not designate an independent nominate delict, though it does signify a separate tort in English law. However, it is demonstrable that the Scots law gives redress in virtually the same cases as the English law. There is considerable reciprocity in the citing of precedents. After all, were not *Donoghue* v. *Stevenson*[1] and *Bourhill* v. *Young*[2] both Scottish cornerstones of the English law?

Unfortunately, the book was written before the *Wagon Mound (No. 2)*[3] reached the Judicial Committee of the Privy Council, but this may not make any great difference to his scheme since he concludes that the Scottish test of recoverability for remotely ensuing damage depends on "directness" and not on "foreseeability". Dr. Walker may not find wholehearted support for his statement that in the *Wagon Mound (No. 1)*,[4] "All that the Board said about compensation or remoteness of damage is obiter".[5] Although the tendency of Canadian courts has been to find questions of remoteness in the most unexpected places, one ought really to

[1] [1932] A.C. 562 (H.L.).
[2] [1943] A.C. 92, [1942] 2 All E.R. 396 (H.L.).
[3] [1967] 1 A.C. 617 (P.C.). [4] [1961] A.C. 388 (P.C.). [5] P. 274.

reserve the expression for compensation and not extend it to culpability. This may be an artificial distinction but it does appear to aid analysis and exposition. The author does use the term "remoteness of injury" as a ground for the total rejection of a claim and he distinguishes this from "remoteness of damage" (used in the sense of limiting the extent of liability). It might have been simpler had the term not been used in the first context.

Rather different from the common law to which we are accustomed are the instances of strict (but not absolute) liability which are found in chapter 8. This chapter outlines the liability for quasi-delict and certain other instances of strict liability. Dr. Walker accepts the traditional four-fold classification of obligations *quasi ex delicto* as modern Scots law, though, as he points out, there is little evidence to support their present existence. The instances of quasi delictual liability are; that of the action against the judge who delivers an unjust sentence; the landowner's responsibility for things projecting or hanging from his premises over an adjacent highway and similarly that of the occupier for things thrown out of premises. Finally, there is the liability of innkeepers, shipmasters and stablekeepers under the Praetorian edict. Modern statutes have tended to restrict the liability of those carrying on these common callings.

The second volume deals with infringement of particular rights and is much more specific than the first volume. Classification of the subject matter of the second volume is done according to the nature of the interest invaded, the factual circumstances in which the damage occurs and also depends on whether the right of the plaintiff is accorded by statute or not. This arrangement necessitates the consulting of various parts of the book when researching a problem, but this is an inevitable and not unusual inconvenience.

The result of Dr. Walker's labour is a very scholarly work which is also one of the most readable and interesting legal text books available. It is to be highly recommended.

JEREMY S. WILLIAMS*

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The Law and Mental Disorder, Part Two: Civil Rights and Privileges. A Report of the Committee on Legislation and Psychiatric Disorder[1]. Toronto: Canadian Mental Health Association. 1967. Pp. xiv, 100. ($2.50)

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[1] Members of the Committee: F. C. R. Chalke, M.D. (Chairman); B. B. Swadron, LL.M.; J. D. Griffin, M.D.; J. Dewan, M.D.; I. Dubienski, Q.C.; F. S. Lawson, M.D.; C. Marshall, M.D.; L. Panaccio, M.D.; F. K. Turner, LL.M.; L. P. Pigeon, C.R.

This slender volume, the second of a planned group of three,[2] is another of the significant efforts of the Canadian Mental Health Association in its continuing task of urging the public and the legislatures to restructure Canadian attitudes, practices and laws in accordance with the advances that twentieth century medical science has made in the field of human behaviour. With solemn absurdity too many of our statutes still speak in Elizabethan language about "idiots", "lunatics" and other manifestations of "madness", although the psychiatrists have long since given up such simplistic nonsense except when humouring their more traditionalist brethren in law. *Civil Rights and Privileges* is a careful compilation of all statutory references, archaic or enlightened as the case may be, illustrating the disabilities placed by the law of each province upon the mentally disordered person in these major areas: domestic relationships, voting, driving, occupations and professions, administration of estates, and the patient in a psychiatric hospital. In addition there is a chapter dealing with the question of privilege and confidential communication between patient and psychiatrist. Although not a textbook by design, this book has the valuable collateral effect of setting out the basic legal profile under existing statutes of the mentally ill person in the above listed areas, and if for no other reason that this, it will be a bargain-priced and useful addition to every practitioner's library.

However, the Canadian Mental Health Association Committee did not labour for three years to produce a citator. The main thrust of the work lies in the forty-six recommendations, stated in the form of "Principles" which describe the law to the legislatures as the Committee felt that it should be, often in radical opposition to the way that it is. For example, in an area that requires much rethinking and the articulation of new goals, the law continues to cling to the security blanket of committal to a psychiatric hospital as its most sophisticated test of the ability of a person to manage his estate, vote, drive, run his business or practice a profession. This legislative *assumption* of a broad spectrum disability evidenced by committal has not been supportable by any valid psychiatric criteria that have existed within the memory of living man. It is rooted rather in the non-empirical memory of the common law, where the tentative hypotheses of one or two centuries ago have survived as the essence of societal wisdom. Much of our modern legislation does nothing more than enshrine these ancient doctrines in statutory form, leaving the courts in the unenviable position as the instruments of repudiated theories, while modern medical science calls in vain across an ever-widening gulf.

[2] Part One: Hospitals and Patient Care (1964). Yet to be published is Part Three: Criminal Process.

In this study, the Canadian Mental Health Association has provided a bridge between the law and the behavioural sciences. Some of the Committee's recommendations are so self-evident that the reaction of the legislators will probably be one of surprise when they realize that their particular provincial laws fail to meet the suggested norm. Statutory guarantees against a patient's being held incommunicado are a good example of significant legislative omissions in a majority of the provinces, and provide an area where immediate amendments to the existing laws can and should be made at the earliest opportunity, without the necessity of much soul-searching. Other recommendations of the Committee point to no such easy path. For example, most provinces[3] (as well as the federal government) statutorily disenfranchise persons who are patients in mental hospitals, or who otherwise have been deprived of their liberty of movement or even of their right to manage their property because of mental illness. This surely imposes a disability on the many that should only be reserved for the few. The Committee takes the position that hospitalization for psychiatric treatment or the loss of the right to manage property because of mental illness should not *per se* disqualify an individual from voting. If there in fact exist some mental disorders which are incompatible with the satisfactory exercise of the franchise, the legislatures are faced with the extremely difficult task of determining what they are. What minimal attributes mark the mental processes of those who should be allowed to vote? Are there not others in addition to some group within the class of hospitalized mentally ill whose attitudes, beliefs and contact with reality are so distorted as to also render them unsuitable as voters? The present legislation takes away the right to vote for a reason that is in many cases as irrational as the situation that it seeks to prevent. The decision to involuntarily detain, for example, is not a determination of the competency to vote, and the present synonymous treatment of these two unrelated situations is merely another carryover from those less complex times when law and psychiatry were thought to be *ad idem*. The presence of mental disorder and the imposition of certain civil disabilities as a result thereof will only become relevant to the ability to vote if the Canadian legislatures choose to come to grips with the more basic and more difficult problem of defining valid criteria for participation in the election process. The practical, not to mention the psychiatric, difficulties involved in any general assessment of the voting competence of the populace were recognized by the Committee as being enormous. As an alternative to the existing practice of arbitrary disenfranchisement without a specific

[3] British Columbia is the only exception noted by the Committee.

determination of incompetency, the Committee therefore recommended that the mentally disordered be placed upon the same footing as the other members of the electorate, and that compliance with the formal procedures required by law of all persons who seek to cast their ballot should be the only criteria for voting.

The Canadian Mental Health Association Committee invites the lawmakers to enter into examination of fundamental policy in many of the other areas touched upon by the study. To cite another example, available data indicated that in the area of the driving of motor vehicles there are certain persons who may be mentally unfit to drive. There is no evidence indicating that there is any functional relationship between this "unfitness" and the mental disorders leading to hospitalization. Yet the persons hospitalized for mental illness comprise the only group of licensees that is significantly affected by current legislation denying the right to operate motor vehicles to persons who are mentally unfit to drive. The Committee neither affirms or denies the fact that hospitalization or treatment for mental disorders may be a relevant consideration in assessing fitness to drive. The important question is *relevant to what*? In the absence of valid standards by which to determine the meaning of "mental fitness to drive", the relevance of involuntary detention to such fitness simply cannot be evaluated.

Voting and driving are but two of the many areas pointed out in this book in which some fundamental assumptions of the legal order are revealed as badly dated and in pressing need of restatement. Whereas civil disability has heretofore been an automatic concomitant of committal to a mental institution or treatment for a mental disorder, the main value of the Committee's effort has been to demonstrate that this result is a psychiatric *non sequitur*, regardless of its legal propriety under the old folklore of the common law. Involuntary detention should stand for little more than a deprivation of certain liberties of movement; treatment for mental disorder stands in no different position. In the words of the Committee:[4]

> Admission to a psychiatric in-patient facility, care in a day hospital or an out-patient clinic, or treatment by a psychiatrist or other medical practitioner for a mental disorder, should not *ipso facto* be the basis for a declaration of incompetency or incapacity to exercise any right or privilege.

As statements of principle it is hard to find fault with the recommendations of the Canadian Mental Health Association Committee.[5] One might wish that their terms of reference had in-

[4] P. 2.

[5] The reviewer's lone exception is to the declining by the Committee to state more forcefully the case for a right to treatment in cases of involuntary

cluded the bringing to bear of their expertise upon those areas where new departures in policy were advocated without being articulated in terms of specific tests or criteria. The initiative in these matters has been passed to the Parliament of Canada and to each provincial legislature. If nothing else this book demonstrates that these unresolved and often disputable questions are not capable of solution by an invocation of existing legal principles couched in archaic and scientifically vague terminology, in the fond hope that the courts can somehow make them work. This would be to perpetuate unsophisticated injustice in the name of reform. Nor can the legislators, no matter how well-intentioned, expect that satisfactory answers will appear if they just think about the problem hard enough. The day of the legislative Renaissance Man is past, distasteful as it may seem to some, and if the gap between law and the behaviourial sciences is ever to be bridged, then heed must be paid to the assistance that the psychiatric expert is capable of furnishing to the legislatures in the process of giving content to theory and direction to policy.

EDWARD F. RYAN*

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hospitalization. The Committee would only go so far as to make the lack of "adequate or suitable treatment" the basis for a right to a hearing before a Review Board. In fairness, it must be pointed out that they found that the facilities with which to provide such treatment are often inadequate or fall short of optimal. In addition, overall standards of care were felt by the Committee to fall within the province of hospital accrediting bodies rather than being proper subjects of legislation. Obviously much of the inadequacy in treatment is based upon the lack of funds with which to provide proper staff and modern facilities. The failure of governments to establish fiscal priorities which would alleviate defects in treatment should not, in the reviewer's opinion, pose any bar to the proposition that if the state deprives a citizen of his liberty because of mental illness, it bears a very heavy and solemn obligation to provide the most modern facilities and scientific resources with which to effect a cure. Anything less than this shifts the emphasis of hospitalization into the penumbra of preventative detention. Elsewhere in the report the Committee did not fail to state that which it felt was desirable even though the implementation of the recommendation would have required more facilities, more personnel or more funds. This deficiency in the report may be based upon some apprehension by the psychiatrists on the Committee that the legislatures might not draw a clear line between a general policy giving a right to treatment and specific legislative directives requiring therapeutic methods that may not be medically indicated. If the right to treatment is to be brought before Review Boards, it will probably be the eventual subject of litigation. A legislative statement of the existence of this right would certainly seem to be more desirable than the prospects of living with whatever form this concept may take on within the exigencies of any given particular case.

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Privacy and Freedom. By ALAN F. WESTIN. New York: Atheneum. 1967. Pp. xvi, 399. ($12.00)

The timeliness of this definitive work on the legal questions raised by modern techniques of eavesdropping and surveillance is accentuated by current concern in Canada with those very questions. The Canadian Bar Association on January 2nd, 1968 circulated to its members a proposed resolution *re* electronic eavesdropping that is to be considered at the forthcoming annual meeting in Vancouver, and the host Province for that meeting has before its legislature as of this writing a bill to enact "An Act for the Protection of Personal Privacy".

Professor Westin's book is a product of a study made by the author with the financial aid of the Carnegie Corporation and under the sponsorship of the Association of the Bar of the City of New York. Its subject is of vital importance to lawyers in one of their most significant professional concerns, that of working toward a balance of competing values in terms of individual freedom versus the restrictions on that freedom necessary to organized society. The work also provides a pleasant bonus in being eminently readable, amply documented and without apparent technical fault.

The subject matter is one in respect of which Canadians can profit from the experience of the citizens of the United States in their dealings with essentially the same problem and even that part of the book that might be of limited direct application in Canada, namely, a detailed outline of the history of American judicial and legislative attempts to control unwarranted surveillance and invasion of privacy, makes stimulating reading for any lawyer.

The author commences by establishing the basic organic need for some degree of privacy that is a fundamental element in the well-being of man. Privacy is defined as the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others and the point is made that few values so fundamental to society have been left so vaguely undefined in social theory. The problem of surveillance and invasion of privacy comes from a deeply rooted tendency on the part of individuals to invade the privacy of others, and of society to engage in surveillance to guard against anti-social conduct. Indeed, a significant characteristic of a given political system is the balance of privacy it achieves: certain patterns of privacy, disclosure and surveillance are functional necessities for different kinds of political regime. The modern totalitarian State represents one extreme, relying on a high level of secrecy for the regime, but a high level of surveillance and disclosure for all other groups. Toward the other end of the spectrum, even in democratic

societies legislative bodies themselves have a need for privacy, a need that is met by the function of committees comprised of members of the elected assembly and of course the chief executive group in our own political system, the Cabinet, meets and deliberates under conditions of total privacy.

The author proceeds to discuss in alarming detail the technological, data processing and psychological testing developments that have made traditional concepts of personal privacy virtually obsolete. Chapter Four reads like a spy thriller in its description of new physical surveillance devices such as vest pocket television cameras, automatic miniature cameras that are activated by the mere entrance of a person into a room or can be controlled by radio from a mile away to take more than four hundred thirty-five millimetre pictures without reloading, microphones built into the button of a suit coat, a transmitter mounted as a tooth in a dental bridge, whole buildings being wired during construction for eavesdropping and miniature tape recorders the size of a cigarette package that will run for a full hour without changing the reel. Chapter Five, entitled "Private and Government Use of Physical Surveillance", forces the realization that 1984 is here already. Tales of industrial espionage, telephone tapping by government agencies employing trucks disguised as telephone company vehicles, prearranged Federal Bureau of Investigation bugging of hotel suites to which designated persons are directed by arrangement with the hotel management, and a microphone planted in a lawyer's office bookcase make frightening, if fascinating, reading. At a time when United States Treasury regulations forbade wiretapping, the author states:[1]

> What Treasury was actually doing with electronic eavesdropping and visual surveillance in the 1960's was dramatically revealed in 1965, as a result of hearings by the Long Committee. First, the Treasury Department was forced to admit that since 1958 hidden microphones and two-way mirrors had been installed in offices of the Intelligence, Alcohol and Tobacco Tax and Internal Security Divisions of the Internal Revenue Service in more than fifty-seven cities across the country. Spokesmen for IRS stated that they eavesdropped, recorded, and watched only when "the criminal element" were questioned at IRS offices, or when criminal charges were going to be lodged in tax-evasion cases. However, the rooms themselves were used for conferences with many other taxpayers, and the equipment was not disconnected. Furthermore, in the so-called criminal cases, conversations between the taxpayer and his lawyer were overheard when the Treasury official left the room temporarily and the individual spoke to his lawyer in the belief that they were alone. A certified public accountant told the Senate Committee that while he was in such a room with his client, a picture of the Statue

[1] p. 122.

> of Liberty with an American flag super-imposed on it was accidentally knocked down to reveal a two-way mirror behind it. In other cases the mirror was behind the Treasury seal. The microphones were built into the walls.
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> Second, it was disclosed that throughout the 1950's and 1960's Treasury maintained a school at its building in Washington in which IRS agents were taught how to tap telephone wires, build and plant radio-transmitter devices, and pick locks for surreptitious entry . . . .

The opposition to invasions of privacy has come from virtually every segment of American society excepting associations of law enforcement officers, and in particular has brought about an unusual harmony between the extreme left and the extreme right. The former reacts in fear of intrusion to enforce prevailing dominant attitudes on its freedom of thought and the latter from fear of indoctrination of unduly liberal ideas, particularly in processes of education.

The problem of surveillance is discussed in two aspects: the ready availability of "bugging" devices makes their use and abuse by private individuals a phenomenon of growing concern, and of course surveillance by public authorities, be it the Federal Bureau of Investigation or the Internal Revenue Service, is something that the long tradition of American liberalism instinctively resists. In addition to problems of private and public use of physical surveillance devices there is concern over psychological surveillance—the probing of the mind through polygraph tests and personality testing in personnel selection. An aspect of the computer revolution also bears on the question of surveillance and the author develops the theme that the simple availability of a multitude of facts drawn from income tax returns, vital statistics records, drivers' licence applications and the whole host of data an individual records and files about himself in the course of a lifetime confers power over that individual on whomever has access to that store of information. An example is drawn from the experience of the Federal Housing Administration which among other things collects data on the marital stability of mortgage applicants on the theory that an unstable marriage is likely to be a greater mortgage risk. The supposedly confidential reports on that marital stability can then be purchased by private mortgage lenders for $1.50 each.

Microimages can now be produced that make it possible to reproduce the complete Bible on a thin sheet of plastic less than two inches square, and the dramatic increase in instant availability of masses of stored data has in effect stripped away defences of privacy that previously rested on physical or cost limitations on the acquisition and correlation of recorded information.

The book concludes with a considered analysis entitled "Policy

Choices for the 1970's" in which the author suggests guidelines that might assist the achievement of an appropriate balance between the legitimate requirements of society to invade individual and group privacy for law enforcement and national security purposes, and the rights of the citizen or the group to resist them. The issue faces us in Canada every bit as squarely: this book can be recommended as a fascinating and thoughtful treatment of an important socio-legal problem that is of concern to us all.

P. N. THORSTEINSSON*

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An Unhurried View of Copyright. Par BENJAMIN KAPLAN. New York: Columbia University Press. Pp. ix, 142. (Prix non indiqué)

Le petit livre de monsieur Kaplan, présenté avec beaucoup de goût par Columbia University Press, relate trois conférence données par l'auteur à la Faculté de droit de l'Université Columbia, dans le cadre d'une série d'instructions de ce genre dédiée à James L. Carpentier, et qui ont été entendues de façon intermittente à cette école depuis 1904. Les trois exposés pouvant former des entités distinctes, nous en traiterons donc de cette façon dans cette brève revue-critique.

I. *The First Three Hundred and Fifty Years.* Dans cette première étude[1], l'auteur, sacrifiant à la tradition, fixe le point de départ de son exposé au moment où la première presse anglaise se mit en marche dans îles britanniques sous la poussée de Caxton, en 1476. Il y démontre l'évolution de la notion de *copyright* à deux points de vue. Il en traite premièrement comme mesure de censure exercée de façon directe par le roi, son Conseil ou les bons offices de la Chambre Etoilée d'abord, puis de la *Stationer's Company* ensuite au moyen des décrets et ordonnances de son tribunal professionnel disciplinaire. Monsieur Kaplan, en second lieu, traite aussi d'un deuxième facteur à la base de notre conception actuelle du *copyright*, soit le facteur économique. Les libraires-imprimeurs londonniens de l'époque, bénéficiaires du monopole commercial d'exploitation de l'oeuvre littéraire qui leur venait du "droit de copie", prétendaient alors que ce privilège leur était nécessaire si l'on voulait que survive la jeune industrie de l'imprimerie. Comme on le sait, les raisons politiques qui ont contribué à la formation de la notion de *copyright*, sont aujourd'hui dis-

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[1] Voir pp. 1 à 37.

parues de nos moeurs, mais les motifs économiques invoqués à l'époque pour réclamer sa formation, sont demeurés et sont repris de nos jours par le même groupe de personnes, dans des circonstances identiques et en visant des buts analogues. Il est essentiel à la juste compréhension de la notion contemporaine de *copyright* que l'homme de loi garde en mémoire ces deux composantes de l'objet de son étude, s'il veut en saisir pleinement la nature et la portée réelle. Mentionnons enfin que l'auteur greffe à la chaîne de son exposé historique du droit anglais, une revue jurisprudentielle de l'évolution du droit américan en cette matière, à partir de la loi de 1790, et surtout de l'affaire *Wheaton* v. *Peters*,[2] pendant américain du litige anglais *Donaldson* v. *Beckett*.[3]

La méthode d'exposition du Professeur Kaplan ne varie pas dans un cas comme dans l'autre. A chaque fois, il cherche à mettre en relief l'influence prépondérante des magistrats qui ont le plus influencé l'évolution juridique du concept de *copyright* à travers les décisions qu'ils ont eu à rendre sur le sujet. En droit anglais, la figure de Lord Mansfield se détachait de tout le contexte historique l'entourant, en droit américain, les juges Story et Holmes prennent surtout la vedette.

Certains auteurs ont peut-être mieux fait ressortir que ne l'a fait le professeur Kaplan, ces facteurs politiques et économiques qui forment l'explication et la base même du droit en matière de *copyright* prévalant surtout dans les pays anglo-saxons, et plus spécialement aux Etats-Unis. Le professeur Lyman Ray Patterson, par exemple, avait publié l'an dernier une analyse fort pénétrante du Statut d'Anne de 1710, où le premier facteur, en particulier, était exposé de façon fort brillante.[4] Sur le second point, et c'est bien naturel, des hérauts de l'histoire de l'imprimerie ont parfois fait ressortir plus complètement l'aspect économique et l'évolution de la notion de *copyright*.[5]

L'ouvrage du professeur Kaplan possède cependant des qualités inestimables de brièveté et de précision, le tout ramassé dans un style vivant d'où l'humour n'est pas absent. Les travaux dont nous parlions tantôt, du fait qu'ils soient exhaustifs, se résolvent parfois en un embrouillamini qu'il n'est pas toujours facile de démêler. Ce n'est pas le cas ici, la matière est exposée clairement et simplement.

Enfin, et c'est là un point d'originalité rare, l'auteur fait ressortir le troisième facteur, toujours oublié mais d'influence certaine,

[2] (1834), 33 U.S. (8 Pet.) 591. [3] (1774), 98 E.R. 257 (H.L.).

[4] Lyman Ray Patterson, The Statute of Anne: Copyright Misconstrued (1966), 3 Harv. J. on Legis. 223.

[5] Par exemple: P. Handover, Printing in London from 1476 to Modern Times (1960); W. W. Greg, Some Aspects and Problems of London publishing between 1550 and 1650. The Lyell Lectures, Oxford, Trinity term, 1955 (1956).

qui a fait évoluer la notion de *copyright,* soit les bouleversements des théories littéraires de l'époque.[6]

Nous devons donc remercier l'auteur pour la qualité de son exposé et, surtout, d'avoir songé à nous le livrer. En matière de *copyright* plus qu'ailleurs encore, on peut reprendre l'énoncé fameux du juge Holmes, même s'il se prononçait alors sur un autre sujet, et dire: "Upon this point, a page of history is worth a volume of Logic".[7]

II. *Plagiarism Reexamined.* La deuxième conférence du professeur Kaplan présente un intérêt moins actuel aux yeux d'un juriste canadien. Elle traite en effet du plagiat, de la piraterie et de la contrefaçon dans l'optique du droit positif américain, corps de règles juridiques d'application marginale seulement au Canada. Dans ce travail, l'auteur suit une méthode indentique à celle qu'il avait adoptée en premier lieu, et il dresse un relevé jurisprudentiel d'où le juge Learned Hand ressort cette fois avec la qualité de figure dominante.

Cette étude mérite néanmoins qu'on s'y arrête, tant en raison de sa réelle valeur de fond, que par l'occasion qu'elle nous offre de méditer une fois de plus sur les différences qui singularisent tellement le *copyright* anglo-saxon du droit d'auteur continental. Ces différences sont particulièrement marquées dans le champ des droits moraux, droits estimés fontamentaux en Europe,[8] mais considérées "incidents" seulement en droit anglo-américain. Les conceptions de base respectives du droit de l'auteur dans ces systèmes de droit se situent à des points opposés puisque les Européens qualifient volontiers ce droit comme de propriété sacrée, alors que les Americains, dont le professeur Kaplan, ne voient en lui qu'un privilège de monopole et d'exploitation commerciale.[9]

Notre droit canadien s'écarte aussi considérablement des dispositions de la loi américaine en matière de droit d'auteur. Il s'en distingue d'ailleurs d'autant plus que ce dernier système se tient lui-même nettement en marge des principes du droit britannique, source de notre loi en ce domaine. Le professeur Escarra résume fort bien la question lorsqu'il affirme que les Américains, en reprenant à leur compte la notion britannique de *copyright*, l'ont non seulement développée, mais "plus précisément déformée en l'exagérant".[10]

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[6] P. 23 et s.

[7] Tiré des notes du juge Holmes dans *New York Trust Co.* v. *Eisner* (1921), 256 U.S. 345, à la p. 349.

[8] Jean Carbonier, Droit civil (1964), tome II, p. 282, no 83.

[9] P. 74.

[10] Jean Escarra, préface à l'ouvrage de Monsieur André Françon, La Propriété littéraire et artistique en Grande-Bretagne et aux Etats-Unis. (1955), p. IX.

Malgré l'obstacle de disparités des règles juridiques, le lecteur canadien pourra sans doute apprécier tout de même en parcourant ce deuxième travail de Monsieur Kaplan, le doigté de l'auteur dans la sélection et le commentaire des arrêt qui ont retenu son attention.

III. *Proposals and Prospects.* La troisième et dernière étude du professeur Kaplan porte théoriquement sur les réformes qui devraient être apportées au *Copyright Act* américain. On sait que cette loi demeure l'objet de critiques acerbes[11] et fait actuellement l'objet d'une revision en profondeur qui la débarrassera, espérons-le, des dispositions antiques et discriminatoires qui la rendent impopulaire, tant aux Etats-Unis qu'à l'étranger. Les commentaires et remarques formulés par l'auteur dépassent cependant par leur intérêt les frontières américaines et peuvent fournir des critères de modernisme dont les autres législateurs feraient bien de prende note. Il importe de s'y arrêter.

Le professeur Kaplan, dans cette partie de son travail, axe ses réflexions et oriente ses conclusions en fonction du bouleversement que vont très bientôt apporter dans le domaine de la publication les nouvelles techniques de diffusion de l'information, domaine ou l'ordinateur électronique joue un rôle de premier plan. De façon réaliste, bien que la situation nous semble encore paradoxale, l'auteur se place dans le monde de *Gutenberg Galaxy*[12] et prophétise une réalité que nous connaîtrons inévitablement à un certain degré, dans un avenir que les juristes devraient entrevoir prochain, surtout si on se réfère aux récents développements de la jurimétrie dans le monde du Droit.

Dès lors, se situant dans un contexte que McLuhan jugerait familier, l'auteur brosse un tableau du monde de la publication où l'électronique joue le rôle qu'elle est appelée à remplir. A peu près tout le champ de l'information, toutes les oeuvres que l'on connaît aujourd'hui comme "écrites", se trouve entreposé sur le ruban magnétique d'un ordinateur électronique. A cette "centrale" d'information, est relié tout un réseau de "postes locaux", peut-être de type Telex, disséminés dans les bureaux, les laboratoires, sinon les résidences des chercheurs. En un mot, le professeur Kaplan conçoit pour le monde général de l'information et de la publication, un état de choses analogue à celui que prévoit J. C. R. Licklider pour la bibliothèque demain.[13]

[11] Parmi les dernières études sur le sujet, on retrouve: George D. Cary, The Quiet Revolution in Copyright: the End of the "Publication Concept" (1967), 35 George Washington L. Rev. 652; Melville B. Nimmer, Implications of the Prospective Revision of the Berne Convention and the United States Copyright Law (1967), 19 Stanford L. Rev. 499.

[12] H. McLuhan, The Gutenberg Galaxy, the Making of Topographic Man (1962).

[13] J. C. R. Licklider, libraries of the Future (1965).

Une transformation aussi radicale demande un changement aussi drastique tant des principes à la base de la loi du droit d'auteur, que de la notion de *copyright* elle-même. Dans le premier cas, le professeur Kaplan suggère que "Conceived as conduits or highways for the transmission of signals, the systems will have intense responsibilities of a 'public utility' type enforced by law—if indeed the systems (or some of them) will not come under direct government ownership and control".[14] Sur le second point, ses conclusions font également table rase des conceptions actuelles: "I am suggesting, déclare l'auteur, that copyright or the larger part of its controls will appear unneeded, merely obstructive, as applied to sectors of production and that here copyright law will lapse into disuse and may disappear."[15]

Ces conclusions sont fort radicales mais logiques dans l'idée du professeur Kaplan, et comme nous l'avons dit tantôt, plus réalistes qu'on ne serait d'abord porté à le croire. Elles portent également le sceau du modernisme et devraient être utilisées comme argument décisif, croyons-nous, par ceux qui réclament un droit d'auteur basé non sur la vente des ouvrages, mais leur utilisation subséquente, à la manière d'un droit de représentation (*performing right*).[16] Si l'on en croit le directeur de la Bibliothèque générale de l'Université de New York, Monsieur Charles E. Gosnell, les auteurs de la revision du *Copyright Act* Américain seraient au moins au courant du problème, et l'on doit s'en réjouir.[17]

Nous concourrons donc entièrement aux conclusions du professeur Kaplan avec cependant une réserve. L'auteur omet de signaler ce fait, ce que nous comprenons parfaitement étant donné qu'il est américain et que notre objection touche au droit moral de l'auteur. Nous pensons en effet que le professeur Kaplan aurait dû rappeler que, indépendamment des moyens techniques par lesquels son oeuvre sera répandue dans le public, l'auteur gardera toujours

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[14] P. 121. [15] *Ibid.*

[16] La controverse commencée il y a quelques années en Angleterre, opposant auteurs et bibliothécaires, fait toujours rage. La querelle s'est même propagée aux Etats-Unis à l'occasion de la revision de la loi de *Copyright*. Le point de vue des auteurs a été soutenu de nouveau ces derniers temps avec encore plus de vigueur Voir: Authors League of America Inc. A Licensing System (1966), 91 Library J. 892; A. P. Herbert, Public Lending Right: A Preliminary Memorandum Humbly Submitted to the Society of Authors (1960); Elizabeth Janeway, "The Tood Beneath the Harrow Knows - - - -" (1966), 91 Library J. 887. L'opinion des bibliothécaires a été exposée dans The Library Position on the Copyright Law Revision (1965), 90 Library J. 3403 et par monsieur R. J. Brongers, qui propose avec beaucoup de bon sens la solution norvégienne; voir, R. J. Brongers, The Author's Lending Right (1967), 30 British Columbia Library Quarterly 4-11.

[17] Charles E. Goswell. The Copyright Grab Bag, II—A New Kind of Lend-lease (1967), 61 A.L.A. Bulletin 707.

sur elle ses droits d'artiste, ses droits de paternité, droits au repentir et au respect.

Le petit livre de Monsieur Kaplan nous a fort intéressé. En fait, nous pensons qu'il comble à sa façon un vide dans notre littérature juridique, si pauvrement fournie en ouvrage qui réunissent les qualités recherchées par tout lecteur, de sureté d'information et surtout d'intérêt littéraire. Nous déplorons toujours que nos livres de droit adoptent uniformément le caractère prosaïque de sévères outils de travail. Nos juristes écrivains seraient-ils si peu sérieux qu'ils ne peuvent jamais sourire?

JEAN GOULET*

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Yearbook of Air and Space Law 1965. Edited by RENÉ H. MANKIEWICZ. Montreal: McGill University Press. 1967. Pp. xxviii, 705. ($25.00)

This is the first volume of a new annual publication produced by the Institute of Air and Space Law. It is designed to provide, in a concise and readily-accessible form, up-to-date information and documentation on air and space law to meet the needs of academic, administrator, and legislator.

To estimate the success of such a laudable undertaking is not easy, especially in view of two points. The first volume of the *Yearbook* does not purport to be a "prototype",[1] giving a complete review of developments in air and space law up to, and including, 1965. The editors could hardly hope even to trace and document fully the growth of air law from its beginnings to 1965 within the pages available. It is, in the words of the editor-in-chief, "but an outline of future editions".[2] Secondly, the editors and research staff clearly encountered problems limiting the scope and comprehensiveness of their work, such as lack of time, lack of funds, and tardiness or unwillingness of contribution. It follows that it was "not possible either to make individual sections of the Yearbook as complete as the Editor would have wished, or to reproduce all the original documents referred to".[3] However, bearing in mind these points, some estimate of the value of this project may be formed from a study of the first volume it has produced.

The book is divided into two parts. Part I (Air Law) is divided into eight sections.

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[1] P. viii. [2] P. viii. [3] *Ibid.*

Section I (Doctrine) consists of an introductory article by Professor J. C. Cooper, which traces the historical background of public international air law, concentrating upon the origins and application of four principles he considers basic to the establishment of a legal regime in air space, namely, territorial sovereignty, national airspace, freedom of the seas, and nationality of aircraft. In this article, Professor Cooper provides the reader with an accurate, concise, and readable account of the development of air law. The article also notes some problems which, related both to air and space law, remain as yet without satisfactory solution, such as: the precise limits of "airspace and State sovereignty in the vertical plane", the definition of "aircraft", and the status of craft operated by international entities.

Section II consists of brief surveys of Australian, Canadian, Polish, Scandinavian, and Yugoslavian legal systems where air law problems are concerned. The emphasis in this section is more upon the provision of an outline of basic constitutional and organisational regimes, plus the enumeration of significant legislation, than upon the summarising of all problems, and the law relating to them in the countries concerned. The great utility of this section is that it provides the reader with a basic framework and ample references to relevant statutory material from which he may pursue his own particular interests further.

Section III (Treaties) is divided into: General Treaties, such as the Chicago, Guadalajara, Rome, Tokyo, and Warsaw Conventions; Joint Support Agreements; Regional Arrangements, and Bilateral Agreements. In some cases, where to do so is deemed practicable, the full text is reproduced. In some cases, either a summary, or extract, is given. In every case full references are to be found concerning the location of documentation, the present status of the treaty, and recent developments with respect to its ratification, amendment and so on.

Sections IV and V provide summaries of the activities of intergovernmental and non-governmental organisations. Amongst the organisations treated are: I.C.A.O., A.S.E.C.N.A., I.A.T.A. E.E.C., International Airline Navigators' Council, International Civil Airports Association, International Federation of Air Line Pilots' Association, and European Air Research Bureau. A useful list of national organisations and institutes engaged in aviation or air law research in various countries is appended. The coverage given to the constitution, history and activities of the organisations included in these sections varies considerably. One reason suggested for this by the Editor is a lack of co-operation in the provision of information by certain organisations.[4]

[4] P. ix.

Sections VI and VII contain notes of national legislation and recent cases of interest. Where legislation is concerned, references are given to the sources of the material noted, and a summary of the effect of the legislation given is provided. Twenty-four countries are covered. Members of the Western, Communist, and Africa nations are included. Four legislative texts are reproduced either in full or in part. The section on cases contains brief analyses of judicial decisions on international conventions, (for instance, a Swiss decision on the Geneva Convention, and United Kingdom and South African decisions on the Warsaw Convention), and on national laws (for instance, Norwegian and American decisions on aircraft noise. Swedish decisions on charter rights and liabilities, and a United Kingdom decision on admiralty jurisdiction over gliders). Brief notes of administrative decisions end this section.

Section VIII (Bibliography) is divided into: authors' summaries of recent articles on various problems of air transport and air law; a list of recent books, together with general descriptions thereof; and briefer references to other articles, surveys, and reports.

Part II of the *Yearbook* deals with Space Law, and is arranged on the same pattern as Part I on Air Law. It consists of seven sections.

Section I (Doctrine) is an introductory article by Dr. Ivan A. Vlasic, which summarises clearly and succinctly the legal problems of a developing space-technology, and the steps so far taken towards their solution. This article emphasises the role of the United Nations in the development of a legal regime for outer space, and brings out well the importance of the General Assembly Resolution in the legislative process.[5]

Section II (Surveys) is very short. The only survey given is that of French law, which "very clearly reflects the intention to provide an administrative framework for the development of space-activities".[6]

Section III, divided into: General Treaties, Regional Arrangements, and Bilateral Agreements, begins with a useful list of multilateral and bilateral agreements on outer space registered with the United Nations. The second part of the section is devoted

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[5] In view of recent development, clearly not available for inclusion in the Yearbook, namely, the drafting and adoption as General Assembly Resolution 222(XXI), 1966, of a Treaty Governing the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, the quasi-legislative competence of the United Nations in this field, and possibly in others, may be less significant than previously estimated. See, for example, Ivan A. Vlasic, The Space Treaty: A Preliminary Evaluation (1967), 55 Cal. L. Rev. 507, at p. 519.

[6] P. 411.

to multilateral communications satellite agreements. Under the heading of "Regional Arrangements", we find texts and extracts from the E.L.D.O. and E.S.R.O. Conventions and related arrangements. Finally, certain bilateral agreements involving the leading space powers are noted, some textually, others by extract or summary only.

Section IV (Inter-governmental Organisations) contains firstly a selection from the United Nations documentation. Texts or extracts are reproduced from: the relevant General Assembly Resolutions, reports of the First Committee, of the *Ad Hoc* Committee on the Peaceful Uses of Outer Space, and of U.N.C.O.P.U.O.S. and its legal sub-committee, together with significant proposals and drafts submitted thereto on: general principles, liability for damage caused by space-activities, and assistance to and return of astronauts and space vehicles. Appended to this, is an invaluable detailed reference-guide to the United Nations documentation and activities in the field of outer space and its exploration. The treatment of the United Nations space effort is followed by summaries of the functions and achievements of I.C.A.O., the I.T.U., E.L.D.O., and E.S.R.O., in the exploration and regulation of outer space.

Section V briefly considers the structures and contributions of non-governmental organisations, both international and national, in this field. Organisations treated include: C.O.S.P.A.R., the Institut de Droit International, the International Law Association, the Inter-American Bar Association, the David Davies Memorial Institute, and the commercial communications satellite entities, C.O.M.S.A.T. and I.N.T.E.L.S.A.T.

In Section VI, we find (a) brief notes on pertinent legislation in France and the United States of America, and (b) reproduction of two legislative texts, the one constituting a National Centre for space studies in France, and the other being the United States Communication Satellite Act, 1962.

The last Section consists of a brief selective bibliography of recent books and articles. A general description and evaluation is made of the materials included, which do not purport to comprise a comprehensive list of the available literature. The editors note the publication of two world-wide bibliographies in 1965, one of which, published by the International Institute of Space Law, will be brought up to date annually, and cite the existence of these comprehensive bibliographies as the explanation for the relatively narrow scope of their own section on the literature of space law. There is no index.

Several criticisms may be levelled at the first volume of the *Yearbook*. As has already been noted, the scope and content of

the various sections vary greatly. There are noticeable deficiencies and gaps in the material presented. This may be ascribed, partly to the editing, partly to the problems facing the editors mentioned at the beginning of this review. This reviewer was unable to find any mention of air transport problems and private international law. This is, to his mind, neglect of an important area. He was also somewhat surprised to see, despite a full description of United Nations activity in relation to outer space, and material reproduced relating to the activities of I.T.U. and I.C.A.O. in this field, scant mention made of the actual or prospective roles of other of the specialised agencies, for instance W.M.O., W.H.O., and I.A.E.A. Finally, there are several typographical errors which appear to have escaped the proof-readers.

This reviewer must confess to having been left with the personal general impression that this first volume of the *Yearbook* attempts to do too much at the same time, with perhaps inadequate resources, and that the general standard of its achievement may have suffered slightly as a result.

On the other hand, the objectives in the *Yearbook* are very valid, and the first volume, if viewed as an example of the future organisational framework of subsequent volumes, indicates that, with more time, money, and wider contributions, the project will fill a definite gap in legal literature. One may point to flaws in the first volume without attempting to deny either the high standard of research which has obviously gone into its production, or the probability that, with the publication of subsequent volumes, such deficiencies as there are will be remedied.

Finally, this reviewer would state without qualification that this book deserves a place in the library of any person or group concerned with air and space law. It constitutes by itself a useful and well-constructed reference-work for those seeking collected information and significant documentation in these expanding and increasingly complex fields.

C. GRANGER*

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International Claims: Postwar British Practice. By RICHARD B. LILLICH. Syracuse: Syracuse University Press. 1967. Pp. xvi, 192. ($6.50 U.S.)

The latest of Professor Lillich's excursions into the field of international law and investment protection embraces an examination of the distribution by the British Foreign Compensation Commission

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(F.C.C.) of the proceeds of six lump-sum settlements concluded by the United Kingdom with Yugoslavia, Czechoslovakia, Poland, Bulgaria, Hungary and Rumania. The only major British post-war settlement not dealt with in detail by the book is that concluded with Egypt in 1959; this apparent omission may readily be justified on the ground that the peculiar nature of that Agreement, and the special considerations involved, would make the deduction from it of any general principles a hazardous enterprise.

The thorough documentation and clear exposition of the subject makes this a book of interest not only to the lawyer, but also to the intelligent lay claimant, particularly in view of the assertion by the Legal Officer of the F.C.C.[1] that "although claimants may be represented by barristers or solicitors, a majority take no legal advice".

The author's statement in the Preface to the first volume of this series that that volume was "planned to serve as a 'hard core' for further research in this area on an enlarged and comparative basis" finds ample justification in the present work. Frequent and salient comparisons are drawn between the F.C.C. and its American counterpart, the Foreign Claims Settlement Commission (F.C.S.C.). The structure of the bodies is examined, and the more judicial approach of the F.C.C. explained in the light of the assistance given by its Legal Officer, the equivalent American "Solicitor of the Commission" having ceased to exist. Full recognition is given to the political considerations which loom large in this area, and the British unwillingness, which contrasts sharply with American practice, to make use of threats against the blocked assets of foreign countries in order to extract a more favourable settlement is explained[2] in terms of a desire to maintain confidence in Britain as an international banker rather than any legal motivation. The comparative generosity of the F.C.C. in recognising as eligible claimants corporations, partnerships and trustees whose shareholders, members and beneficiaries are non-nationals is noted.[3]

Occasionally, Professor Lillich's search for a coherence of principle in the F.C.C.'s practice leads him to judge political settlements and discretionary acts by the standards of strict international law, with unhappy results. The statement that the Orders in Council making the nationality of beneficiaries irrelevant for the purposes of F.C.C. proceedings are "clearly contrary to international law"[4] is a case in point.

If this statement means that the United Kingdom might have difficulty in prosecuting the claims of such beneficiaries before an international tribunal, then it is true but not germane to the issue

[1] P. 62. [2] P. 135. [3] Pp. 34, 39, 54. [4] P. 54.

at hand. If intended to mean that the Orders in Council themselves represent a contravention of international law, then it is wrong, for what is in issue is a discretionary act of internal administration which is not governed by international law. Even assuming that the F.C.C. *ought* to act in compliance with some minimum international standard, it can hardly be "clearly contrary to international law" to allow non-nationals to enjoy a slice of the British cake after the settlement has been concluded. (Aliter, perhaps, if the foreigners' claims were presented and pressed at the negotiation of the settlement.) The author himself demonstrates how, as in the case of the Polish creditor claims,[5] many claims may be settled by mutual agreement which are not "true international claims", and how, as with the Yugoslav nationalisation claims,[6] the Orders in Council governing distribution of a particular fund may diverge from the terms of the settlement which produced that fund.

Even the most fervent monist would find it hard to maintain that, once the money is, so to speak, in the F.C.C.'s purse and awaiting distribution, international law should govern that distribution. If the British or any government wishes gratuitously to assume the role of claims adjuster between a non-national and another state, it is acting no more or less illogically than when it offers the hospitality of its courts to foreign litigants whose only link with Britain is the stating of a consultative case by arbitrators, as in the *Suisse Atlantique* case.[7]

Such criticisms apart, the conclusions drawn are clearly expressed; particularly interesting are the numerous footnotes based on interviews with Foreign Office and F.C.C. officials. The F.C.C. decisions which are cited are treated as fully as possible in the light of the Commission's practice of refraining from giving reasons for its decisions. Professor Lillich takes issue both with this practice and with the absence of a competence in the courts judicially to review the F.C.C.'s decisions. Certainly, the position of the F.C.C. is now unique, in that it is the only administrative tribunal which, under English law, enjoys a complete immunity from the review of its decisions by *certiorari*; it may, however, be that the explanation of de Smith, rejected by Professor Lillich,[8] is justified in view of the intolerable delays—intolerable particularly for smaller claimants—which might result if distribution had to be delayed pending appeals. What is more, the recent *Anisminic* decision,[9] most use-

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[5] P. 83. [6] P. 61.

[7] *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale*, [1967] A.C. 361.

[8] Pp. 17-18.

[9] *Anisminic Limited* v. *The Foreign Compensation Commission and Cecil Frank Cooper*, [1967] 3 W.L.R. 382 (C.A.).

fully included as an appendix to the text, now stands as a warning (spotlighted by the judgment of Sellers L. J.) to the F.C.C. against the unnecessary revelation of Minutes of Adjudication.

The practice examined in this book is not portrayed as a prosaic collection of facts and rules; this is a stimulating survey which takes account of the political and economic factor. In particular, the excellent final chapter evaluating the practice described may be commended to an audience wider than the fraternity of international lawyers. The forthcoming companion volume on French practice in claims settlements may, on this precedent, be anticipated with interest.

J. M. SHARP*

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Mulla, Principles of Hindu Law. Thirteenth Edition. By S. T. DESAI. Bombay: Tripathi. 1966. Pp. lxxxv, 1055. (Rs. 22)

This is the latest edition of Sir Dinshah Mulla's standard book on the principles of Hindu law by Sunderlal T. Desai, Senior Advocate of the Supreme Court of India. Thirteen editions and one reprint in twenty-four years speak for themselves as to the popularity and usefulness of this book.

It has been observed by Mayne and others that Hindu law has the most ancient pedigree of any known system of jurisprudence. The rights and obligations of a Hindu are determined by Hindu law that is his traditional law, sometimes called the law of his religion. Hindu law is based on ancient sanskrit texts. Many treatises have been written on Hindu law. The first edition of Mulla appeared in 1912 to meet the demands of legal practitioners and the students of Hindu law and it at once became an indispensable book.

Hindu law is applied to Hindus in India, Pakistan, Ceylon, Burma, Malaysia and in certain parts of Africa, in matters of succession, inheritance, marriage, religious usage and institution, adoption, minority, guardianship, family relations, wills, gifts, and partition of property. The personal law can be abrogated. In India, Hindu law has been considerably modified by the recent legislation embodied in the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoptions and Maintenance Act, 1956. These statutes have brought changes in the law which is now comparable to the family law of a western European country. These statutes are not

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retroactive except where expressly stated. In the last edition, the editor (the present editor was also the editor of the last edition) stated the old law with cases and the new law in separate chapters. This arrangement has been continued in the present edition. Thus, chapters IV, V, XXII, XXIII, XXIV, XXVII, deal with the order of inheritance to males according to the Mitakshara law, Dayabhaga or Bengal school, marriage, minority and guardianship, and impartible estate are the old law prior to the enactment of the recent statutes. Chapters XII to XVIII and XX deal with joint family, gifts and wills and these remain unabrogated by statute. The rest of the book contains a commentary on the recent statutes. The introductory notes to each statute will prove very valuable to students and legal practitioners.

The present editor has brought this book up to date. Many important decisions given by the Supreme Court and also by the various High Courts since the last edition have been incorporated at appropriate places. There are, however, some errors and omissions. For instance the editor should have stated[1] that in England the House of Lords laid down the rule in *Williams* v. *Williams*[2] that insanity was not necessarily a defence to a charge of cruelty. It should also have been stated[3] that *Gollins* v. *Gollins*[4] is an authority for the proposition that the actual intention to injure is no longer an essential element in cruelty. Under Desertion and Cruelty,[5] the close link between the test for constructive desertion and for cruelty as emphasized by Lord Pearce in *Gollins* v. *Gollins*[6] should have been incorporated where His Lordship observed:

> It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances would consider that the conduct complained of is such that this spouse should not be called on to endure it. The judgments of the Court of Appeal in *Hall* v. *Hall* ([1962] 1 W.L.R. 1246) propounded a similar test in a case of constructive desertion, save that in such a case there need be no injury to health.

On the same page, it should have been made clear that the conduct must be grave and weighty for desertion or cruelty. In cruelty it must cause actual or apprehended injury to the petitioner's health. The interpretation of Sir Jocelyn Simon, President of the Divisional Court on Lord Pearce's observations in *Saunders* v. *Saunders*[7] should also have been incorporated when he said:

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[1] P. 669. [2] [1964] A.C. 698. [3] P. 664.
[4] [1964] A.C. 644 (H.L.). [5] P. 658.
[6] *Supra*, footnote 4, at p. 695. [7] [1965] 2 W.L.R. 32, at p. 38.

> Lord Pearce's speech in *Gollins'* Case as a whole is, . . . a valuable statement of and guide to the law; it is unfair to it and gives an entirely wrong impression to isolate the passage relied on. In my view it is not to be applied as an exhaustive definition or test of either cruelty or constructive desertion. The test is still: was the conduct of such a grave and weighty nature as to make cohabitation virtually impossible?

The reviewer would like to conclude that this is one of the best books on this subject and the editor ought to be congratulated for his excellent work in this edition.

S. KHETARPAL*

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Mulla, Transfer of Property Act. Fifth Edition. By M. C. SETALVAD and ATUL M. SETALVAD. Bombay: Tripathi. 1966. Pp. Cxx, 883. (Rs. 35)

Mulla's classical work on the Transfer of Property Act[1] needs no introduction. Its reliability and clear commentaries have resulted in this book being very widely used by members of the legal profession in dealing with matters of transfer of immoveable property. The fifth edition is the latest edition by M. C. Setalvad, Attorney-General of India, Chairman of the Law Commission of India and his son Dr. Atul M. Setalvad. Practitioners and judges in India, Pakistan and Burma will certainly give this book a warm welcome because it is nearly ten years since the publication of the last edition appeared in 1956.

"The learned editor of the fourth edition [S. R. Das, the then Chief Justice of India] quoted in his preface Sir Frederick Pollock's lament about the enormous quantity and uncertain quality of law reports in India". The present editors comment that the same unsatisfactory conditions continue today. Apart from law reports, this part of the law has always been uncertain and many conflicting decisions by the High Courts have been given in India and Burma. It is regrettable that the present editor, who is the Chairman of the Indian Law Commission, has given no indication in the book whether any substantial change in the statute is proposed by

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[1] Act IV of 1882.

the Commission. However, such omission does not in any way detract from the undoubtedly high quality of the book.

The introduction deals concisely with the history of the law with regard to transfer of immoveable property in India and the ultimate enactment of the Transfer of Property Act, 1882, the Transfer of Property (Amendment) Act, 1929 and its many recent statutory changes. It also explains that the principles of English law and equity which were applied in India before the introduction of the Act of 1882 were not always applicable to social conditions prevalent in India. Some of the provisions of the Act of 1882, namely discharge of incumbrances on sale, consolidation of mortgage, power of sale of the mortgaged property without the intervention of the court are borrowed from the English law of conveyancing and Property Act, 1881.[2]

The rest of the book illustrates the main principles in the Transfer of Property Act. The commentary is exhaustive in its reference to the case law. Busy practitioners will find the explanation given as to what the law was prior to the amendments, and what the law is subsequent to the amendments very useful. The Act lays down general principles with regard to the transfer of immoveable property but it is not a complete code, and thus it saves many local usages. Any person competent to contract may transfer property. There are no equitable estates in Indian law. The Act deals with sales, mortgages, and leases except leases for agricultural purposes. A lease may be in perpetuity. The Transfer of Property Act, 1882 deals with the transactions of immoveable property and the Indian Registration Act, 1908 deals with registration of documents affecting immoveable property.

Canadian lawyers and judges will find this book useful for comparative study as one of the outstanding features of this commentary is that the editors have pointed out those sections of the law which are based on the English law and have discussed and explained the differences, if any, between that law and the Indian law. For example, the rule that registration amounts to notice which has been adopted in India,[3] the statutory recognition of the mortgagor's power to lease,[4] and his right of inspection of title deeds,[5]

[2] 44 & 45 Vict., c. 41.

[3] S. 3 of the Indian Act is based on s. 198 of the Law of Property Act, 1925, 15 Geo. 5, c. 20.

[4] The power is similar to that conferred on an English mortgagor in possession by s. 99 of the Law of Property Act, 1925, *ibid.*

[5] Modelled on s. 96 of the Law of Property Act, 1925, *ibid.*

the provision for appointment of a receiver by a mortgagee exercising a power of sale without the intervention of the court,[6] and so on.

It is also interesting to note that firstly, section 53A of the Indian Act gives statutory recognition of the doctrine of part performance. This section imports into India a modified form of the equity of part performance as developed in England in *Maddison* v. *Alderson*.[7] This right is more restricted than the English equity in two respects, (i) that there must be a written contract, and (ii) it is only available as a defence. Secondly, the rule against perpetuity in England differs from the Indian Act. The Indian law allows the vesting to be postponed beyond the life of persons in being only for the period of the minority of some person born in their life time. The additional period of twenty-one years (as in English law) has not been adopted in the Indian Act. Some of the exceptions recognized by English law have also been recognized by courts in India.

There have been many changes in the law since the last edition was published in 1956. The task faced by the editors was a difficult one but the present editors have managed to bring the law up to date by inclusion of numerous cases decided by the Supreme Court and the High Courts in India, and also by incorporating in appropriate places all other changes in the law. The important cases decided between the date of the manuscript going to the press and the date of publication are found in the addenda. It is understandable that the book is primarily meant for Indian practitioners; however, it may be suggested that they should also have incorporated the latest Burmese cases since this commentary is extensively used in Burma. In this edition the editors have not merely contented themselves with the addition of cases, but have rearranged and re-written many chapters resulting in the removal of obsolete material. The original text has been left intact and the language of the learned author has been retained as far as possible.

This edition retains all those features which contributed to the reputation of the book as a helpful and useful one to Indian practitioners as well as to others who needed it for comparative

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[6] With some slight variations the section closely follows s. 109 of the Law of Property Act, 1925, *ibid.*

[7] (1883), 8 A.C. 467.

study, and thus continues in its traditional purpose to serve the needs of practitioners.

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