BOOK REVIEWS
REVUE DES LIVRES

Canadian Negligence Law. By ALLEN M. LINDEN. Toronto: Butterworth. Pp. xv, 575. ($48.50)

Only a master of the law could write this work, and Professor Allen Linden has created for us as Canadians an authoritative and stimulating statement of Canadian negligence law which has long been needed and has now arrived in a most valuable form. Learned authors have presented us with case books and commentaries, but to date none has assumed the responsibility of preparing a text which says "Here is the Canadian law of negligence as developed by Canadian judges and lawyers contrasted with the efforts of those in the Commonwealth and United States". It is with a sense of pride that one discovers that our Canadian jurists frequently have been in the forefront of the law's development, expressing concepts to be adopted elsewhere later, while at the same time expressing themselves in their own rugged individual style. Rather than to look for source material elsewhere, we will hereafter go to Linden, and if perchance we do wish to compare the law in other jurisdictions, our author has provided the most up-to-date footnotes for research in Anglo-American jurisprudence. This is his work in perspective.

Turning to the daily practice of the judge and lawyer who need to know at a glance the leading authorities on a subject, Professor Linden has done us even a greater service. He has collected the best decisions on each subject, extracted from them the spirit of the judicial pronouncement, and where there are apparent conflicts, he has reconciled them, or with laudable independence, indicated the view most in accord with the evolving law. And finally, before parting with each subject, he has with diffidence indicated the probable future course of our jurisprudence. So well has he enunciated in lay language the many concepts of negligence law that a trial judge could usefully make them part of a jury charge, and the lawyer adopt them in clarification of his opinion. The author has given us a working manual of great worth.

It will have an especial appeal to students, who have been subjected to the case book methods where they were expected to

wade through excerpts of reported decisions and discover the rationale of the decision. No doubt case books are excellent teaching tools provided the student has the time to study the reams of material and recognize that all he has really done is contemplate what some judges have decided upon a certain set of facts, well knowing that if the facts were changed ever so slightly, or the personnel of the bench by even a judge or two, the result might have been different. Good mental gymnastics, if one does not become confused in the process. Then how refreshing to pick up the work such as we have here and find the solutions expressed clearly, in perspective and with authority.

Finally, Professor Linden in his chapter on the future of negligence law tackles the all too popular specious thought that in a welfare state the law of negligence is being phased out as the state ever comes to the rescue of its needy citizens. As a consummate artist, he reveals the constellation of tort law remedies and their role in the life of each citizen. It is not merely the recovery of compensation, but the vindication of rights. In the complexity of modern living, the law of torts provides a remedy for those inevitable losses each of us must suffer, and a check upon those who would ignore the rights of their neighbours. That the citizen may know that the law exists for him and that he may use it in its proper capacity is a legacy that makes for acceptance of the social conditions in which we live. Tort law enables each citizen to be his own ombudsman. In my respectful view herein lies the future of tort law, and our courts may be readily accessible to recognize and declare the constantly evolving rights of our people. There is only one obstacle in the way, and that is our system whereby the loser pays the costs of the winner. The result is that only the poor financed by legal aid or the very rich can afford to exercise their rights by litigation. To the man of modest means, costs can be ruinous. One is prompted to ask "Why should a taxpayer be obliged to place his home, his earnings and his resources on the line as a condition to the exercise of his rights?". The answer is that no such obstacle can be tolerated longer. Our founding fathers in creating this great country did not promise us welfare, bonuses and pensions, medical and hospital care, and all those other benefits which sorely burden the taxpayer, but they did promise us justice—not at a price, but free. Rather blindly we accepted the English system of civil litigation whereby the loser pays the costs of the winner, while our American friends recognize no such penalty. Today the survival of tort remedies depends upon those remedies being used, upon justice being free. Let the litigants pay their own lawyers. Many Canadian provinces recognize the contingent fee and I have not the slightest doubt that the stability and

genius of Canadian lawyers can develop a reasonable contingent fee basis, so that all can afford free access to the courts. There will be those who say the penalty of heavy costs prevents overcrowding of our civil courts. They provide their own answer. By making litigation expensive, they discourage those who would seek justice.

Our citizens must have confidence in our system of civil justice. Its availability at minimum expense is essential. A belief that somewhere in our system there is someone who will put things right and that he is accessible at a price the citizens can afford makes for confidence and satisfaction, whereas a sense of injustice makes people want to tear things down.

EDSON L. HAINES*

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Studies in Canadian Family Law. Edited by D. MENDES DA COSTA. Toronto: Butterworths. 1972. Pp. 1104. ($79.50)

In a field of law afflicted by a dearth of good basic material, it is difficult to be critical of such an ambitious work as this one. However one expects a solid and lasting piece of work when asked to pay $79.50 (there is no reduced price for students) and this book simply does not deliver this kind of value. There are two or three very good essays in the two volumes but on the whole they are neither sufficiently broad in coverage nor helpful on difficult practical and procedural problems to be of great use to a practitioner and they lack the depth and critical flavour that one would hope for in a collection of essays aimed at the academic community. As I hope to demonstrate later by referring to specific essays, the general approach seems to have been to report what the cases have to say in a particular area of concern without a serious attempt to identify new patterns that may be emerging, suggest other more desirable courses which may be open to the courts or criticize some of the glaring deficiencies in our current family law. Surely the Canadian academic community can go beyond survey articles setting out what the cases have decided. Such work is a first step but in a book of this kind one hopes for more.

Perhaps the most important shortcoming of the book is the apparent lack of editorial control over the subjects to be covered in each essay. As a result there were both some serious overlaps between essays and some serious omissions which left important topics untouched. The most serious overlap was between the editor's

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essay "Divorce"[1] and Professor MacDougall's essay, "Alimony and Maintenance".[2] Both essays contain eight page discussions of the problem of the maintenance of children of a marriage.[3] In both essays the same cases and the same issues are canvassed in a very similar way. The topic is important but is it not enough to cover it well once? A similar overlap occurs between the editor's essay "Divorce" and Professor Mewett's essay "Evidence and Proof in Proceedings for Divorce".[4] Both discuss the burden of proof in proving adultery and although the discussion in the Mendes da Costa essay is somewhat more detailed, the duplication was completely unnecessary.

While some topics were covered twice other important topics were left untouched or inadequately handled. One of the most inadequately handled areas was the field of support prior to divorce by way of alimony and deserted wives legislation. The title of Professor MacDougall's essay, "Alimony and Maintenance"[5] suggests that these topics are covered. In fact, alimony, an extremely difficult area of the law which in some provinces traces its origins to antiquated legislation adopting uncertain principles of English law from the nineteenth century[6] is dealt with in a few pages. Summary procedures for maintenance are also covered very cursorily in the MacDougall essay despite the fact that for a large segment of the population this is the only type of procedure which is available because of the expense of an alimony suit, a divorce action or because grounds for divorce do not exist. Despite the wider grounds for divorce, pre-divorce support will certainly continue to be an important area demanding a much more serious treatment than it was afforded here.

The other topics which escaped attention were most notably juvenile delinquency and the provincial legislation dealing with unmanageable children. Both are important aspects of the work of judges handling family matters and could easily have been included. On the other hand the editor has included essays on a number of important issues that are frequently ignored in books on family law. Most notable are the essays "The Family and Welfare Assistance Legislation in Canada" by Professor Fodden[7] and "Children in Need of Protection" by Professor Fraser.[8] Both topics are not only important but badly neglected in Canadian legal writing. Both

[1] P. 359.
[2] P. 283.
[3] Mendes da Costa, pp. 399 to 407. MacDougall, pp. 344 to 352.
[4] P. 627, at p. 629. Mendes da Costa, "Divorce", p. 429.
[5] P. 283.
[6] See the discussion of the source of the authority to grant alimony in Ontario, in *Hawn* v. *Hawn*, [1944] O.R. 438.
[7] P. 757.
[8] P. 67.

articles are welcome beginnings although there is less critical analysis of the issues than I would have liked. For example Professor Fraser tends to stress the rights of the child in his article without fully meeting the arguments which can be advanced on the other side for protecting families from arbitrary interference by government officials. Perhaps such a tendency is not surprising in view of Professor Fraser's particular interest in the narrower area of battered and maternally deprived children[9] where the need for strong investigative and apprehension powers is evident. There are however other values in our society which must only be infringed upon in the most serious emergencies. Protecting values such as freedom from search and seizure and the right to have custody of one's child and to raise him as one sees fit may make the work of child protection agencies more difficult but the dangers of broad discretionary powers are very serious especially in low income homes.

As presently defined in child protection legislation the powers of child protection workers are so broad that in the hands of incompetent or vindictive officialdom serious injustices can occur under the protective wing of the law.[10] Definitions in this kind of legislation tend to play down the right of a family to be protected from arbitrary search and seizure, the rights of indiduals to practice religious freedom[11] and the dangers of the greater society imposing its concept of child rearing on minority groups. Professor Fraser's essay has not adequately dealt with these values which have an important place in our society.

As well as my concern for lack of editorial control in some areas I have an equal concern for too much control over the type of approach taken in the essays. There is a serious lack of critical analysis in nearly all of the essays. If this were true only in those areas which were relatively new to Canadian legal scholarship, for instance child protection and welfare legislation it could be dis-

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[9] See Child Abuse in Nova Scotia (1973).

[10] See *e.g.* the definition of a child in need of protection in the Child Welfare Act, R.S.O., 1970, c. 64, s. 20(1)(b). In particular it is worth noting that in Ontario a child found in an *unfit* or *improper* place or found associating with an unfit or improper person is subject to being removed from his home without a warrant as a child in need of protection (see ss 20(1) b (iv)(v) and 21). Because the power to detain is so broad covering all children in need of protection not just emergencies and because the words improper and unfit are such vague subjective terms the doors are open to abuse. These powers are too broad and as has been done by bail reform legislation the power to arrest and detain should be restricted to serious cases.

[11] Child Welfare Act, *ibid.*, *e.g.* s. 20 (1)(b)(x) provides *inter alia* that a child is a child in need of protection where the person in whose charge he is neglects or refuses to provide or obtain *proper* medical treatment. The power may be perfectly justified in cases involving life and death but it is surely arguable that in cases involving less severe matters religious freedom is a value to be considered.

missed as a shortcoming which resulted from the work necessary to draw the material together. However when virtually every essay lacks the critical input which one expects from legal academics the reader is left with the feeling that the editor was interested primarily in having the contributors lay out the law as the courts had found it to date and detailed evaluation of that law was eschewed.

This is not to say that there was no critical analysis; Professors Hughes and Cullity[12] in particular were prepared to criticize in addition to carefully setting out and analyzing the decisions of the courts on the broad range of problems encompassed by their topics. For the most part however the writing was seriously lacking in critical analysis indicating to this writer that the editor did not push for it.

Perhaps the editor's own essay, "Divorce", best exemplifies the non critical approach although a number of others could have as easily been selected: Hahlo, "Nullity of Marriage",[13] Mewett, "Evidence and Proof in Proceedings for Divorce",[14] and Foote, "Family Organization and the Illegitimate Child",[15] being prime candidates.

In his 182 page essay on divorce, Professor Mendes da Costa painstakingly explores each ground for divorce set out in the Divorce Act including six pages defining sodomy, bestiality and rape and six pages defining adultery. As well there are six more pages discussing the proof of adultery. Nowhere in the eighteen pages is any question asked about the social value of including such matters as grounds for divorce. Do we need the matters raised by these grounds aired in public when parties are trying to rebuild their lives? There is no serious mention of the obvious temptation to manufacture evidence of sodomy or adultery to obtain a speedy divorce. Professor L. C. B. Gower in his testimony before the British Royal Commission on Marriage and Divorce[16] in 1952 clearly exposed the problems involved in making such private conduct a ground for divorce. Direct independent proof is unlikely and testimony from interested parties is highly suspect. There is little doubt that similar grounds cause similar problems in Canada with resulting harm to the legal system as lawyers and laymen alike realize that many divorces are obtained on questionable and in some cases manufactured evidence. We have no discussion on this from the author.

When Professor Mendes da Costa turns to a discussion of

[12] Hughes, "Adoption in Canada", p. 1013. Cullity, "Property Rights During the Subsistence of Marriage", p. 179.
[13] P. 651.
[14] P. 627.
[15] P. 45.
[16] Royal Commission on Marriage and Divorce, Minutes of Evidence (May 20th, 1952), p. 18.

cruelty as a ground for divorce he says that cruelty falls to be determined on its facts.[17] No serious attempt is made to point out the highly subjective standard which results from such an approach. The old standard set out in *Russel* v. *Russell*[18] while stringent was one which at least approached the objectivity necessary to permit its classification as a judicial standard. The difficulties introduced by standards tied to whether the conduct complained of has rendered continued cohabitation intolerable to the spouse[19] are not resolved by saying that each case must be looked at on its facts and setting out in four pages fact situations which have and have not been found to be cruelty as Professor Mendes da Costa does starting on page 459. Perhaps we should be questioning whether cruelty can be considered a standard which can be sufficiently well defined to be used as a judicial standard. To date the courts have given little evidence that it can.

A ground requiring proof of cruelty by a party seeking a divorce is also a questionable practice if we wish to encourage the couple to deal reasonably with each other after divorce. Washing the family's dirty linen in public is not calculated to increase the chances for amicable custody and access settlements or regular support payments. The critically important problems raised by the retention of grounds for divorce are touched on briefly in the conclusions at the *end* of the essay but the author spends the bulk of his article discussing the minute issues raised by the Act without a hint that the Divorce Act is a most unsatisfactory resolution of the problem. Brief conclusions and suggestions at the end while in some cases helpful are too little, too late.

Professor Mendes da Costa's book lacks the range and practical approach which would make it valuable to the practitioner and the depth and critical analysis one looks for in a good student text. As a result the book is simply not worth its $79.50 price tag for either a student or a practitioner.

JOHN BARBER*

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Residential Tenancies. Second Edition. By DONALD LAMONT, Q.C. Toronto: The Carswell Company Limited. 1973. Pp. viii, 144. (No price given)

Part IV of The Ontario Landlord and Tenant Act,[1] described by its political mentors as a "bill of rights for tenants" came into ef-

[17] P. 451.

[18] [1897] A.C. 395. The standard was "grave and weighty and such as to cause danger to life, limb or health bodily or mental or give rise to a reasonable apprehension of such danger".

[19] See *Knoll* v. *Knoll* (1970) 10 D.L.R. (3d) 199.

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[1] R.S.O., 1970, c. 236.

fect on January 1st, 1970. By February 16th, 1970, Donald H. L. Lamont, Q.C., head of the course in real estate and landlord and tenant of the Ontario Bar Admission Course had in the hands of his students a booklet containing not only the new Part IV but also thirty-eight pages of detailed commentary on the effects of the changes to the Act. It was intended, of course, as an aid to his students, but it became much more; the legislation was new and radical where nothing new and radical, except for a wartime freeze on tenancies, had occurred for nearly a century. It was a product of the Ontario Law Reform Commission's study during the previous decade, and there was no textbook and no judicial authority to light the way for the student seeking the truth, the solicitor advising his client, or the advocate seeking to instruct the court.

The Lamont handbook entitled *The Landlord and Tenant Act, Part IV*[2] became not only prescribed reading but a necessarily ever-ready companion to every practitioner in the field. It became valuable across Canada when other provinces enacted essentially similar statutes.

Now the same author, after three years of reflection, a modicum of judicial pronouncement, a few amendments by the Ontario Legislature, but most of all after observing the practice with a very practical mind, has produced *Residential Tenancies*, 140 pages of law, practice, forms and references, all based on the same Part IV of The Landlord and Tenant Act of Ontario, 1970. The book describes the operations of the Part, including the changes relevant to rent, the rights of assignment and the obligation to repair, the introduction into landlord and tenant law of the principles of the interdependence of covenants and frustration of contract, and the abolition of distress and of self-help by the landlord or his bailiff in the repossession of the rented premises. It sets forth in great detail the procedures for termination of tenancies and enforcement of the repair provisions, and engages in some intellectual speculation on the tortious liability of landlords for non-repair, the effectiveness of the clause requiring the landlord to mitigate his damages, and the dangers to mortgagees inherent in the attornment clauses that most mortgage forms contain.

The style is conversational, as befits a lecturer in a practical course, and the book cannot be read without constant reference to Part IV of the Act, which is, fortunately, appended. We might have been better served with a few subheadings; it is mildly jarring the way one must jump from one subject to another, but everything needed is there; there is a good index and the book and the chapters are short enough that it is no real hardship to ferret it out.

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[2] (1970).

I have a couple of mild and carping reservations. On page 63 in dealing with the rights of re-entry of landlords the author brings up the ever-present problem of a tenant's abandoned furniture. He makes reference to the Manitoba statute[3] authorizing storage and sale after three months, and suggests that such is a practical method of solving the problem, even where no statutory authority exists. It certainly is a "practiced" solution, as we can judge from the many classified advertisements every day threatening to sell the absconding tenant's goods for "storage", but it is hardly a legal one. While a landlord can have no responsibility for such goods, he cannot exercise any control or dominion over them, and he has no license to put them in storage or sell them. Better to give them away unless the landlord hopes to recover the arrears of rent by way of execution of a judgment, and even then he must surrender the goods if reclaimed by the tenant at any time before judgment.

I have also a reservation on the very difficult question of mitigation of damages. The statute[4] requires the landlord to mitigate his damages after an abandonment by the tenant, and the author implies that notwithstanding the section, the landlord may elect to "stand by and sue for the rent as it falls due. The matter of damages does not arise".[5] There is perhaps support for this in the now famous decision of Laskin J. in *Highway Properties Limited* v. *Kelly Douglas & Company Limited*,[6] where the right of election is preserved but the precise words of the decision are as follows:[7]

> Although it it correct to say that repudiation by the tenant gives the landlord at that time a choice between holding the tenant to the lease or terminating it, yet at the same time a right of action for damages then arises; and the election to insist on the lease or to refuse further performance (and thus bring it to an end) goes simply to the measure and range of damages.

In *Highway Properties*, the rented premises were commercial so the question of the landlord's obligation to mitigate did not arise. It may well be, however, that the courts will eventually hold that in residential tenancies, whatever the election of the landlord, his remedy is in the nature of damages and he has a duty to mitigate.

But all this is, as I have said, carping. The book is of immeasurable value to lawyers and others concerned with residential renting. There are very few people who, at one time or another in their lives, are not.

S. G. M. GRANGE*

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[3] R.S.M., 1970, c. L-70, s. 94 (2), as am. S.M., 1970, c. 106, 1971, c. 35.
[4] *Supra*, footnote 1, s. 92.
[5] P. 30.
[6] [1971] S.C.R. 562.
[7] *Ibid.*, at p. 567.
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In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts. By W. VAUGHAN STAPLETON and LEE E. TEITELBAUM. New York: Russell Sage Foundation. 1972. Pp. xv, 243. (No price given)

The central theme of this book is concerned with the philosophy of the juvenile court and the ways in which it has been affected by the United States Supreme Court decisions in *Kent*[1] and *Gault*[2] which granted some aspects of due process, including right to counsel, to juveniles coming before the court for children.

In a controlled experiment, "project lawyers" with special knowledge and expertise acted on behalf of some of the youths charged in the juvenile courts of two cities called, in the book, Gotham and Zenith.

The authors wanted to discover "whether an attorney can enhance the court's effectiveness or whether the adversary-minded attorney's tactics will limit the court's ability to fulfil its rehabilitative goals".[3]

The Gotham judges were "traditionalists", who had been in their jobs for many years, and had served on the executive of the National Council of Juvenile Court Judges. The traditionalists favour the *parens patriae* approach, a rationalization of an old equitable notion that, in the absence of proper or any parental supervision, the state acts as super-parent to protect the child from the world and from itself. The adherents of this view feel that the introduction of counsel would result in a legalistic approach in what was meant to be a welfare tribunal. They believe that the lawyer would help the child or youth to "beat the rap", thus encouraging disrespect for the court and indirectly contributing to further delinquencies.

The court's defenders also argue that the presence of counsel "interposes an agency between the court and the child so that the juvenile court's message to the child and his parents may be determined by the lawyer's attitudes and comments rather than by the court's pronouncements and disposition".[4] The judge is said to impart a sense of social responsibility which would be impaired by the injection of an adversarial quality in the juvenile court. The "fact-finding" process of the court would be inhibited and would prejudice the "best" disposition of the case. The lawyer might well rejoin that the cure and prevention of delinquency seem to have failed and that some legalism might stop the proliferation of these failures.

The stage at which counsel intrudes himself into the juvenile

[1] *Kent* v. *United States* (1966), 383 U.S. 541.
[2] *In re Gault* (1967), 387 U.S. 1.
[3] P. 2.
[4] *Ibid.*

process will be crucial. By the time of the first court hearing, the juvenile has usually made admissions to the police and the parents have encouraged him to co-operate with the authorities. This will not happen if the child is experienced or the parents are antipathetic to the juvenile agencies. Defenders of the juvenile court point out that these are the only cases in which institutional disposition is likely and, ironically, where, in the eyes of the traditionalists, legal intervention is most unsuitable because they are the very cases in which the child needs help.

If, on the other hand, the child is making his first appearance before the juvenile court, should the lawyer adhere to due process or advise the child to admit the delinquency because the judge will only caution the juvenile or place him on probation? The more doctrinaire critics of the traditional philosophy would argue that the child still has a record (which is not as secret or erasable as we have been led to believe). In other words, what is in the "best interests of the child"?

Those in favour of injecting some due process into the juvenile court argue that legal representation "will heighten rehabilitation by demonstrating fairness, minimizing alienation, and avoiding unjustified convictions".[5] They also contend that any legalistic approach which keeps juveniles out of the unsatisfactory reformatories is a positive value. Concepts of fairness cannot be communicated to the juvenile unless the court acts (and appears to act) impartially.

Table III.1 in *In Defense of Youth* clearly shows the results of this study. In Gotham, where the bench was manned by traditionalist judges, the presence of "project lawyers" had no, or possibly even a deleterious, effect on the juveniles so represented. There was no significant difference, in percentage of cases dismissed, between the experimental group and the control group which was left to the meagre legal resources conventionally available in the juvenile court. In Zenith, however, where the judges were younger and more recently appointed, there was an overall 10 per cent increase in dismissals where cases were taken by project lawyers.

The Gotham court favoured the strategy of continuing cases (or informal probation or adjournment *sine die* as it is called in some jurisdictions); 34.5 per cent of all cases in the control group were dealt with in this way against 30.5 per cent of the experimental group. In Zenith, where this disposition was much less popular, the statistical pattern was reversed; 3.9 per cent of the control group's cases were continued and 9.9 per cent of the experimental group.

[5] P. 3. See also Matza, Delinquency and Drift (1964), Ch. 4.

There was also a contrast between the two cities in the numbers of commitments to institutions. In Zenith, the lawyers seem to have had some effect because 8.7 per cent of the experimental group were sent to institutions while 12.3 per cent of the control group suffered that disposition. In Gotham, there was a reverse trend with 10.7 per cent of the experimental group being committed but only 5.9 per cent of the others.

In the choice of probation, there was no difference between the two groups in the Gotham court. In Zenith, a juvenile had most chance of being placed on probation if he was unrepresented (45.3 per cent), almost as much chance if he hired a conventional lawyer (40.7 per cent) and least chance if he used one of the project lawyers (20.7 per cent). These figures suggest that the Zenith judges were most likely to use probation when they had least background information and when they were most uncertain of the best disposition.[6]

In summarising the Gotham findings, we see that if a youth were unrepresented (rather than randomly chosen for project lawyer representation), there was more chance of a continuance, much less chance of being committed and an equal chance of probation.

The Zenith judges were more receptive to the well-informed intervention of the project lawyers. This is well exemplified in the clear distinction between the two courts' attitudes toward plea-determination:

> The Zenith lawyers felt free to use the plea as an indication of their client's desire to resist authoritative intervention until adequate proof of guilt had been adduced in a procedurally proper fashion. This approach contrasts strikingly with the practice in Gotham, and with the traditional concept of the lawyer's rule in juvenile courts.[7]

In almost all (92.4 per cent) of the Gotham cases the contested cases were argued on factual issues. In Zenith, legal defences were much more readily received and the judges would hear motions to suppress impugned evidence in separate hearings, which saved evidential questions being blurred as happened in the more traditional one-hearing Gotham courts. Of the dilemma in the latter courts, the authors say:

> The significance of the pressures on the Gotham project staff is perhaps heightened by the realization that their posture was affected by the inability to rely on the same rights their presence presumably guaranteed.[8]

The role imposed on the Gotham project lawyers seriously affected their function because the courts there tried to concentrate

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[6] The relevant tables are found at pp. 66-76.
[7] P. 133.
[8] P. 138.

on the facts of the case, the truthfulness of the child and the co-operative, as opposed to the conflict, nature of the tribunal.

This dichotomy between conflict and co-operation is the basic problem facing the juvenile court and is the essence of the disagreements between the traditionalists and the legalists which have been discussed earlier. The Supreme Court decisions on the juvenile court did not make the "political" decision that the court should have the same qualities as a criminal court. Similarly, the decisions offer some *indicia* of due process but do not guarantee equal protection. Children are not to be treated in the same way as adults and consequently they are not able to demand that all the manifestations of due process will be applied to them when they appear before the juvenile court.

This dilemma is well illustrated by a situation often faced by lawyers (and social workers) who have spent any time in the juvenile court. Teitelbaum and Stapleton cite a typical case where a legal or procedural technicality enables the youth's case to be dismissed because of the intercession of the lawyer who has protected the youth's legal rights and has acted in accordance with professional ethics. Yet the lawyer has some reservations about the disposition which he himself has engineered. The boy's home *was* unsatisfactory, and he *was* having difficulty functioning in the neighbourhood school. Foster care was unavailable or unsuitable and he could be helped by institutional care or by probation supervision, and may be so deterred from specific delinquent or criminal behaviour while, at the time of the dismissal of his case, he was merely pre-delinquent—incorrigible or neglected.

Yet the lawyer knows that the United States Supreme Court has correctly pointed out, with the help of social scientific data, that there are real faults in the juvenile process—the label of "delinquent" is a social stigma, the juvenile court has increased delinquency, partly because of this labelling process. The juvenile court has failed to enhance the youth's concept of justice. Institutions too often do not cure or prevent delinquency or the social deviancy of youth.

Teitelbaum and Stapleton do not advocate the British solution of making the juvenile court an a-legal tribunal like the Scandinavian family panels. On the other hand, they do not suggest that the United States Supreme Court should grasp the constitutional nettle and make the juvenile court a full-blown mini-criminal court with all the guarantees of due process and equal protection. They do not follow Handler's suggestion[9] for a bifurcated system of arbitration of the conflict issues followed by a legal hearing if such is necessary.

[9] The Juvenile Court and the Adversary System: Problems of Function and Form, [1965] Wisc. L. Rev. 7.

Instead, they suggest that the only way to discover the truth about the juvenile court's performance and future usefulness in society is to institute an "experimenting society" which would include the following methods:

> . . . tries out proposed solutions to recurrent problems, which makes hard headed multi-dimensional evaluations of the outcomes, and where the remedial effort seems ineffective, goes on to other possible solutions. The focus will be on reality testing and persistence in seeking solutions to problems. The justifications of new programs will be in terms of the seriousness of the problem not in the claim that we can know for certain in advance what therapy will work.[10]

One third of all youths like the one the lawyer had qualms about would admit guilt and be given the normal "traditional" juvenile court treatment (with strong likelihood of treatment in an institution). One third would be dealt with outside the framework of the juvenile court and the remainder would be given a project lawyer.

But there is a catch. How can we make a political decision to institute this programme when we know that "it necessarily denies the existence of any right on the part of the admittedly guilty child to resist societal intervention"? The authors answer this by asking for official (judicial or legislative?) determination of the "experimenting society" before it starts.

This is precisely where we came in.

GRAHAM PARKER*

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Criminal Rehabilitation. . . Within and Without the Walls. Edited by EDWARD M. SCOTT and KATHRYN L. SCOTT. Springfield, Illinois: Charles Thomas Publisher. 1973. Pp. 223. ($7.95 U.S.)

The latest addition to the ever increasing number of books dealing with criminal rehabilitation is *Criminal Rehabilitation. . . Within and Without the Walls* edited by Edward M. Scott and Kathryn L. Scott. The book consists of a series of short contributions from a wide number of American experts within the field. It is an attempt to explore the rehabilitation of criminals using an interdisciplinary approach. Due to the broad area covered, the editors have had to be very selective in the materials included. The first section of this work consists of chapters on general aspects of crime and the administration of correctional programmes. The second section presents

[10] Cited at p. 174. See also Campbell, Reforms as Experiments (1969), 24 Am. Psychologist 409.

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articles on the legal aspects of the rehabilitation process. (One of these aspects is that of sentencing).

The third section deals specifically with rehabilitation problems and programmes "within the walls" of our prisons. Some of the articles here involve a discussion of group therapy programmes and of women's prison conditions.

The fourth section concentrates on rehabilitation efforts "outside the walls" of prisons.

The book for the most part is really for the student in the criminal rehabilitation field and not for the professional. Areas which are of value to professionals in the field are the chapters on sentencing, community centred treatment programmes, and group therapy efforts with prisoners. However, the discussion in all these areas is too brief to be of any value other than merely suggestive. In the area of sentencing, for example, much more thorough analyses exist.[1] In an effort to present a smattering of many ideas on rehabilitation from many disciplines, the editors have in effect treated the topic too briefly. The collection is aimed at providing both a theoretical and a practical approach to the corrections field—a most noble goal. However, most, if not all of the contributors have based their approach upon the premise that prisons are a necessary part of the administration of the criminal justice process. Having made such an assumption, most of their comments are aimed at developing programmes or techniques of rehabilitation within the present framework without giving any thought to alternatives to the prison process.

It saddens one to see so much literature in the area of criminal rehabilitation, but very little that even begins to scratch the surface of a new approach. What we have is merely a rehash of older theories, older approaches, and what is most important, out-dated assumptions. That the latter have been unsuccessful is borne out by our current recidivist rates and prison unrest.

What are the faults of these older assumptions? They have failed to confront the following realities: (1) the prison process in itself is a destructive process and every possible effort must be made to keep people out of prisons. Alternative programmes, as suggested by a few contributors in this book[2] must be developed and implemented. Millions of dollars and man-hours are being plowed into rehabilitation efforts which in fact do no more than attempt to rehabilitate the prisoners from an unhealthy prison stay and not from an unhealthy mental attitude prior to their being incarcerated. Traditional efforts in the area of rehabilitation fail to come to grips

[1] See Hogarth, Sentencing as a Human Process (1971).

[2] Chap. X, Community Centered Treatment of Offenders, by Gordon Bird, p. 127, and Chap. XI, Group Therapy with Convicts in Work-Release, by Edward M. Scott, p. 147.

with the central contradiction of present rehabilitation methods: how do we rehabilitate and reintegrate people into a society and back into societal values when we have purposely removed these people for long time periods from such a society? If we could eliminate this isolation approach to criminal rehabilitation then half our problems would be eliminated. Our psychologists, sociologists and psychiatrists now know enough about the various mental and physical needs of man to tell us that prisons destroy people. How much time must pass before we begin to guide rehabilitation techniques according to this "new found" knowledge?

(2) Another issue which this book and others like it fail to confront is that of the political or convictional criminal. How effective are current rehabilitation efforts in regards to that growing number of criminals who do not recognize the legitimacy of the entire criminal justice system. Of what use are rehabilitative methods to these people? Surely before a correctional scheme can adapt or readapt a "criminal" to a social system whose rules he has been deemed to have broken, the "criminal" must accept the fact that he has broken such rules. Traditional rehabilitation techniques have failed in many cases to help even the traditional type criminal (conventional crimes). It is wishful thinking to believe that such techniques will do anything for the political criminal. The entry of this newer type of criminal clearly points out the inadequacy of current rehabilitative techniques in that they are aimed at treating a symptom while leaving the underlying maladies unresolved. The political assassination, the political kidnapping, the political bombing are all violent attempts to open the eyes of society to injustices—injustices of which the majority of the population are unaware. Is any correctional scheme going to convince the "political criminal" what wrong has been done? The powers behind such a scheme must be deemed legitimate by these "criminals" before they can be effective. As long as our criminal justice system treats symptoms rather than causes, traditional rehabilitative efforts will continue to be ineffectual for a growing body of offenders.

(3) Another aspect of rehabilitation which is not focused on until the very last page of the book is that of public attitudes towards the ex-offender. Rehabilitative approaches have for too long concentrated only upon the offender, yet, the success of any programme clearly depends on whether society will accept the ex-offender, offer him work, and permit him to lead a normal existence once more. Societal attitudes towards the ex-offender have developed in a general atmosphere of ignorance of the entire criminal justice system. Lack of understanding has engendered feelings of fear and mistrust of the ex-offender on the part of the public. As a result, John Mitchell points out in his chapter New Doors, Not Old Walls,

"every sentence becomes a life sentence"[3] for the ex-offender. Only with greater understanding of the process on the part of the public will come greater support for the allocation of more funds into this area.

It is for the above reasons that this book fails, as do so many others in this area, to contribute anything new to discussions of rehabilitation. The point that the prison process is a destructive one is mentioned in a number of chapters, but such observations are not carried to their logical conclusion in the form of suggested new programmes. The only chapters of the book which do so are found in section four "Outside the Walls". It is here in Chapters X and XI[4] that new assumptions have been implemented as programmes.

While the chapters dealing with group therapy and community centered treatment programmes are instructive and valuable, beyond these illuminating contributions there is little in the book which adds anything to the discussions in this area. The chapter on women's prisons is so brief and cursory an analysis that it serves no more than a descriptive function. Section two on "Legal Aspects" of criminal rehabilitation fails completely in its attempt to come to grips with the whole question of whether conviction or incarceration or both deprive a person of more rights and freedoms than they should. The chapter on sentencing does discuss recent United States judicial review of the non-physical aspects of punishment in prisons, but no thought is directed towards the post-release period and the inability of both the ex-offender and the public to cope with the new role of the ex-offender. The incarceration process clearly strips an individual of much more than we can ever give back to him by way of a rehabilitation programme. What becomes of his "right" to earn a living? Of his "right" to be treated and accepted as a fellow human being? Of his "right" to self-respect and self-dignity? Where in this section of the legal aspects of rehabilitation is consideration given to all those freedoms set out in the Universal Declaration of Human Rights? If there is any place such a document must be given serious consideration and practical application, surely it is here in a discussion of the treatment and rehabilitation of offenders.

Criminal Rehabilitation. . . Within and Without the Walls raises a number of crucial elements in the area of rehabilitation. However, the contributions for the most part pay only passing lip service to these elements. What is required in the area is a book which deals with the issues only mentioned in this book and books like it. If the prior process is a destructive one then let us devise

[3] P. 208.
[4] *Supra*, footnote 2.

ways of using prisons as only a very last resort. Let us have our experts concentrate on this problem instead of expending their efforts in perpetuating a clearly inadequate system—incarceration. Let us stop studying and talking about the pains of imprisonment and begin devising serious alternatives which reach both the offender and the public. As Roger Owen states in Chapter VI: "The great majority of inmates do not require secure care and custody because they do not present a threat of physical harm to self and others. They can be monitored in open society."[5]

Criminal Rehabilitation. . . Within and Without the Walls raises in some way all the needed changes in our approach to rehabilitation—more funds, more alternatives to prison incarceration, more understanding and empathy on the part of the public, more participation in the process by more professionals of varied fields. What is now required is a body of research activity, and literature which will *act* upon these new-found assumptions and thus breathe new life into the whole area of criminal rehabilitation. Until the focus of study is changed to include not only the prisoner but his incarceration process, his society, and his attitudes towards the goals of his society, criminal rehabilitation will continue to be no more than a nineteenth century approach to twentieth century problems.

This book review was not intended to cast aspersions upon the contributors but merely to suggest that their expert abilities and vast experience be channelled in new directions. They, by their own words, recognize the need for changes in these areas but seem to hesitate in acting upon their discoveries in the field. If the purpose of this book was aimed at no more than generating the beginning of new discussions and new approaches in the field of criminal rehabilitation then it has succeeded. If, however, it was supposed to serve as a new discussion or new approach in itself, then it clearly fails and must be relegated to the long ranks of prior attempts in this area.

New assumptions about the criminal rehabilitation field must be followed by new action and new programmes. To do otherwise is to foist yet another fruitless rehabilitative programme upon our society and to merely perpetuate the gross injustices presently occurring to the ex-offender.

S. SILVERSTONE*

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[5] The Correctional Counselor as a Change Agent, p. 71.

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The Canadian Yearbook of International Law. Vols IX and X. Edited by C. B. BOURNE and J.-Y. MORIN. Vancouver: University of British Columbia Press. 1971. 1972. Pp.355 and 375. ($14.00)

Volumes IX and X of the *Canadian Yearbook of International Law* are somewhat more closely interconnected than is usually the case with the succeeding volumes of an annual series. Perhaps one of the most useful sections of the *Yearbook* is that on "Canadian Practice in International Law", and these two volumes illustrate that it is not only an international organization that seems for ever to be dealing with the same subjects, but emphasises the continuity of issues in the Department of External Affairs, particularly in such matters as Arctic sovereignty and maritime jurisdiction in which Canada is seeking to blaze its own trail, while hoping that this will serve as a precedent for other states and thus make its own contribution to the development of international law. In this connection it is as well to point out, as Professor Bourne reminds us[1] that state practice only acts as a creative force in international law if that practice is accepted as law. It is for this reason that he is hesitant in the second of two related articles on the settlement of disputes between states sharing international drainage basins, to assert dogmatically that there is an international duty to submit such disputes to consultation and negotiation. Professor Bourne examines the evidence with some care, and emphasises that any duty to "consult and negotiate" does not involve a concomitant duty to "agree", but only to act in good faith,[2] and he feels that there may in fact now be an obligation to indulge in such consultation and negotiation in good faith.[3] In his earlier article he was concerned with third party assistance in solving such disputes, and reminds us that, "in this respect, drainage basin disputes are indistinguishable from other international disputes", so that any hope of making reference to third party settlement compulsory is at present somewhat remote.[4]

The paper which is likely to be of most interest to Canadian readers is that by Professor Castel on exemption from jurisdiction of Canadian courts.[5] This survey considers the position as it affects the state, the sovereign, *acta imperii* and *gestionis*—the discussion on the *Venne* case[6] should be read together with the note on the Supreme Court decision in Volume X[7]—diplomats, consuls, foreign

[1] Vol. X, p. 223.
[2] Pp. 223-232.
[3] Pp. 233-234.
[4] Vol. IX, p. 158.
[5] Vol. IX.
[6] (1969), 5 D.L.R. (3d) 128, (1972), 22 D.L.R. (3d) 669.
[7] Vol. IX, p. 169 *et seq.*, Vol. X, pp. 319-321.

armed forces and international organizations. Dr. Castel also looks at the question of waiver and at the position of enemy nationals, who cannot invoke Canadian jurisdiction unless they are living in Canada by license or under royal protection.

Two interesting and related articles appear in Volume IX and deal with the attitude of the Soviet Union. Dr. Patry examines "La conception soviétique du droit international", pointing out that while the Soviets concede the juridical character of international law, they allow it no supremacy over municipal law. As to its sources, they consider international agreements as a formal source, recognizing both the principles of *pacta sunt servanda* and *rebus sic stantibus*—Professor Ginsburg's study of the execution of foreign commercial awards in post-war Soviet treaty practice is relevant here—and while they pay some attention to custom and the decisions of international organizations, this is so only to the extent that they are not incompatible with the "conscience juridique socialiste". While international decisions are important, in the Soviet view the state remains the principal subject of international law, with sovereignty and self-determination basic principles.

Volume X contains two articles in the field of humanitarian law, one by Dean Macdonald on the fate of the proposal to appoint a United Nations Human Rights Commissioner, and the other by Professor Samuels on humanitarian relief in man-made disasters with particular reference to the Nigerian civil war. As to the law of international organizations, Dr. Akindele in Volume IX examines the problem of the relationship between regional and universal organizations, with particular reference to the Organization of African Unity; while in Volume X the reviewer analyses the difference between representation and membership in the light of what happened in the case of China. Two papers in French may be regarded as contributions to international economic law, the one by Dr. Carroz in Volume IX is concerned solely with the International Commission for South-East Atlantic Fisheries, and the other by Dr. Grenon in Volume X is a study of treaties of commerce in the light of exchange liberalisation, with an interesting exposition of the impact of the adhesion of Great Britain to the Rome Treaty,[8] and another on the commercial treaties to which Canada is a party.[9] For some years now, Dr. FitzGerald has contributed notes on the work of the ICAO and his contributions to these volumes deal with the Guatemala Protocol amending the Warsaw Convention on liability,[10] and hijacking controls[11]. In the field of space law, Professor Dalfen deals with the proposed convention on the registration of space

[8] P. 94 *et seq.*
[9] P. 81 *et seq.*
[10] Vol. IX.
[11] Vol. X.

objects in Volume IX, and in Volume X looks at the legislative process by comparing direct broadcasting and remote earth sensing by satellite and he suggests that there is a definite trend back from the "operational" to the "legislative" approach.[12] Closely connected with these papers is Professor Foster's account of the 1971 Convention on International Liability for Damage Caused by Space Objects,[13] to the adoption of which Canada abstained with three others, and which by the end of October 1972 had been ratified by only five of its sixty-seven signatories.

The *Canadian Yearbook of International Law* continues to provide papers on a variety of significant issues, usually topical in character, most of which draw attention to the Canadian role or their relevance for Canada. In addition, those seeking to keep up to date with Canadian trends will find the contributions on Canadian practice, administrative and judicial, of significant value. As always, these two volumes reiterate the debt in which scholars are placed by Professor Bourne and his editorial colleagues.

L. C. GREEN*

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American International Law Cases: 1783-1968. Edited by FRANCIS DEAK. Vol. 4. Dobbs Ferry: Oceana 1972. Pp. xiii, 495 ($40.00 U.S.)

One of the problems that faces international lawyers, whether they operate on the academic or practical level, is the large amount of material that is available if only they could get hold of it. In recent years various efforts have been made to compile collections which indicate a particular state's practice, and more recently there have been one or two series devoted to the judicial practice of a particular municipal system in so far as international law is concerned. The United States has a two-hundred year history of international legal practice and the late Professor Deak undertook as his last major work the preparation of a series of volumes of *American International Law Cases: 1783-1968*. The fourth volume is concerned solely with the control of resources, and within this head are to be found judicial decisions relating to the acquisition and loss of territory—cession, annexation, acquiescence, prescription and occupation; boundaries—rivers, lakes, bays, inland and territorial waters; the continental shelf; and mandates, trusteeships, leased territories, "foreign" states.

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[12] P. 206.
[13] Vol. X.
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From the point of view of the Canadian lawyer, it is of value to have readily available the decisions of the Supreme Court in the Louisiana, Texas and California offshore oil cases, which he might like to compare with the Canadian Supreme Court's *Offshore Mineral Rights Reference*. Perhaps equally interesting is the decision in *U.S.* v. *Spelar*[1] in which it was held that the Federal Tort Claims Act which excluded claims "arising in a foreign country" covered claims occurring on an airbase leased to the United States by an executive agreement with Great Britain, since Newfoundland constituted a foreign country. This decision to some extent rests on that in *Vermilya-Brown Co.* v. *Connell*,[2] which was discussed, applied and distinguished. In that case, it was held that an air base in Bermuda leased to the United States under the same agreement was a "possession" of the United States and therefore within the purview of the United States Fair Labor Standards Act. It is perhaps unfortunate that the learned editor does not print the two decisions in running order. The 1948 case is named and there appears the statement "For opinion see *infra* III (3) (a)", but, since there is no consolidated table of contents and no indication is provided of what future volumes will contain, there is no way of knowing why the printing of the decision has been postponed and no indication is given of the rubric under which it will eventually appear.

When the series is complete, and the consolidated tables of cases and contents are available, together it is hoped with a comprehensive index, this work should serve as one of the most useful compilations in the field of international law.

L. C. GREEN*

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The Making of the Australian Constitution. By J. A. LA NAUZE. Melbourne: Melbourne U. P. 1972. Pp. xi, 369. ($20.00 U.S.)

This book is a fascinating account of the events leading up to the enactment by the Imperial Parliament in 1900 of Australia's federal constitution, the Commonwealth of Australia Constitution Act. Professor J. A. La Nauze, the author, is an historian, not a lawyer, but his book will have a special interest for lawyers, especially those who study federal constitutional law.

Unlike the Canadian federation, which was first officially mooted in 1864 and was completed (not without plenty of dif-

[1] (1949), 338 U.S. 217.
[2] (1948), 335 U.S. 377.
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ficulties) only three years later, the Australian federation took a lot longer, starting with a conference in Melbourne in 1890 and ending in 1900. The author takes us through the whole process. The narrative, which could have bogged down in the terrible prolonged business of draft after draft, amendment after amendment (and there is by necessity plenty of this), still holds the reader's interest because the author is such a good writer and good historian. Thus we learn of the personalities of the important "framers", of how they related to each other, and of the kinds of local and political pressures they were under; even the weather played its part, with the fierce heat of the Australian summer influencing the time and place of meetings and exacerbating tensions at those meetings which did not avoid the summer.

The Australians of the 1890's had a number of advantages over the Canadians of the 1860's. They were more self-confident, less oriented to the United Kingdom. Thus it never occurred to the Australians to follow the Canadian precedent of allowing British Colonial Office officials to have a hand in the drafting of the bill for enactment by the Imperial Parliament. They sent their delegates to London with a bill already drafted, and with instructions that it was not to be altered. In the end the delegates were forced to accept one alteration, but only one. Nor did the Australians believe that the Privy Council was the summit of judicial wisdom, and they not only established their own High Court of Australia, but sought to make it the final court of appeal in constitutional cases. It was the appeals clause which they were forced to modify in London, but the resulting compromise excluded the Privy Council from most constitutional appeals.

The later date of their federation also gave the Australians the models not only of the Swiss and United States' federal constitutions, but also the British North America Act. And many of the delegates to the various meetings did their homework well, displaying a close knowledge of the text of, and judicial gloss on, the earlier constitutions. It was probably the United States' model which was most influential, partly because James Bryce's text, *The American Commonwealth*[1] made its terms and rationale more accessible, and partly because the strong states' rights feeling among the Australians led them to reject the more centralized Canadian distribution of power. But it was the Canadian model which taught them the important lessons that federalism could be combined with membership of the British Empire under the British Crown, and with responsible government; and that a federation could live without a bill of rights. The failure to include a bill of rights was due not merely to the uplifting conviction that civilized men of British descent organized

[1] (1888).

as a parliamentary democracy would never deny due process or equal protection to their fellow man, but also to the inconvenient fact that it would have placed in legal jeopardy the existing legislation of some of the states, which discriminated against the Chinese and other non-white residents.

The author is always realistic in his assessments without being cynical. He points out, for example, that as well as the nationalistic and altruistic impulses to federation, the politicians and lawyers who headed the federal movement were members of the two occupations which "were bound to gain by the establishment of a federal constitution".[2] Furthermore, the division of legislative and executive powers which is essential to a federation imposed an obstacle to the rapid and sweeping changes proposed by the radicals of the 1890's and was "likely to assist the preservation of things as they were".[3]

It only remains to add the platitude which is mandatory in a review of this kind, but which is nevertheless true, that it is a great pity that the constitutional lawyers of Canada and Australia have not since 1900 taken more interest in each other's work. The two constitutions are similar in important respects, and so are many of the problems which beset the two federations, as current needs overwhelm the structures designed (and very well designed) last century. If this book helps to interest Canadians in the Australian constitution it will have performed a service for Canada. But the book must not be judged on that parochial basis; by any rational standard it is excellent.

P. W. HOGG*

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Constitutional Law Cases from Malaysia and Singapore. By S. JAYAKUMAR.[1] Singapore: Malayan Law Journal Pte. Ltd. 1971. Pp. v, 464. ($15.00 U.S. hard cover, $11.00 U.S. paperback)

The rationale behind the case book method, and the evolution of the case book and materials from the legal treatise would indeed be a useful area for investigation today.[2] In the development of the case book and materials, it is quite evident that Anglo-American tradition has played a most significant part. In the civil law tradition, the case book plays little or no part.[3] It is the *Tome,* labor-

[2] P. 281. [3] *Ibid.*

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[1] Former Vice-Dean, Faculty of Law, University of Singapore. Presently Singapore's Ambassador to the United Nations.

[2] Morgan (1952), 4 J. of Leg. Ed. 379; Patterson (1952), 4 J. of Leg. Ed. 1 and Scott (1955), 8 J. of Leg. Ed. 198

[3] Kronstein (1950), 3 J. of Leg. Ed. 265 and Gorla (1950), 3 J. of Leg. Ed. 515.

iously and painstakingly written, that forms the matrix for both the study and the teaching of law in civil law countries.

It has often been suggested that when an author decides to produce a case book, he does so with the singular purpose of denying to the legal fraternity his own views and thoughts on that subject. Another suggestion is that when an author is in a hurry to have a work published, he resorts to the swift comfort of a case book. These are indeed harsh accusations and to avoid them authors of case books have sometimes skilfully altered their style of presentation by spinning their cases and materials into a form of a textbook. Some have even gone to the extent of introducing such epithets as, "Source Book of ————", "Studies in ————", "Readings in ————". The unavoidable limitation one finds in a case book is that it is meant not so much as a substitute for a treatise on that subject, but as a compilation of both primary and secondary sources, in a manner in which one could have ready access to a storehouse of knowledge in that limited area. Beyond this basic limitation, common to all case books, Dr. Jayakumar's present work has several further limitations which are otherwise avoidable.

Firstly, Dr. Jayakumar appears to have chosen his chapter headings not as they should occur in a study of constitutional law, but with reference to the availability of the local case law on that subject. This places an undue limitation upon the substantive content of his work.

As the title reads, it is meant to be a compilation of constitutional law cases from Malaysia and Singapore. This limitation makes this work somewhat premature, and its publication should have been delayed until sufficient local materials for a case book on constitutional law became available.

Secondly, the selection of materials has been limited to "Post-Merdeka" decisions for Malaysia,[4] and "Post-Unification" decisions for Singapore.[5] Admittedly, such decisions alone would deal with the present constitution both of Singapore and of Malaysia. But in areas such as constitutional supremacy and judicial review, fundamental liberties, public services and the protection for public servants, preventive detention and emergency powers, both pre-Merdeka and pre-Unification cases would not have been out of place. On the contrary, they could well have thrown a great deal of light upon the present day constitution.

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[4] "Merdeka" in Malay means freedom. Malaya received her independence from Great Britain on the 16th of September, 1963.

[5] Singapore broke away from the Federation of Malaysia on the 9th August, 1965. She is today a republic within the British Commonwealth of Nations.

Thirdly, the author has studiously avoided the treatment of any English or other Commonwealth cases in *pari materia*. Admittedly, the work is for the Malaysian and Singaporean student. But in a discipline such as constitutional law this parochial approach is inadvisable, and breeds a kind of narrowness which constitutional law is least justified to receive.

Fourthly, as a result of the foregoing, the work as it stands provides a restricted source for the teaching of constitutional law. The book, perhaps, affords an excuse to stay away from the library, in a very limited area of constitutional law namely, when one is dealing with the local case law. But the library must indeed be used in all other areas in this subject. For it is truly too simplistic to suppose that the materials contained within this work are adequate for the understanding of this discipline. In the preface, Dr. Jayakumar writes:

> No casebook can, of course, be an effective substitute for the original law reports. But students do face certain difficulties which have necessitated the publication of this casebook. For instance, the law reports on the library shelves are subject to intense and frequent use by students of all law subjects, by law teachers and by non-university users and, further, students are not permitted to take a law report out of the library for private study at home.

If this is the purpose for which the work has been prepared, then it must be said at once, that a teaching aid on this subject as an appendix to any recognized text book currently in use at the University of Singapore would have sufficed. The sad truth is that Dr. Jayakumar has maintained this theme throughout his work.

Fifthly, despite the extensive writings of Dr. Jayakumar, to which reference has been made in the bibliography, the reader has been deprived of an opportunity to learn from the views held by the author on the topics he had carefully chosen in his book. It would have been very useful and intellectually satisfying if the author had written an introduction to each section. This, therefore, limits his intellectual participation to the relatively narrow area of case editing.

The judgments in the cases have been well edited. The author has succeeded in bringing sharply into focus the relationship between the relevant facts and the points of law in question. This should be of considerable help to the students in their laborious task in search of the *ratio decidendi* of a case.

However, unnecessarily to my thinking, the author has in some instances retained the headnotes of cases. This could well have been avoided considering the skillful manner in which the editing has throughout been conducted.

This book should be of interest to the Canadian law schools in

their teaching of comparative constitutional law. It should prove a useful source for the Canadian student of comparative law in his search for Malaysian and Singaporean case law.

LAKSHMAN MARASINGHE*

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They Got to Find Mee Guilty Yet. By T. P. SLATTERY. Toronto: Doubleday Canada Ltd. 1972. Pp. 353, 61. ($10.00)

Patrick James Whelan was the last person to be executed publicly in Canada. This book is about Whelan's trial for the murder of Thomas D'Arcy McGee; it is a sequel to Mr. Slattery's biography of D'Arcy McGee,[1] and is the end product of a lifelong concern which the author has had for this case. Mr. Slattery ought to be satisfied with himself for a job well done. He has produced another obviously thoroughly researched, well documented, and very readable book, which contains for the more serious reader a bibliography, as well as a set of notes in connection with the text and a fairly detailed index.

Although the Crown was able to build a strong case against Whelan involving motive, opportunity, weapon and conduct, Whelan's counsel were equal to their task, with the result that the reader is left, as was the jury, in a real quandary. If this is not enough to intrigue you, Mr. Slattery's account of the trial is engrossing for the glimpse which it affords of the quality of police detection, the administration of criminal justice, and of leading counsel in Canada in 1868. Also of interest in connection with the trial were, the fact that the defence counsel for Whelan an alleged Fenian included Hillyard Cameron, the grand master of the Orange Association of British North America, and M. C. Cameron who as Provincial Secretary of Ontario, had signed a public proclamation of a reward for the capture of McGee's assassin, the fact that on the two unsuccessful appeals[2] for a new trial following Whelan's conviction the trial judge was a member of both appellate tribunals and as matters turned out his was in effect the decisive decision,

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[1] The Assassination of D'Arcy McGee. Toronto: Doubleday Canada Ltd. (1968).

[2] These appeals arose out of a controversy between the trial judge and defense counsel regarding the right of the defense to make challenges for cause before it had exhausted its peremptory challenges; the trial judge's decision against the defence was erroneous. but defense counsel made the tactically questionable decision of acquiescing and proceeding to challenge the juror in question peremptorily.

and the fact that Prime Minister Sir John A. and Lady Agnes Macdonald sat as observers for a period of the trial on the bench; as well, there is the delightful episode of the bewildering examination of John Donnelly who mistakenly answered the court crier's call for John Downey.

There are only three negative comments that I have to make. The first one has to do with the fact that Mr. Slattery chose to write the book in the style of a novel, with the result that a certain amount of the description of the trial is fictionalized;[3] this I realize is a matter of personal taste, and able to be justified at least to a certain extent in this case. The second one has to do with the author's reference to the overly maligned English Court of Star Chamber.[4] The mention of the aspect of torture in its procedure was irrelevant and is exemplary of an all too prevalent tendency, it seems to me, to dwell on the relatively few shortcomings of that court rather than its several original contributions to our criminal law. My last comment is in regard to the dust jacket of this book which describes Whelan's trial as "Canada's most dramatic murder case"; this should be written off as publisher's puff, for while the trial of Whelan probably ranks with the most dramatic, other murder trials, such as those of Townsend, Carroll, Nelson, Dick, Truscott, Green, Bennett, and the men accused of murdering Pierre Laporte, have been equally, if not more, dramatic. Nonetheless, I heartily recommend this book both to the lawyer and the layman. It is a welcome addition to our literature on Canadian legal history.

CAMERON HARVEY*

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[3] However, Mr. Slattery does not go nearly so far as did, for instance, E. B. Osler in his book, The Man Who Had To Hang Louis Riel. Toronto: Longmans Green & Co. (1961).

[4] Ch. 24, note 4. With regard to the comment about the cruelty of the situation where the accused is a compellable witness, it is my understanding that this is still a feature of the inquisitorial system of justice in use in civil law countries today. Who is to say that the more circuitous adversary system of justice with its protection against self-incrimination is more desirable and commendable than the more direct inquisitorial system?

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