REVIEWS AND NOTICES

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Traité de la Faillite en la Province de Quebec. By L. J. de la Durantaye. 1934. Montreal: chez l'auteur. Pp. 605.

The preface to this work contains a scathing criticism of the Bankruptcy Act. "It is in large part", says the author, "a copy of the English statute which had preserved the archaic and diffuse style of former laws. There is nowhere in these texts the slightest evidence of any tendency towards simple expression; they deal with the complex, and not with the simple, with the whole, and not with its elements, with results instead of principles, with effects instead of causes, with the particular instead of the general." The author goes on to complain of the confusion worse confounded by the addition to the Act of a body of general rules dealing not only with form but with substantive law. He complains of the "muddled syntax, the tautology of the vocabulary, the chaos of the plan, the number and length of the amending statutes, and the re-numbering, with even less system, of the provisions of the original law and rules which took place in the course of the revision of 1927." These are harsh words indeed, and the author is no kinder to the commentators than to the legislators. He informs us that, apart from some English manuals, by no means free from the intricacies of law, the authors have at best collected a hotch-potch of decisions gathered under each article, with or without any direct application, and that, consequently, bankruptcy practice has become rather a mystery, monopolized by a small fraternity of the elect. The author claims for his work the advantage of a logical analysis. He does not propose to refer to judgments which are found in the Bankruptcy Reports for no better reason than the fact of their having been rendered in the course of a bankruptcy. He aims to co-ordinate in a logical, concise way the Act, the rules, the relevant portions of the Civil Law of Quebec, and the "jurisprudence".

The preface leads one to expect a more vigorous style than that of the usual textbook. Many French writers have been able to make effective use of the peculiar clearness and charm of French prose to produce very readable works on abstruse subjects, but in the present case the vigour of the work is contained mostly in the preface, and the style is neither better nor worse than that of the average legal treatise. It is to be feared that the preface was written before the remainder of the volume, as the author cannot be said to have escaped from the contagion of the law writers whom he so heartily, and perhaps deservedly, abuses.

Notwithstanding the promised discernment in the treatment of judgments, the pages abound with footnotes distracting the reader's attention and containing references to decisions which are sometimes of little value from any scientific point of view. The text indeed assumes the appearance of a collection of headnotes. In spite of the author's cavalier, but by no means unfounded, attack on the usefulness of so much of the judicial literature preserved for us in the reports, he has not succeeded in shaking off the lawyer's natural reverence for judicial pronouncements, and has added considerably to the difficulty of his task by including references to

hundreds of decisions, only a small portion of which can really serve any useful purpose. A careful selection of the really valuable opinions of the Appeal Courts or of Trial Court Judges of recognized ability, in the manner suggested in the preface, would have very considerably improved the work from the standpoint of legal science. While we are on this subject, it may be pointed out that if the author desired to refer to all these authorities, the reader would have appreciated a more careful examination of the judgments on his part. It is always somewhat annoying to look up a reference and to find that it has little or no bearing on the point, and may even contradict the author's conclusion.

The reviewer has opened the book at random at two places. At page 131 Mr. de la Durantaye gives his own opinion, something which we would like him to do more frequently, to the effect that even after the discharge of the trustee, a bankrupt may not be sued without permission of the Court, and he states that the jurisprudence tends to support this opinion, in spite of a contrary pronouncement in a recent case. This is, of course, a fairly important matter of procedure because often a plaintiff is quite unaware of the fact that the defendant whom he proposes to sue is still an undischarged bankrupt, especially where the bankruptcy proceedings have long since terminated. The author refers in a footnote to five authorities in support of the opinion allowing suit in such circumstances without special authorization, and most of the judgments cited are those of jurists whose opinions carry considerable weight. He then cites seven contrary judgments in support of his own opinion, but only one of these bears directly on the point, and even in this case the judge gives no reason for his decision except a previous authority which, on examination, does not appear to decide the point at all. Again, at page 256, there is a statement that if the trustee sells an immovable at his own office this will not have the effect of a Sheriff's sale. The first of the two decisions mentioned in support of this proposition in the footnote is on another point, and in the second one, the sale at the trustee's office was upheld, notwithstanding its informality. On the same page we find it laid down that a trustee, with the written permission of the Inspectors, or in default, the authorization of the Judge, may sell the whole or any part of the goods of the bankrupt. It is far from a careful statement to assert that a trustee who cannot get his Inspectors' authorization may ask the Court to substitute its own judgment, and the author in this case cites no jurisprudence for so doubtful a proposition. At page 259 in the same chapter, dealing with the sale of immovables in the Province of Quebec, the author states that such a sale may be held without formality if all the hypothecary or privileged creditors consent in writing, or if the sale is advertised and completed without any prejudice to the creditors' hypothec or privilege. The decision referred to in support of this proposition was rendered under an article differently worded, which did not then require the consent of the secured creditor, and the decision does not support the proposition laid down in the text, as in this case the sale had not been either advertised or completed. Again, on the same page, the proposition is laid down that the Trustee is not entitled, in the case of a sale of real estate, to be collocated for his general costs of administration or a proportionate amount to the value of the immoveable. One of the cases cited denies to the Trustee the right to have the proceeds of a Sheriff's sale of a bankrupt's property turned over to him for distribution, and sets aside the Registrar's order to the contrary. Apparently this case has no bearing on the proposition in support of which

it is cited, and in fact renders a judgment on another point which is now made clear by the Statutes. Another of the decisions cited in support of the foregoing proposition applies to the next proposition laid down by the author, that the Trustee's costs of sale must not exceed those of an ordinary Sheriff's sale, but it would seem that, in view of the decision of the Court of Appeal in re Spearing also cited by the author and now confirmed by article 85 of the Act, this decision should be disregarded and the fees of Trustees for their services in selling fixed on some more rational basis than that of allowing them to compute the Sheriff's costs and charging up to that extent. It is, of course, beyond the scope of any such article as the present one to take up matters of detail, and the reviewer has contented himself with taking two passages at random as samples of the work.

Turning to the analysis of bankruptcy made by the author, it is very doubtful whether the re-arrangement of a few subjects is really helpful to the practising attorney. The sections dealing with compositions are dealt with, together with those relating to the debtor's discharge, on the ground that these are both methods of terminating bankruptcy, but bankruptcy is not necessarily terminated by composition, and it is at least open to question if the arrangement of the Act is not as useful and even as logical. Again, the sections dealing with settlements and preferences are treated, together with the stay of proceedings and the vesting of the bankrupt's property in the Trustee, as effects of bankruptcy, but is this displacement really more than a matter of taste? Might not many other provisions of the Act be quite properly classed as "effects of bankruptcy"? After a perusal of the book we are by no means convinced that there has been any practical advantage obtained by departing from the order of the legislator, which has certainly some marked advantages of convenience from the standpoint of the profession.

One of the features of the work is the chapter dealing with costs, in which the author lingers over the minutiae of fees for twenty-one pages, adding little to the rules of the Tariff, and sinning in no small measure against some of the wholesome canons of legal writing already noted in the preface.

M. de la Durantaye has been much more helpful in his editing of the texts and rules which are incorporated at the end of the volume. At the end of each article there is a useful note of its legislative history, referring to its corresponding Imperial Statute or rule, as well as to the former Canadian ones, and a reference to all amendments. This is supplemented by an appendix containing this information in tabular form, with a reference to a numbered paragraph of the work in which the article is dealt with.

While I must say that my expectations after reading the preface have been a little disappointed, I think the author is none the less deserving of the thanks of the legal profession for having produced a book which many will more readily consult than some of the more ponderous authorities, and while I think that its conclusions must be cautiously checked with the authorities cited, it renders a real service to the attorney who is ready to use such treatises as a point of departure for further investigation.

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LEGAL ESSAYS: IN TRIBUTE TO ORRIN KIP MCMURRAY.—Edited by Max Radin and A. M. Kidd. Berkeley, California: University of California Press. 1935. Pp. x+694. $5.00.

In the January number of this REVIEW, Professor Auld reviewed the Harvard Legal Essays written in honour of Professors Beale and Williston of the Harvard Law School. The present volume proceeds upon the same notion of the Germanic *Festgabe*, and is the happy method adopted by some twenty-four eminent legal scholars of doing honour to Orrin Kip McMurray, Dean of the School of Jurisprudence of the University of California, who has been associated with that school for over thirty years. Although the name of Dean McMurray is perhaps not so well known to Canadian lawyers as that of either Professors Williston or Beale, the partial list of his writings given in the present volume (pp. 693-694) may indicate in some small manner the wide range of his interests, even as the homage of his friends and colleagues, presented in this diversified collection of essays, bears witness to the respect held for his opinions by men engaged in practically every field of legal scholarship. If it be true that a man is known by his friends, the present volume should serve to introduce Dean McMurray as a man who has taken "all law for his province".

A book of legal essays such as the present, should not be classified as "just another law book". The expression "law book" (unfortunately) does not, as a rule, arouse any pleasurable anticipation. It is undoubtedly true that the legal profession regards most law books, not as something to read and enjoy, but rather as a source from which to cull neatly-phrased generalities with which to confront a court or adversary. On the hypothesis that such generalities found in an American law book are based on something "foreign", the Canadian profession on the whole has a peculiar antipathy towards American legal literature, while, on the contrary, anything English in origin is eagerly sought after. There is no reason to suppose, however, that all English law is any more applicable to Canada, than all American law. Further, as English texts steadfastly refuse to consider any decisions other than those of English courts, whereas the better American books consider English, Canadian and Australian, as well as American decisions, in the Canadian lawyer, faced as he is with the application of English law to economic and social conditions which are probably more closely allied to those in the United States than in England, this attitude regarding American law books seems strangely perverse. In addition, the reviewer believes that, with the development of the American university law schools, a class of legal scholars has arisen whose capabilities for legal writing of a constructive character have, with rare exceptions, not been equalled in England. (See the Addendum of Harold J. Laski to the Report of Lord Atkin's Committee on Legal Education, H.M.S.O. (cmd. 4663).) The present collection of essays presents within a short space so many angles, not only of private law, but of international law, legal history, jurisprudence and comparative law, that those hitherto unacquainted with American legal literature can easily obtain some idea of the work being done in the United States. Not only that, but as there are, in addition, articles by continental writers on aspects of the Civil law, a reader who fails to find something of interest to him, whatever his field of law may be, has a jaded appetite indeed.

Under the common law topics, there are some articles, such as that of Professor J. W. Bingham, *Some Suggestions Concerning the California Law*

of Riparian Rights (pp. 3-77), and of W. E. Colby, *The Freedom of the Miner and its Influence on Water Law* (pp. 67-84), which might appear at first glance to be so exclusively American as not to merit consideration by a Canadian lawyer. Such, however, is not the case, and anyone at all interested in riparian rights will find in Professor Bingham's study an excellent discussion of the manner in which English doctrine is capable of adaptation to new conditions. Professor George P. Costigan, Jr., in his essay on *Those Protective Trusts Which Are Miscalled "Spendthrift Trusts" Reexamined* (pp. 85-116), combats the strong individualism of Professor Gray, who was a vehement opponent of trusts free from creditors' claims. Accustomed as we are to a more kindly treatment of debtors than formerly existed, the present essay is well worthy of attention in Canada, where the spendthrift trust in its widest form is practically unknown. This is particularly true in view of the fact that England by The Trustee Act, 1925 (15 Geo. V, c. 19, s. 33) has, under the term "protective trusts", adopted a modified form of the spendthrift trust. Of a more technical nature is the paper of Professor Stephen I. Langmaid on *Some Recent Subrogation Problems in the Law of Suretyship and Insurance* (pp. 245-276). Subrogation, like many other equitable devices, has been intuitively assumed rather than analyzed by most English texts, and the present article should serve to awaken interest and suggest solutions in a subject as practical as it is difficult. Sayre Macneil's essay on the *Growing Lawlessness of Trees* (pp. 375-398), is one of the most delightfully entertaining articles the reviewer has read for some time. Let any lawyer stop and ask himself what he knows of the common problems of invading roots and boughs, of boundary or line trees, and he will be amazed to find that his store of knowledge is so limited. Mr Macneil reaches back into antiquity and shows a continuity of problems rather than solutions which should dispel once and for all the fetish that "law is logic". Canadians should particularly welcome the study of Professor William E. Masterton on *Specific Performance of Contracts to Deliver Specific or Ascertained Goods Under the English Sale of Goods Act and the American Sales Act* (pp. 439-468). The question of specific performance under the Sale of Goods Act is one that has been singularly neglected by both courts and practitioners. The analysis of all the English and American cases here made, should materially assist in clearing up the many obscurities on this point. Professor Edmund M. Morgan continues his work on the difficult topic of presumptions and burden of proof in the law of evidence, by an article on *Instructing the Jury Upon Presumptions and Burden of Proof* (pp. 487-511). It is to be hoped that the writer's pessimistic attitude that his essay is a waste of "so much good white paper", because, as he states, his attempt to make simple and workable devices "which the courts have been using for generations as if they were simple, sensible, and workable" will pass unnoticed except by a few, is not entirely true. If Professor Morgan depreciates the influence of the academic writer in the United States, the reviewer shudders to think what he might say if he were a Canadian. But then, if Professor Morgan were a Canadian, perhaps the influence of the academic writer would be greater in this country. Dean John H. Wigmore turns to a new field in *The Scientific Rôle of Consideration in Contract* (pp. 641-656), in which he attempts to corelate contract, deceit and estoppel, in an effort, as he puts it, "to help save the soul of Consideration". The analogies of the author are, as usual, stimulating, but the reviewer must confess (to his shame) that confronted by a series of Wigmorian diagrams he has the same

feeling of inferiority he experienced before the Euclidian theorems; a feeling which, for him, spoils half the fun of new discoveries. Criminal law is ably represented by Justin Miller's article on *The Criminal Act* (pp. 469-486).

In the field of international law, Professor Edwin D. Dickinson's article on *Jurisdiction Following Seizure or Arrest in Violation of International Law* (pp. 117-134) presents the problem when lack of jurisdiction in the nation due to breach of international law or treaty can be raised by an individual without encroaching on the competence of national governments to direct foreign affairs. The suggestion is made that many existing decisions, both English and American, should today be considered as no longer binding. Professor Manley O. Hudson contributes a paper on *International Engagements and Their Interpretation by the Permanent Court of International Justice* (pp. 187-220), which is to appear as a chapter in his treatise on the Permanent Court of International Justice. Professor Hudson's knowledge of the work of that Court is so well known that no further comment is necessary for those interested in International Law. The article by Professor Dudley O. McGovney on *Our Non-Citizen Nationals, Who Are They?* (pp. 323-374), deals with a problem so peculiar to the United States in relation to Puerto Rico and the Phillipines, and is so intricate in nature, as to be of little general interest to Canadian readers.

For those interested in comparative law and jurisprudence the present collection is particularly noteworthy. Henri Capitant and Louis Josserand contribute articles in French, the former on *La "Propriété Commerciale"* (pp. 51-65), and the latter on *La Protection des Faibles par le Droit* (pp. 221-243). Both writers need no introduction, especially to Quebec readers, and Professor Capitant's article, dealing with the struggle of tenants of business premises for recognition of their interest in goodwill on the termination or renewal of leases—a problem that has recently been dealt with by English legislation (Landlord and Tenant Act, 1927, 17 & 18 Geo. V., c. 36) and which, without doubt, will arise in Canada in the near future—furnishes an excellent illustration of economic conditions imposing limitations on property rights and the doctrine of freedom of contract. The discussion of *l'abus de droit* as it entered into the controversy in France is an excellent epitome of this fascinating subject. The article by Josserand shows how the class of persons given particular protection by the law has changed from infants, lunatics, and married women, to labourers, persons contracting with large corporations and the harassed pedestrian. The discussion of the different method adopted to secure adequate protection for these new categories *des faibles* is not only done in the delightfully lucid manner so characteristic of French writing, but should assist us in recognizing similar trends in our own legal system. Professor Francis H. Bohlen's short article on *The Reality of What the Courts are Doing* (pp. 39-49), is a further defence of "realism" in the law. Professor Bohlen has never been a mere academic juggler of legal phraseolgy, and his remark that in 1892 "the teaching of law was an exegesis on sacred texts culled from judicial opinions", a method now happily abandoned in the better American law schools, should be carefully considered in this country, where such an outmoded approach still has many adherents. As a simple introduction to the modern approach to law and legal education the article should be read by anyone who still believes in "text-book" law. Dean Roscoe Pound contributes *More About The Nature of Law* (pp. 513-535), in which he re-examines the diverse elements and characteristics of the

concept "law". One of the most difficult tasks the reviewer has annually to perform, is to attempt to tell students beginning their study of law, just what it is they are to study. This is no mere academic inquiry, and the attitude one assumes on this question (often intuitively, rather than by any process of reasoning) will colour his whole approach, as a brief consideration of the much-discussed "rule of law" will indicate. What are our law schools teaching as "law"? What should they teach? Much of the current discussions on legal education could be of materially more value if there was some common understanding of what was comprised in the term "law". It is quite probable that many of the protagonists are, unsuspectingly, at cross-purposes on this basic question. Professor Max Radin (one of the editors of the present collection) contributes *A Juster Justice, A More Lawful Law* (pp. 537-564), in which the term "justice" is traced abstractly through Greek and Roman usage, and which the reader will find fairly stiff going. On the other hand, the reader should thoroughly enjoy the articles by Hon. Robert L. Henry, a judge of the Mixed Courts, Alexandria, Egypt, on *The Story of the Criminal Jury in the Civil Law and in the Common Law* (pp. 135-164), and by Frank I. Shechter on *The Law and Morals of Primitive Trade* (pp. 565-605). Professor A. Arthur Schiller's essay on *The Business Relations of Patron and Freedman* (pp. 623-639), is a study in the neglected field of Roman commercial law.

With signs of constitutional change on the horizon, American constitutional law should acquire an added interest for Canadians. Professor Karl N. Llewellyn, leader of the "realist" school of jurisprudence, here departs from private law, and in *The Constitution as an Institution* (pp. 277-322), he attempts a "realist" explanation of constitutional theory in the United States with the same vigour with which he "exposed" the "fundamentalists" in private law. Although there is less scope in Canada than in the United States for judicial review of legislation, Professor Llewellyn's attack on the myth of the written constitution, should, in view of certain recent decisions on Canadian legislation, awake responsive Canadian echoes. Professor Douglas B. Magg's article on *The Constitution and the Recovery Legislation: the Rôles of Document, Doctrine and Judges* (pp. 399-437), deals with the same problem, namely, the comparatively minor rôle played by the "written constitution" in American constitutional development. The part that "statesmanship" plays in the work of the Supreme Court of the United States is shown in the Gold Clause decisions which seem to have vindicated the views of the writer, which views should assist the Canadian profession towards an understanding of present American constitutional practice.

In addition to the foregoing, Captain Hubert D. Hoover's article on *Army Court-Martial* (pp. 165-186), throws light on a topic as interesting as it is unknown to the average lawyer. Professor Hessel E. Yntema's essay on the history and work of *The American Law Institute* (pp. 657-691), in its gigantic task of restating the law, is familiar to readers of the REVIEW, it having appeared in an earlier issue, (1934), 12 Can. Bar Rev. 319).

Anyone who is interested in law other than as the mere "pursuit of gain", will find the present collection a worthy addition to his library, and a book that should afford considerable enjoyment during the summer months. Dean McMurray, the editors, and the University of California Law School Association are all to be congratulated. The only criticism the reviewer has to make, is concerning the annoying habit of placing the

notes at the end of each article instead of at the foot of the page. The constant flipping of pages becomes irritating, but such an inconvenience is probably compensated for by the reasonableness in cost of the collection.

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De Jure Naturae et Gentium Libri Octo. By Samuel von Pufendorf. Volumes I and II. Oxford: At the Clarendon Press. London: Humphrey Milford, 1934. Price $10.

This reprint of the famous work of Pufendorf on natural and international law forms part of the series known as "The Classics of International Law", edited by Dr. James Brown Scott, and published by the Carnegie Endowment for International Peace (Division of International Law), Washington, D.C. The first volume contains a photographic reproduction of the edition of 1688, with an Introduction (Einleitung) by Walter Simons. In the course of his most interesting review of the personal history and literary achievements of the great German publicist, Mr. Simons says of the work in hand: "The principle source of his fame is and remains his work concerning natural and international law . . . It reminds us by its form of the scholarly and diffuse diatribes of the humanistic period . . . Probably we are justified in classifying him with the positivists, but Pufendorf is undoubtedly to be counted among the theorists of the law of nature. . . Our time stands closer to the orientation of the seventeenth and eighteenth centuries in matters concerning philosophy of law than does the nineteenth century. Humanity, giving up the exaggerated worship of historical bases and positivism which characterized the last century, now resolutely takes hold of absolute values, without which the safe conduct of life becomes impossible for the individual as well as for States".

In the second volume we have a translation into English of the edition of the work published in 1688, together with a translation from the German of Mr. Simons' Introduction.

Pufendorf, as one of the seventeenth century men of light and leading who laboured to provide a legal structure for the *civitas maxima* they envisaged, became known to the reviewer many years ago when he sat at the feet of a professor who in his turn had learned much of the great publicist while at Heidelberg. Contact with him in and by these beautifully printed volumes revives some memories of class-room enthusiasms which may otherwise have hopelessly faded.

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A COLLECTION OF THE DIPLOMATIC AND CONSULAR LAWS AND REGULATIONS OF VARIOUS COUNTRIES. Edited by A. H. Feller and Manley O. Hudson. Volumes I and II. Washington: Carnegie Endowment for International Peace. Price $5. per set.

The editors explain that this is a compilation of the texts of the diplomatic and consular laws and regulations of various countries prepared in connection with the work of the Research in International Law conducted under the auspices of the Faculty of the Harvard Law School. In view of the proposed codification of the law as to Diplomatic Privileges and Immunities and the Legal Status and Functions of Consuls, draft conventions become necessary embodying the texts of the various laws and regulations. It appears that there has been no published collection of such texts since the publication in 1851 of Baron Ferdinand de Cussy's *Règlements consulaires des principaux Etats maritimes de l'Europe et de l'Amérique*.

The task undertaken by the editors has been an exacting one, and we think the method pursued by them in their selection of texts will prove entirely satisfactory to all who have recourse to their work. Two general divisions have been made with respect to each State: (1) the organization of its own diplomatic and consular services; and (2) the laws relating to diplomats and consuls sent to it by other States.

In the first volume, at p. 220 ff., the matter referring to the Dominion of Canada is grouped under two heads: (1) The Diplomatic and Consular Services; and (2) Status of Foreign Diplomatic Officers and Consuls. Under the first head sec. 6 of the Act respecting the Department of External Affairs (R.S. 1927, c. 65) is cited as transferring to that department the administration of all matters relating to the foreign consular service in Canada; and under the second head is summarized, *inter alia*, the legislation of the Dominion respecting the immunity from income tax of consuls and of officials of a foreign country whose duties require them to reside in Canada, together with similar legislation in the Provinces of British Columbia, Manitoba, Ontario and Prince Edward Island.

The book is arranged in the alphabetical order of the names of the countries whose pertinent texts are dealt with by the editors. This feature along with its excellent Index makes the work easy of reference.

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