

REVIEWS AND NOTICES

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Legal Essays and Addresses. BY THE RIGHT HON. LORD WRIGHT OF DURLEY. Cambridge: At the University Press. Toronto: The Macmillan Company. 1939. Pp. xxxv, 442. (\$5.00)

To anyone familiar with legal periodical literature Lord Wright's name has become associated with the movement towards liberalization of law in England which is one of the most interesting phenomena of the past few years. It is doubtful, however, whether the legal profession have overcome their prejudice to what might be called "pamphlet" literature concerning law, or whether they do not share the sentiment expressed by Dr. Johnson who, in reply to a friend who had stated that he had seen it in a book, snorted contemptuously, "Not in a *bound* book." Perhaps this prejudice of the profession is partly due to the fact that much of the periodical literature is written by so-called academic writers who, until a short time ago in England, if not viewed with distrust or misgivings, were, to say the least, tolerated with that condescension which the man of affairs customarily assumes towards persons who have the temerity or audacity to suggest from time to time principles on which affairs of the world might be better conducted.

The present Essays and Addresses, which have to a large extent appeared in periodical literature, have now received the respectability of binding and for that reason alone they will no doubt be read by many to whom the extra-judicial work of Lord Wright has heretofore been unknown. To persons who have not become acquainted with that work, we believe the book will prove to be a revelation. Lord Wright, although writing throughout as an academic lawyer, will still be thought of by many as a member of the House of Lords. Thus, many things which he says will undoubtedly command the respect and attention of practitioners who would scoff, and indeed have scoffed, at the very ideas here presented by the academic writers on whom Lord Wright has relied so strongly, and whose work will doubtless take on new importance simply because it has the imprimatur of a member of the judiciary.

Lord Wright is definitely not one of those judges or lawyers who believes that the existing state of the English law is perfection itself. On the other hand, he would doubtless object to being styled a "reformer", since that term all too frequently denotes a person with a misplaced zeal for change for the sake of change. As the reviewer sees the author as disclosed in his writings and addresses, he is rather a person who has not failed to appreciate, and to have the courage to state, that our law consists of a great deal of "mumbo-jumbo". That a considerable portion of our legal system consists of fictions, formulae and concepts which have developed from the dim recesses of our history, is to him not necessarily a virtue proving the continuity of law. On the other hand he is anxious to discover beneath the veneer of fiction and form the substantive propositions on which the law may proceed. That fictions have played a remarkable part in the develop-

ment of English law would be admitted freely by him, as by anyone conversant with the rudiments of our legal history, but he has seen, what has been unfortunately but faintly discernible in English thought until recently, that fictions frequently become mistaken for fact and when that results, progress and rational development are impeded.

As one reads Lord Wright's *Essays and Addresses* on a diversity of topics, he cannot fail to notice the remarkable influence which American legal writing and American legal thought have had on the author. The reviewer has, in this REVIEW and elsewhere, written and spoken on the influence of American legal thought on the development of English law, and it is an amazing fact that Canada, lying in such close proximity to the United States where, as Lord Wright admits freely, academic work in law is at least one hundred years ahead of that in England, has paid so little attention to the work that has been done in the United States. Indeed, in many places, to recommend American text books or to refer to the development of common law principles in the United States is considered somewhat as an act of treason. To persons with such beliefs we particularly recommend Lord Wright's book, since throughout one finds constant reference to and adoptions of views which have been developed in the United States. Lord Wright has discovered American legal writing, and since Lord Wright is a member of the highest court in England, his writings have an importance and an influence which we may hope to see reflected in the subsequent development of English law.

The subject in which Lord Wright is particularly interested in these essays is that of quasi-contract. His essays on the American Restatement of the Law of Restitution and his attacks on the fiction of "implied contract," while reflecting what has been accepted in American legal writing for years, has, as Lord Wright points out in his preface, brought down on his head a storm of protests from persons who derive satisfaction from continuing the quaint and archaic notions embodied in the "forms of action". Lord Wright is more outspoken about the peculiarly insular state of English law on this subject of quasi-contract than would be tolerated, perhaps, by the profession from a person lacking his judicial dignity. Furthermore, his references to the use of the American Law Restatement must come as a shock to persons in this country to whom the work of the American Law Institute and their Restatement of the Law are practically unknown. It is particularly comforting to the writer to notice that Lord Wright states that he regrets "to see that the citation of American authorities has almost completely ceased in England", and it is encouraging to notice that he devotes practically fifty pages to a review of Williston on Contracts, which, in the reviewer's opinion, so far outclasses any other book dealing with the subject in England as to make comparisons extremely odious. That Lord Wright has discovered virtue in a book which has had such difficulty in making a place for itself in Canada, due entirely to an unthinking prejudice against things American, may, we believe, be due to the fact that Lord Wright has read American legal literature, whereas the critics of it have not. It is not surprising to find that about five of the chapters in the present volume were addresses delivered at the Harvard Law School and this direct contact with American legal thought has undoubtedly played

a large part in the writings of Lord Wright. It is not, in the reviewer's opinion, any exaggeration to say that Lord Wright stands as a twentieth century Lord Mansfield seeking to bring English law into the full current of common law thinking, which he readily admits must no longer be considered as confined to England alone.

Being a collection of occasional writings and addresses delivered at various times, the book treats of a diversity of topics ranging through legal education; suggestions for the abolition of the doctrine of consideration in contracts; discussions of important cases in which the learned writer participated as judge; prophecies as to the future developments in the common law generally. It would be hopeless to single out any of these matters for individual treatment in a review of this nature. As an indication of the liberality of thought, and the unusual but, if we may say so with respect, extremely welcome freedom of expression from one who spends his days in the administration of justice, we may notice a few of the matters which, from the reviewer's experience with the legal profession in Canada, would cause, coming from any other source, indignation and accusations of laying unholy hands on the sacred tabernacle of the law. Thus, for example Lord Wright casually states (p. xviii) that "probably today no one would defend the doctrine of contributory negligence". He further indicates his belief that it is wrong to hold that a plea of contributory negligence should bar the claim of an employee against an employer for a breach of statutory duty causing injury to a workman. Despite this latter fact Lord Wright himself sat in the case in which the House of Lords gave effect to this plea, notwithstanding that the High Court of Australia had held to the contrary in another decision. Things such as this make one wonder in Canada the extent to which we should continue to be bound by decisions of the House of Lords. His remarks on administrative law certainly do not jibe with those flights of oratory with which one has become so familiar at bar association meetings. Lord Wright has seen beyond the form, and admits quite frankly that procedure which passes to tribunals other than courts the working out of social, industrial and commercial control is "inevitable", and further states that the questions before such boards, which are frequently referred to by other writers as a form of new despotism, are not questions which the ordinary courts are qualified to consider. (pp. xxii, xxiii.) He is ready to admit that in constituting boards as both judges and legislators, we are not doing anything novel, since "from the earliest times the judges have really made laws". He deprecates the outcry raised at every proposal to change or amend the law "that the law is being destroyed or revolutionized" (p. 192). He approves quite definitely of the abolition of grand juries. He advocates the simplification of our procedure by suggesting that there be no reporting of decisions in practice cases. This is a suggestion which we feel quite sure would meet with strong opposition from the legal profession, and yet one wonders whether in many cases the legal profession is not actuated by the spirit of that legal writer referred to by Lord Wright who refused to mention the decision of the House of Lords in *Van Grutten v. Foxwell* because he could not bear "to think of a judgment which spoke disrespectfully of the rule in *Shelley's Case*". (p. xix)

Among the less satisfactory of the chapters in the present book are, in the reviewer's opinion, those dealing with public policy, the "frustration" cases in contract (pp. 255 and 256), and the doctrine of mistake in contracts.

To persons familiar with the writings of Lord Wright the present volume needs no recommendation. To those persons who continue to believe that the Bench is the sole source of law and that all wisdom begins and ends in the decisions of the English courts, we heartily recommend this book. The reviewer hopefully believes that it marks the dawn of a new era in English legal thinking. Whether such will be the case will, in the main, depend on the attitude of the profession. If they approach this book in the sense of hostility to anything new, their hostility may be increased. We believe, however, that the present collection of essays will disarm most oppositionists and will lend new courage to those who have, without the judicial aura of Lord Wright, worked less conspicuously perhaps, along similar lines.

C. A. W.

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Cases and Materials in the Law Merchant. By PHILIP WARREN THAYER. London: Humphrey Milford. Cambridge: Harvard University Press. 1939. Pp. xxvi, 1296. (\$7.50).

To review a case book without having used it is always a hazardous undertaking. Such a book can only prove itself in the classroom as an instrument for the stimulation of thought and the presentation of problems. The reviewer is particularly interested in the present volume since in 1938, when addressing the Canadian Bar Association, he spoke of the necessity of revamping our present arid courses in Sale of Goods, most of which seemed to be based on the old horse deal and had comparatively little to say about the complicated mechanics of modern sales, conducted as they are between parties at a distance, with all the attendant risks of loss in transportation and the ever present need of proper financing.

In the present book Professor Thayer, who is no stranger to members of the Canadian Bar Association, has attempted to link up Sale of Goods with topics ordinarily treated as distinct and severable, such as Bills of Exchange, Letters of Credit, Marine Insurance Certificates, etc., dealing with the financing of the transaction. His main concern throughout, so far as one can gather, is to attack the problem of sales from the standpoint of the risks of buyer and seller, usually at considerable distance apart, and the method by which business men have attempted to cover these risks and the extent to which courts have given legal effect to the methods adopted, frequently without regard to any preconceived or existing legal theory. The c.i.f. contract plays, and we think quite rightly, a much larger part in this book than one is accustomed to in the ordinary case book. This of necessity involves a large portion of the work being devoted to the operation of Bills of Exchange. Whether it is possible in one course properly to deal with this last topic is a question which can only be proved by experience. Certainly it is an experiment worth trying since it is the reviewer's opinion that our present courses on Bills of Exchange tend to become a sort of legal algebra unless linked up with some practical problem of merchandising, and from the reviewer's own experience it seems doubtful whether our existing course on Bills of Exchange, treated as it frequently is *in vacuo*, is worth the time spent on it.

Professor Thayer has not cluttered his book with those long and elaborate footnotes which give the appearance of learning to so many

case books but of whose existence students remain, in most cases, oblivious. On the contrary he has chosen problem cases and left them to stand alone with the addition of condensed notes of other cases, including many from civil law jurisdictions. We believe this to be a distinct advantage and only regret that there is not more of such "foreign" experience reproduced since the problems of distribution of risk in Sale of Goods is international and cannot be treated from an insular standpoint. In this connection it is interesting to observe that the present volume contains an extremely high percentage of English cases—a percentage so high indeed that the book might even be used in Canada without arousing that prejudice which frequently becomes vocal with the use of the ordinary American book. In addition the book contains an appendix of some two hundred pages in which the English Sale of Goods Act, the American Uniform Sales Act, relevant sections of the French and German Civil Code, and the Draft International Law of Sale of Goods prepared by the International Institute in Rome for the uniformity of private law, are reproduced. Such a comparative study on questions of mercantile law we believe to be a distinct advantage. In like manner provisions regarding Warehouse Receipts and Bills of Exchange are given from various countries and forms of Bills of Exchange, Bills of Lading, Commercial Letters of Credit are reproduced in full.

It will be seen from this short statement that the book is not designed to deal with fanciful legal abstractions but is directed to the practical solution of the business man's problem. The scheme of the book is simplicity itself and the reviewer heartily recommends the treatment and the book itself to those Canadian schools who may have the opportunity of remodelling their curriculum in such a way as to break down the artificial boundaries between subjects, and to bring work in the classroom in closer touch with actual problems rather than with legal concepts developed in the abstract. There is no nonsense about this book. It is prepared in a workmanlike manner and in the reviewer's opinion should be an extremely valuable instrument in preparing students to deal with commercial problems in an equally workmanlike way.

C. A. W.

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Lawyers and Laymen of Western Canada. By ROY ST. GEORGE STUBBS. Toronto: The Ryerson Press. 1939. Pp. 197. (\$2.50).

To readers of this REVIEW the author of the present collection of sketches on some of the more colourful of the lawyers of the West needs no introduction. Mr. Stubbs has been a faithful contributor to the REVIEW. His biographical sketches, the latest of which appeared in the December issue, dealing with high-lights in the lives of famous advocates, English, Canadian and American, and the fund of anecdotes which gather around any person who is in constant contact with the ebb and flow of humanity in the courts, have appealed to an extremely large proportion of our readers. In the present collection Mr. Stubbs has confined himself to sketches of eight western advocates and judges, one of which, that on "Paddy" Nolan, appeared in the May 1939 issue of this JOURNAL.

Not being as familiar as one should with the persons around whose names Mr. Stubbs has spun in his own inimitable style the pungent, colourful and at all times fluent tales of law and life in the West, it is impossible to estimate the accuracy of the author's treatment. This, however, is a small matter. It is high time that the legal profession in Canada collected material on which to found the tradition of its legal profession. Altogether too little has been done along this line and no doubt vast quantities of personal experiences have been lost to posterity because no one bothered to set them down in any permanent record. Ontario has been particularly remiss in this regard and we would like to see some one do for the East what Mr. Stubbs has begun for the West.

We are not quite sure that Mr. Stubbs has painted pictures of giants at the Bar, but then he probably did not intend to do so. In any event his book is full of wit—in places his comments are quite outspoken—and should furnish good fun and a good fund of stories to any person looking for a few hours' relaxation.
