BOOK REVIEWS

A COMMON LAWYER LOOKS AT THE CIVIL LAW

By F. H. Lawson, Professor of Comparative Jurisprudence, Oxford University. Being the fourth in the series of the Thomas Cooley lectures delivered under the auspices of the University of Michigan Law School, Ann Arbor, 1953. Pp. xvii, 238. $4.00

The study of comparative law is gaining in importance to-day as the interdependence of the nation states continues to grow under the pressures of international politics and technological development. Jurists and men of affairs are coming increasingly to realise that systems of municipal law are not separate entities, but are the very bricks and mortar out of which the international community is built, and of practical concern to all who do business across national frontiers. This is particularly true in the Western world where the two great legal systems of the Civil and the Common law are but two different expressions of cultures which have common roots in Western philosophy and history.

Professor Lawson's five lectures in this volume contain, as Professor Yntema says in his foreward, "a magistral account, as envisaged by a common lawyer, of the central element of Western legal culture — the civil law". We are given the origins, development and chief characteristics of the civil law, and comparisons with the common law, from the point of view of a scholar deeply familiar with both; the whole sketched in grand perspective, and fascinating in its description of the evolution and interplay of basic concepts. For Canadian lawyers and law teachers, cognizant of the presence in this country of flourishing examples of the two systems Professor Lawson describes, the book will be convincing evidence of the richness of the legal material with which we are endowed by history.

It is not possible to compress still further in this review the multitude of ideas which are presented by Prof. Lawson so compactly and lucidly. Certain concepts, however, will strike the Canadian reader who is alive to the problem of conflict between the civil and the common law both in and outside Quebec. Of these, a few may be singled out for special mention.

The structure of the modern civil law is found by the author to consist of three principal elements, namely, a mass of customary law, the Roman law as transmitted in mediaeval and modern times in the Corpus Juris of Justinian, and natural law. Or, as he puts it more succinctly, civil law is built out of "custom, a book, and reason". To these three sources, each of which has left a deposit upon the body of the law, there may be added a fourth element, the canon law, though he feels that this has left little that is permanent. The

analysis of these various elements, the way in which they interacted one upon the other, and the ultimate expression of their joint contribution in the various civil law codes, particularly the French and the German, form the substance of the book. At every point the comparable rules of English law are referred to and contrasted.

In discussing the essential difference between the civil and the common law, Professor Lawson disposes of some easy preconceptions. He does not agree with Roscoe Pound that the difference is one "not of substance but of method". Nor does he think that the codified form of the civil law is itself a distinctive feature; he points out that the great period of codification has lasted little more than 150 years, and some civil law systems remain uncodified, whereas some common law countries have civil codes. Much more important, in his view, is the difference in the basic legal concepts themselves, and in the fact that the two sets of concepts are not the same. Only when the actual content of the law has been learned and understood will the nature of these concepts become significant and intelligible; when this is done, other characteristics of the civil law system which help to distingnish it from the common law, such as its conceptualism, its "economy of juristic concepts", its reliance on the jurist and writers of great literary power, its tendency to keep the law ahead of the facts, its neglect of precedent, even its aesthetic affinities with classical music, become clear.

The book bristles with lively images and challenging observations, all presented with disarming simplicity. This reviewer could not but note the comment that "the more one studies French law, the more one realises that in many ways it greatly resembles the Common Law and serves as a bridge between it and the more remote of the Civil Law systems". (p. 55). This is a novel thought for Quebec, where there is so much concern lest the civil law be "assimilated" to the common law, though Quebec is, in a sense, a "remote system". Equally striking is the analogy between a code and a constitution. The suggestion is put forward that a civil code plays the same part in relation to the total body of private law in a civil law jurisdiction, as a written constitution does to the total public law of a country. Certainly in Quebec the Civil Code, though fundamental, is surrounded by an increasing body of private law based on statute; in our federal system part of this, of course, like Bills and Notes or Copyright, is federal in origin. Also significant is his observation that in contemporary France the old predominance of *la doctrine* over *la jurisprudence* has been effectively reversed so that not only are the great jurists seldom cited below the Cour de Cassation, but the place accorded to decided cases and precedent is increasingly important. This has relevance to the problems of legal education in Quebec, where too great an emphasis on case law is sometimes suspected of belonging to the British rather than the French tradition. This was once true, but perhaps is no longer true. All codes are eventually overlaid with case law.

A considerable portion of these lectures is devoted to an analysis of Roman Law and its contribution to modern civil law. The author pleads for a return to Roman Law as the source from which so many of our dominant legal notions have sprung. That a knowledge of the *Corpus Juris* can illuminate the whole subsequent evolution of the legal systems of the western world is amply proven in these pages.

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JURISPRUDENCE

BY G. B. J. HUGHES, FIRST EDITION, LONDON: BUTTERWORTH AND CO., LTD., 1955. PP. 544. $9.50.

This excellent book was intended by the author to fill two gaps in the available literature on Jurisprudence (in England). The main purpose was to attempt to "treat the subject from the contemporary standpoint of the realist jurists, which, although acknowledged, has not yet found its way in a predominant form into the English student texts." A second less important consideration was that the internal structure of the book should parallel the teaching semesters.

Basic, though not the first to appear, is the section on modern realism. Hughes maintains that while "it is impossible to bring to the legal movements and literature of one's own day the detachment and impartial evaluations that one can give to the work of the past . . . there can be no doubt that the realist movement in Jurisprudence is the most interesting, novel, and vigourous force in legal thinking [today]." With true objectivity and insight, in spite of his modesty, Hughes analyzes the realist "school", if school it be; their reasons for defining law, not in terms of rules and principles, but what the courts in fact do; the dominant position of the judge in the American legal scheme, and the fact that and reasons why he does not enjoy complete trust and confidence as does the English judiciary. The problem of the vulgarization of Psychology, which may be the germinal force behind the focus on personality, is touched upon; the attack by Jerome Frank on the myth of the certainty in law being in part based on certain psychological insights the veracity of which, the reviewer suggests, are questionable. The realists hold that rules are only generalized predictions of what the courts will do: the law is in flux, plastic, open to continual judicial moulding and shaping as a means to social ends and not as an end in itself. Law is defined "in terms of the sociological method of investigating law."

The American realists are, in the main, lawyers, law teachers, (and judges, although Hughes does not specify them). The author completes his discussion by describing a contemporary juristic movement that has been taking place in Sweden, which is the product of men who are trained philosophers; a movement "too little known in England and America, for it forms the philosophical supplement to the practical work of the sociological and American realist schools." Named as its main exponents are Hägerström, Olivecrona, and Lundstedt.

Hägerström's basic position is a denial of the existence of objective values; questions of juristic purposes and aims of law are personal evaluations and are not amenable to the scientific process. The primary task is to examine the actual use of legal concepts and a psychological analysis of the mental attitudes involved in one's conceptions of law. Roman law was the field Hägerström focused upon, concluding that the concept of obligation in Rome was rooted in mystical or magical beliefs.

Olivecrona analyzed what is meant by the word "binding" in "law is binding", and concluded that the phrase is illusory and meaningless, i.e. mystical. Rather, Olivecrona suggests, law is a potent influence on conduct, but only in the natural world of cause and effect. In his analysis, law is ultimately based on force (power). Hughes feels that "regrettable as this may be, it is an undeniable social fact". Society, whether democratic or dictatorial, is and must be based on organized force. The author asserts that Olivecrona's denial of the binding force of law is not a plea for disorder. In itself law has no validity; it should command our respect only when it is doing a reasonable job of regulating society. Thus demonstrating law as social fact, Hughes accepts the realist approach.

The section on the Swedish realists is at once the most exciting and disappointing of the book. A mere ten pages is devoted to the subject. Hughes' insight and critical awareness are nowhere more evident, and one cannot but regret the compression. Lundstedt's views are not expounded. This omission is most unfortunate in view of the paucity of information on the subject in North America.

Hughes' Jurisprudence opens with an introduction on semantics to sharpen the ability to read and cogitate perceptively and with precision. This attempt to instill in the student or general reader the habit of constant mental vigilance in grappling with abstract, imprecise words is a valuable part of the book.

The first part of the book, Legal Theory, fills roughly one-third of the pages, as does the second, Classification and Sources of Law. Part three, Legal Concepts, is expertly handled. Most discussion is directly in relation to common law cases, concretizing issues and thereby aiding the conceptual analysis. However, certain sections, particularly the one on stare decisis, could benefit from additional analysis of Civil Law systems and techniques.

Throughout the book, the approach, particularly for teaching, appears somewhat insular.

In part four, which is considerably less extended, Hughes traces the development since 1800 of some of the laws of master and servant and the organization of workers in trade unions, two segments of the law which particularly mirror the theme of modern jurisprudence that law cannot be divorced from, but in fact reflects and embodies social, economic and political considerations. One is reminded that the maturity of the English social awareness was long in emerging. To borrow the author's words, "It is the invigorating tale of the triumph of intelligence and a sense of justice over stupidity and greed."

The section on Natural Law, given an overprominent place, is an excellent endeavour to sort out the "shifting band of unrelated ideas" which constitute one of the most persistent themes of Western civilized thought. After brilliant exposition and analysis, Hughes demonstrates that when society was chaotic and disturbed, man tended to evoke a theory of natural law which made for stability and security, but when society enjoyed stability and security, natural law theories tended to justify individualism and liberty.

The author suggests that the future of jurisprudence lies in the hands of the lawyer who can bring to his study of the law an expert technique in some other branch of learning, particularly economics, psychology or statistics. Hughes avers that there is a pressing need for a reappraisal of methods of teaching law. "In Britain today the professional and the university courses are more and more removed from the reality of law." Too little attention is paid to administrative law. What is required in the classroom is analysis of concepts and doctrines, not a recitation of cases and statutes. Hughes states somewhat bitterly that "the whole sociological movement might never have taken place for all the impact it has had on law teaching in England." This is surprising to one in Canada, for Hughes criticism, if applied here, would fall far wide of the mark.

The style of the book is an added merit: the delight that awaits the reader will be experienced, one feels certain, by many legal minds. The author's precision of thought, smoothness, urbanity, and irreproachable use of vocabulary to reveal his precise shade of meaning is evident thoughout. Subtle humour, never off point, ever so often will quicken the pace. The book is at once lucid, yet erudite; easily comprehended, yet never shallow. Hughes very wisely chose not to clutter his book with footnotes, preferring to stimulate thought rather than research. Footuotes, if and when read, of necessity create disjointed thought in the reader. The case list, index, and suggested readings are adequate for the purposes intended.

One may deeply regret the fact that a book with Canadian law, both common and civil, serving as a base for discussion and exposition, has yet to

appear on our legal horizon. When such a book is written, Hughes' Jurisprudence will serve as a standard by which it must be measured. This book is certain to take its place as one of the leading texts on jurisprudence, and all interested in law can read it with profit.

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CHANCELLOR THURLOW: THE LIFE AND TIMES OF AN EIGHTEENTH CENTURY LAWYER

BY ROBERT GORE-BROWNE, FIRST EDITION, LONDON: HAMISH HAMILTON, 1953. PP. 383. $3.50.

It is not without some misgiving that I have undertaken to review this biography of Edward Thurlow, a former Lord Chancellor of England during the reign of George III. For, as the jacket of this book points out, his private life was marked by scandalous deviations from respectability. As a young man he seduced the daughter of the Dean of Canterbury, who died giving birth to his son; later he had a lifelong liaison with the barmaid of Nando's Coffee House, by whom he had three illegitimate daughters.

Law students may erroneously conclude that great eminence in the law may be attained despite serious lapses in personal conduct. On the other hand, I am sure that my readers will appreciate that times have changed in the last two hundred years since Thurlow's days, and that behaviour which public opinion then may have tolerated would hardly be condoned today . . .

The purpose of this volume, as its author states, is to rescue from oblivion the name of a man who was outstanding as a lawyer, a wit, and a politician. He questions the verdict of posterity in forgetting the name of Thurlow, which contemporaries ranked with Mansfield and Blackstone in law; Fox, Burke and Pitt in eloquence; and Johnson and Sheridan in wit.

Now time has a way of its own of relegating to the limbo of the past those who have failed to make an indelible mark upon the course of history. And one wonders to what extent the effort to counter its effacing action may be justified. Yet, after perusing the record of Thurlow's life, it is difficult to say that he does not merit at least the monument of this biography.

Even though the passing years have gone far in obliterating his memory, there is no doubt that Thurlow played an eminent role in the life of England nearly two centuries ago. For fourteen years he was Lord Chancellor, despite changing ministers; he was the confidant of the King and one of the few ministers who could talk frankly to the wayward Prince of Wales. Some of the most momentous events in England's history took place during his tenure

of the highest legal post in the realm: the revolt of the American colonies, the war with France, and the troubles of the East India Company. Of particular interest to Canadians is the fact that Thurlow was one of the men who had a great deal to do with the drawing-up and enactment of the Quebec Act of 1774.

As in the case of every legal biography, the reader is given an account of some of the celebrated trials of the times. This reviewer must confess that he found these of far greater interest than the lengthy recitals of the complicated intrigues and the bare-faced depravities which characterized the politics of the day. Not the least fascinating of the legal battles in which Thurlow participated were the trials of the Duchess of Kingston for bigamy, and of Rev. John Horne Tooke for libel — in both of these he acted as prosecutor in his capacity of Attorney General. Later in life, as Lord Chancellor, he presided for a considerable period over the House of Lords' impeachment of Warren Hastings — a trial which lasted for one hundred and forty-two days spread over seven years!

A good deal of the historical background evoked in this volume covers the same ground as that depicted by Lloyd Paul Striker in his excellent biography of Erskine who was called to sit on the Woolsack in 1806, the very year that Thurlow died. Erskine, though a political opponent of Thurlow, had a kindly thought for him. Contrasting the characters of the two men, it is perhaps easy to understand why Erskine's memory has shed greater lustre over the years: for he was the great liberal, the defender of the oppressed; while Thurlow, for all his integrity as a judge, his wisdom as a lawyer and his astuteness as a statesman, stood on the side of reaction and oppression.

Yet with all that, anyone who wishes to read of the colourful life of a leading figure of the English bar and bench of a bygone age will find in this volume an account of a life replete with human interest, narrated against the background of some of the most momentous days in England's history.

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MENS REA IN STATUTORY OFFENCES

BY J. LL. J. EDWARDS. ENGLISH STUDIES IN CRIMINAL SCIENCE: VOL. VIII, FIRST EDITION, LONDON; MACMILLAN AND CO. LTD., NEW YORK: ST. MARTIN'S PRESS, 1955. PP. XIV, 297. $3.00.

Symbolism has many problems, and not the least of these is the manner in which words will betray. Words are the symbols in which the laws are set down.

Mr. Edwards suggests that he realizes the intricacies of the problem by the following statement:

> In his book on the *Advancement of Learning,* Bacon wrote that words were like the Tartar's bow, they shoot back upon the understanding of the wisest, and mightily entangle and pervert the judgment.

In the English law reports, many hundreds of pages are devoted to the task of "defining the definitions" of what constitutes particular crimes.

Mr. Edwards seized upon roughly a dozen words used by the legislature to define the state of mind requisite to commit certain statutory offences, and he wrote a thesis on the meanings of these words. The thesis has now been expanded and published.

Prior to the decision rendered in *Rex* v. *Prince,* in 1875, it was a principle of both common law and statutory interpretation that mens rea (a guilty mind), was presumed to be a requisite part of any crime. If the statute specifically excluded the necessity of mens rea it was another matter. But in the *Prince* case, the court held that it is not a general principle that mens rea must be read into every statute, but rather that each statute must be considered separately in the light of the object which the legislature had in mind when passing it.

From this it follows that a statute may create a "strict liability" or "absolute liability" offence, where no mens rea is needed to secure conviction, or a similarly worded statute may require mens rea to constitute the offence. And, as noted above, the difference is to be found, not in the specific wording of the law, but in the court's decision as to which type of offence the legislature intended.

In some statutes, the legislature has employed what Mr. Edwards calls "key words" in order to insure that mens rea will have to be proved to secure a conviction for the offence. And occasionally the legislature has used such words to increase the burden of proof normally on the Crown, or to offer certain defences (such as claim of right) to the accused. That is, in order to be guilty of an offence the accused must have acted "maliciously", "wilfully", "knowingly" or "fraudulently", or else he must have been "permitting", "suffering", "causing", or "allowing" something to be done. Sometimes the courts have ignored these words and have still treated the offence as one of strict liability. But usually they have attempted to give some meaning to the words, since all words used in a statute are deemed to have some meaning. Mr. Edwards has devoted a chapter to each of these eight terms, giving a brief historical account of their use in statutes, and he has made a clear and concise analysis of the manner in which the English courts have interpreted these words and some of their synonyms.

As a result of his analyses, he is able to show us a certain order in these decisions. He also makes some suggestions for the future drafting of statutes so that certain ambiguities may be avoided.

There is also a chapter on The Criminal Degrees of Knowledge in Statutory Offences and one on Vicarious Liability. In the chapter on Criminal Degrees of Knowledge there is a suggestion that seems worth considering:

> Certainly in common law crimes negligence has no part to play, but with the present wide range of statutory crimes the judges are faced with two forms of liability — on the one hand, knowledge or connivance, and, on the other hand, absolute prohibition. Should Parliament and the courts be left to choose between these two exclusive forms of liability? As another alternative to absolute liability, it is submitted, there exists with justification an intermediate theory of liability based upon misadventure.

The author notes that many will be reluctant to permit any type of criminal liability to rest upon mere negligence. Criminal law takes cognizance of recklessness, not of negligence. In more serious offences, such as receiving stolen goods, the mens rea, or guilty knowledge, is more akin to the old *mala conscientia* or evil design, and carries with it a serious punishment. However the same degree of moral blameworthiness is not involved in the lesser offences such as permitting drunkenness, suffering gaming, or knowingly permitting pollution of rivers. "Hence, whereas in the case of the former, actual knowledge or connivance is required, in offences bent on maintaining a certain standard of behaviour for the protection of the public, negligence is more readily accepted."

The author has done an admirable piece of work in threading his way through the masses of case law built up around the terms he is considering. His search for order amid considerable confusion can only be commended. Generally this search has been successful.

The cogency of his argnments and the clarity of the presentation are striking, and the prose flows along in a pleasing style.

In England this book will be indispensable to practising lawyers. Since it provides authoritative material for the current discussions of criminal liability it will also be of considerable interest to the academic lawyer. It is a valuable addition to the field of legal research.

For the North American reader, the book will have more of an academic than a practical usefulness, since all the statutes discussed are English, and Canada and the United States have developed their own bodies of case law in this field. However, the book is helpful as a clarification of the issues involved in the problem of mens rea in statutory offences. Consequently, the book should prove of interest to Canadian and American readers.

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