BOOK REVIEWS

The Law of the United Nations: A Critical Analysis of Its Fundamental Problems. By HANS KELSEN. (Stevens & Sons Ltd., London. 1950. xvii and 980 and (index) 13 pp. £5 5s. stg.)

The North Atlantic Treaty, The Brussels Treaty and The Charter of the United Nations. By SIR W. ERIC BECKETT, K.C.M.G., K.C. (Stevens & Sons Ltd., London. 1950. viii and 72 and (index) 3 pp. 10s. 6d. stg.)

Russia and the United States. By PITIRIM A. SOROKIN, LL.M. (Stevens & Sons Ltd., London. 1950. xi and 209 and (index) 4 pp. 12s. 6d. stg.)

If proof is needed that the lawyers are playing their part in a new attempt to create a stable international order, it is to be found in Professor Kelsen's *magnum opus*. It is a work of great industry and skill devoted to a careful examination of the problems of interpretation which the Charter of the United Nations poses for the lawyer. At the same time Kelsen is aware that juristic technique is not primary in the ensuring of order. At the conclusion of the preface he writes—"(the author) is aware that the international community established at the San Francisco Conference is by its very nature a political phenomenon and that a merely juristic interpretation cannot do justice to it." The *Abbe* Sieyes thought to bring order to France by means of the perfectly drafted constitution and there are many, even now, who naively believe that juristic labour alone can produce international order. But Kelsen is not of their number. His work is then an act of faith in the existence of an international community prepared to back the technical instrument in the Charter and to make of the United Nations Organization a living international institution. For surely if there is no such international community, Kelsen's toil is futile.

The thoroughness of his analysis of the Charter text is wholly admirable. He worries out every possible interpretation of the words in the light both of a careful examination of their history and of the experience of their operation to date. Significant comparisons with the Covenant of the League are drawn in appropriate contexts. In common with most multilateral international instruments, the Charter suffers from the defect that compromises between opposing views have in places been effected by making the wording so ambiguous that each of the opposing views can claim to have won. The docu-

ment thus bristles with difficulties of interpretation. Kelsen performs the primary task of making clear the alternatives whence a choice must be made. He says—"The author considered it necessary to present all the interpretations which according to his opinion might be possible, including those which he himself—if he were competent to apply the Charter—would reject as undesirable, and even those of which it could be presumed that they were not intended by the framers of the Charter." Thus he offers an objective exposition of the two possible answers to the question of the effect under article 27, para. 3, of the absence or abstention from voting of a permanent member of the Security Council. Whether the United States and other countries are in fact acting in Korea on the authority of the United Nations Organization depends on the answer to that question.

Withal *The Law of the United Nations* is the foremost juristic work on the subject which has appeared to date. The publishers too are to be congratulated on the technical production of the volume; the type is clear and attractive and sufficiently open to allow comfortable reading.

Beckett's little book, *The North Atlantic Treaty,* is dwarfed by Kelsen's, and certainly does not pretend to be a major contribution. It belongs, however, to the same universe of discourse. Beckett's main purpose is to examine the relationship with the Charter of the United Nations of the North Atlantic Treaty, but he hastens to add that it is not his purpose to consider the political aspects at all but "merely the purely juridical aspects."

The reviewer is prepared to accept Beckett's conclusion that from the juridical standpoint the Atlantic Treaty is not inconsistent with the Charter. Within the limits of his discourse Beckett's argument is convincing. At the same time, the reviewer cannot resist the comment that this is no cause for complacency. Beckett's is a hollow achievement if in fact there is an inconsistency between the Treaty and the spirit of the Charter. Juristic endeavour, let it be remembered, is not enough to build a stable international order. The fact that the Atlantic Treaty has been thought necessary may indicate a crumbling of the community sentiment on which the United Nations Organization rests. Assume for a moment that the members of one group of States within the Commonwealth of Australia agreed to arm and to assist one another in defence against the members of the other group. Pure juristic endeavour might demonstrate that this was consistent with the Constitution but it would nevertheless be true that we were well on the way towards the dissolution of the Commonwealth.

The appendices are a useful collection of documents. They include the texts of the Treaty of Dunkirk 1947, the Inter-American Treaty of Reciprocal Assistance 1947, the Brussels Treaty 1948, the North Atlantic Treaty 1949, and the Anglo-Soviet Alliance 1942.

In contrast with those of Kelsen and Beckett, Sorokin's study, *Russia and the United States,* is in the realm of politics. All the

juristic endeavour of all the lawyers in the world will not ensure international order if Russia and the United States decide that they must fight. Sorokin's simple but vitally important submission is that there really is no reason at all why these two countries should not live in amity. Most Americans and most Russians seem to be convinced that there is an irreconcilable antagonism between the values of American Capitalism and of Russian Communism. Sorokin flatly denies any such antagonism and at least he deserves a patient hearing. He was born in Russia and lived there from 1889 to 1922. Since then he has lived in the United States. He can claim then to know each country intimately.

At times he indulges that pretentiousness in choice of words which some modern social scientists seem to enjoy. The name of the post Sorokin holds at Harvard—Director of the Research Centre in Altruistic Integration and Creativity—is a sample. But generally his lanuguage is clear and forthright.

We are led to believe that democracy is our own special miracle. Sorokin asserts that Russian social institutions are essentially democratic. He calls to witness the Russian family, provincial, local, and municipal self-government, and religious and ecclesiastical institutions. It is true, he admits, that Communism attempted to destroy the family and religion. But he claims it has led to the growth of a vital new Russia, to the "rebuilding of the family" so that now there is a "rigorously Victorian code of faithfulness," and to an "enormous religious revival" so that the "Russian religious system is potentially as strong as that of any other country." Russia too is "as sound morally as any other nation." Somewhat naively Sorokin writes off the viciousness of the revolution with the remark that its victims were negligible when compared with the victims of Nazism, that the "Communist brand of barbarism was vastly preferable to that of the Nazis."

He parallels the economic, industrial, and technological progress of Russia and the United States. He devotes special consideration to the educational and cultural progress of Russia, calling on John Galsworthy and Arnold Bennett to testify to the greatness of Russian literature.

Chapter 9 is pivotal in Sorokin's thesis. It is here that he attempts to show that while pure Communism and pure Capitalism may involve diametrically opposed systems of values, American Capitalism and Russian Communism are now "little more than ghosts of their former selves." Indeed "there is scarcely any fundamental difference between Soviet and American war-time economies."

Sorokin's conclusion is that "the total sociological differences between Soviet Russia and the United States are less than those between the United States and Turkey, Saudi Arabia, Chiang Kai-shek's China, Iran, and Greece, which enjoy friendly relations

with the United States." The causes of American-Russian conflict are not then to be found in socio-cultural differences, but simply in "sensate lust for power." Sorokin advances the startling prediction that "if Russia is eliminated then the conflict will centre between the most powerful countries of the contemporary Western bloc just as after the elimination of Hitler's Third Reich it focussed itself between previous allies."

The way of reconciliation is the adoption of new values involving "a common fight against the perennial and common enemies of both nations and of the whole of humanity, against death, destruction, disease, insanity, misery and crimes whenever and wherever they are found, in the Soviet or anti-Soviet world." It is hard to disagree with Sorokin that "the treasury of moral values is almost empty now. Only the counterfeit money of morality—high-falutin' speeches —fills their ethical vaults. A new World War will destroy even the remnants of moral values and will make all nations hopeless moral bankrupts. A democracy or autocracy which murders millions of innocents is not a democracy or autocracy but a gang of murderers . . . The values of 'governmentally managed' and 'privately managed' economy become so relative, so little specific, for each nation that only a madman can declare them sacred and absolute or can make war to eradicate, in the name of God, democracy, or communism, the 'mortal sin' of either nationalised economy or free enterprise."

It is indeed a challenging book.

R.W.P.

International Law and Human Rights. By H. LAUTERPACHT, K.C., LL.D., F.B.A. (Stevens & Sons Ltd., London. 1950. xvi and 463 and (index) 11 pp. £2 10s. stg.)

Positivism and the dualist theory of the subject of international law are beset by many critics, of whom Lauterpacht might well claim to be the leader. *International Law and Human Rights* opens (Part I) with a relentless attack on the dualist assumption that "duties prescribed by international law are binding upon the impersonal entity of States as distinguished from the individuals who compose them." The assumption "opens the door wide for the acceptance, in relation to States, of standards of morality different from those applying among individuals."

Lauterpacht then proceeds in Parts II and III to consider the task of conferring human rights and fundamental freedoms on individuals by international law. The Charter provisions lack "a legally organised and effective machinery of compulsion." Lauterpacht seeks the adoption of an International Bill of the Rights of Man supported by an effective right of petition. Progress towards his ideal is over

a difficult road, fraught with hazards of "vital interests," "sovereignty," and "domestic jurisdiction." The Universal Declaration of Human Rights has taken us but little of the way along the road. Lauterpacht submits that "the Declaration is an instrument which does not possess—and does not purport to possess— . . . legal force or authority" and that "its moral significance is controversial."

It would be easy to characterize Lauterpacht's cause as hopeless and rudely dispose of the book as "unreal." But may it not be that a certain amount of apparent unreality is of the essence of any really definitive work in the story of man's moral progress?

R.W.P.

An Introduction to International Law. By J. G. STARKE, B.A., LL.B., B.C.L. (Butterworth & Co. (Publishers) Ltd., London. Second edition, 1950. xvi and 397 and (index) 25 pp.)

A Manual of International Law. By GEORG SCHWARZENBERGER, PH.D., DR.JUR. (Stevens & Sons Ltd., London. Second edition, 1950. lii and 409 and (index) 19 pp. £1 5s. stg.)

Starke's *Introduction* and Schwarzenberger's *Manual* both purport to be books for beginners but are of very different types. Starke's book is an exposition of the rules of international law with relatively few references and with the emphasis placed, in the author's words, "on the practical standpoint" rather than on discussion of controversial questions. Schwarzenberger's book on the other hand has but 155 pages of text (Part I) and for the rest is devoted to "Study Outlines" (Part II) and "Material for Further Reference" (Part III). A most impressive array of references is given. It is then rather a guide to study than a book to be studied. One who seeks an uncomplicated exposition of the rules in the traditional manner will find it in Starke's book. It is never "difficult" and the style is delightfully clear. One who seeks a close understanding of the many problems of regulating international relations by law will find that Schwarzenberger's book offers expert guidance to the great bulk of material that has to be explored.

Each has now reached a second edition. Starke's book contains a new chapter on the law of International Institutions, and the chapters on the law of War and Neutrality have been expanded. New literature, e.g., Jessup's *A Modern Law of Nations,* has been taken into account. The text of Schwarzenberger's *Manual* remains substantially unchanged but more recent material has been incorporated in Parts II and III.

R.W.P.

International Law. The Collected Papers of Sir Cecil Hurst, G.C.M.G., K.C.B., K.C. (Stevens & Sons Ltd., London. 1950. ix and 294 and (index) 6 pp. £1 10s. stg.)

After a long life devoted to the cause of international law as Judge and President of the PCIJ, Member of the Permanent Court of Arbitration, Chairman of the United Nations War Crimes Commission, and Legal Adviser to the Foreign Office, Sir Cecil Hurst will require no introduction. A collection of his papers has now been published at the inspiration of some friends at Cambridge and as a method of marking his 80th birthday.

His presidential addresses to the Grotius Society in 1944 and to the Institute of International Law in 1937 form Part I. They are inspiring addresses reflecting a deep belief in the present reality and in the future of international law.

Parts II and III comprise articles published in the British Year Book of International Law and in the Proceedings of the Grotius Society. Each has become a classical treatment of its special subject.

Part IV comprises a course of lectures delivered at the Academy of International Law in August 1926 on the subject of diplomatic immunities.

R.W.P.

The Law of Contract. By G. S. CHESHIRE, D.C.L., F.B.A., and C. H. S. FIFOOT, M.A. Second edition. (Butterworth & Co. (Publishers) Ltd., London. 1949. lvi and 495 and (index) 28 pp. £1 17s. 6d. stg.)

This is the second edition of the authors' work on Contract which, since its publication only five years ago, has firmly established itself as a book for students and practitioners alike. The first edition was, as Lord Justice Denning has pointed out (62 L.Q.R. 190), "a good book." It was good because the authors combined accuracy and simplicity with courage and constructive thought. In this respect, the edition under review is worthy of its predecessor.

The chapter on mistake has been re-written but without in any way altering the method of treatment nor the classification adopted. The chapter still makes stimulating reading. At the same time one feels that the apparent simplicity achieved is somewhat unreal, and that the cases are doing forced labour in support of principles enunciated *ex post facto*. Dr. Cheshire achieved simplicity in his Private International Law by using the same technique. Recent history in both fields has demonstrated that the lead given may not be reflected in future judgments.

Since this edition went to press *Solle v. Butcher,* [1949] 2 All E.R. 1107, has been decided by the Court of Appeal. The opinions expressed by Denning, L.J., in this case, if established by subsequent decisions, will completely destroy the authors' classification of mistake into those which are common, mutual, and unilateral, and it will also make false the authors' fundamental premise, namely, "if a plea of mistake succeeds the conclusion of the law is that the contract is void" (page 156).

The rule to be extracted from the cases of mistaken identity is concisely stated (page 171), and it is a pity that it is contradicted in an earlier portion of the text, where it is said (page 158) that "if A., to the knowledge of B., is mistaken with regard to something fundamental, as, for instance, where he believes B. to be C., and the question of personality is important, the effect of this fundamental unilateral mistake is to render the contract void." It may be, too, that the rule as stated by the authors is not sufficiently exhaustive and that to their two requirements should be added a third, namely: "— and (iii) that B. and C. are two distinct and separate persons or entities."

The authors persist in their strictures upon the principle said to be established by the decisions of *Angel v. Jay,* [1911] 1 K.B. 666, and *Seddon v. North Eastern Salt Co. Ltd.,* [1905] 1 Ch. 326. They say (at page 218) "There is still room for hope that this (the decision in *Angel v. Jay*) may some day be reviewed and over-ruled by a higher Court." This hope finds temporary fulfilment in *Solle v. Butcher,* but the indications are that the doctrine will die hard: See *Leaf v. International Galleries,* [1950] 1 All E.R. 693. On its death the question asked by Denning, L.J., in *Leaf's Case* (at page 695 of the report), namely, "Is it to be said that the buyer is in any better position by relying on the representation, not as a condition, but as an innocent misrepresentation?", will presumably be answered in the affirmative.

The accuracy of the authors' statement as to the effect of the operation of the doctrine of part performance is open to doubt. At page 141 they say, "Through its operation a modern litigant, though he is unable to claim damages for breach of a contract which is caught by the statute and which fails to satisfy its provisions, may yet obtain from the Chancery Division a decree of specific performance." One would expect that in a jurisdiction where Lord Cairns' Act has been adopted this statement of the law would require some qualifications. *Lavery v. Pursell,* (1888) 39 Ch. D. 508, is not the last word on the subject. It would appear to be open to a court exercising the powers given to it by Lord Cairns' Act to give damages in substitution for specific performance even in cases where the power to give specific performance depends upon application of the doctrine of part performance. This power has been exercised by the Supreme Court in Victoria: See *Dillon v. Nash,* [1950] V.L.R. 293.

The section on quasi-contract has not been expanded. This, we feel, is a pity. The authors' treatment of this subject is confined to some 24 pages, and within this space they are unable to do justice to a section of the law which is so pregnant with possibilities for the future.

The book, however, is still "a good book"; in fact, we venture to vary Lord Justice Denning's note by saying that it is "a very good book."

F.T.P.B.

The Law relating to maintenance of Wives and Children. By JOHN CHARLES LITHERLAND, B.A., LL.B., Barrister-at-Law. (The Law Book Co. of Australasia Pty. Ltd.: Sydney, Melbourne and Brisbane. 1949. clviii and 509 and (index) 65 pp. £2 17s. 6d.)

Mr. Litherland claims to have attempted to write a single volume which would embrace the many laws and decisions governing the determination of complaints relating to the maintenance of deserted wives and children and ancillary problems in Australia and New Zealand; he has been eminently successful.

The vast number of decisions concerning such proceedings in many instances make nice distinctions and are frequently bewildering. To the practitioner, who, it must be admitted, is all too frequently called upon to undertake cases of this kind, the book must be a well ordered and accurate work of reference. The questions of jurisdiction and the procedure upon the hearing of a complaint are fully dealt with. The chapters on separation, desertion, adultery, and the effect of condonation and connivance are necessarily briefer than corresponding chapters in a standard work on Divorce, but even so are sufficiently detailed to be helpful in the preparation of cases for presentation to the Divorce Courts. Western Australian practitioners will note that the work throughout refers to the Matrimonial Causes and Personal Status Code 1948 and to the Child Welfare Act 1947.

The chapter on affiliation proceedings is thorough and interesting. The question of what evidence is sufficient to corroborate that of the complainant is clearly discussed, as are the merits and demerits of the use of blood tests as aids to prove or disprove paternity. Perhaps the most useful portions of the work are those dealing with the nature, duration and effect of a Court order for maintenance including its enforcement, variation, suspension or discharge. Also included are chapters on appeals, *res judicata,* and additional statutory provisions in aid of a deserted wife or child which are less commonly resorted to.

Enough has been said to indicate the considerable scope of the task the author has undertaken. The advantages of such a com-

parative and detailed study of the law of the Australian States and of New Zealand are at once apparent. The book supplies a long felt need.

I.S.

The Married Women's Property Act 1901 (*New South Wales*), with annotations including references to relevant decisions of the Courts of England, Scotland, Australia and New Zealand. By R. E. WALKER, B.Ec., LL.B., Barrister-at-Law, Prothonotary of the Supreme Court of New South Wales, and C. A. WALSH, B.A., LL.B., Barrister-at-Law. (The Law Book Co. of Australasia Pty. Ltd.: Sydney, Melbourne and Brisbane. 1950. xv and 120 and (index) 6 pp. £1 10s.)

This book is a compact statement of the Australian and other relevant decisions on the respective Married Women's Property Acts of the Australian States. The authors have adopted the scheme of annotating the printed sections of the Act of New South Wales. The most interesting and practically useful parts of the book are of course concerned with the remedies of the wife for the protection and security of her separate property, with actions against spouses generally, and particularly with proceedings under the summary jurisdiction to determine questions as to the title to or possession of property. Under the first heading is included a discussion of the recent case of *Curtis v. Wilcox,* [1948] 2 All E.R. 573. Under the second heading are included references to servicemen's allotments, bank deposits, joint bank accounts, gifts between spouses, housekeeping allowances, wedding presents and the like, all of which very frequently arise for determination. The topic of gifts naturally occupies the greatest amount of space given to any one subject and all the important cases are mentioned.

A comparative table of corresponding sections of the various State Acts is included, and the book is competently cross-referenced and indexed. A most useful book to have at one's side.

I.S.

Inventions, Patents and Monopoly. By PETER MEINHARDT, of the Inner Temple, Barrister-at-Law. (Stevens & Sons Ltd.: London. Second edition, 1950. xvi and 300 and (index and bibliography) 20 pp. £1 10s. stg.)

Patents for Inventions. By T. A. BLANCO WHITE, of Lincoln's Inn, Barrister-at-Law. (Stevens & Sons Ltd.: London. 1950. lix and 378 and (index) 10 pp. £2 5s. stg.)

Recent English legislation in the field of Patent law (mainly as the result of the Report of the Swan Commission) must have

resulted in new editions of earlier works becoming necessary or in new publications being written. Of those books which have come to our notice that of Mr. Meinhardt is a second edition and that of Mr. Blanco White appears for the first time. The first edition of Mr. Meinhardt's book appeared in 1946. Mr. Blanco White has, however, been responsible for three other works in this field. The new legislation around which both books reviewed are written is the Patents Act 1949, the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, and the Development of Inventions Act 1948.

Mr. Meinhardt's book deals only with invention, and it is claimed for it that the subject has been broadly enough treated to satisfy the requirements not only of legal practitioners but of industrialists, businessmen, and economists. This is certainly so; for anyone interested to discover the scope of patent law with some discussion of its history and sociological implications, this is the book to read. Chapters on patent litigation and the abuse of monopoly are included which have not only a legal interest.

Mr. Blanco White's book includes within its scope the registration of industrial designs and is primarily addressed to lawyers. It therefore assumes a little more than the book reviewed immediately above. However, for those who require a text-book of some authority which includes an annotated Table of Statutes giving an analysis of the English Patents and Registered Designs Act 1949, Mr. White's book is more than adequate.

It may be remarked that although the legislation of the Commonwealth on this subject has not yet been amended so as to be brought into line with the latest English Acts, quite recently the Commonwealth Attorney-General announced the appointment of a Committee whose task is to consider the necessary and desirable amendments to our own legislation. It is to be hoped that the eventual amendments will closely resemble those already adopted by the Parliament of the United Kingdom.

I.S.

Second thoughts on Life, Law and Letters. By A. LAURENCE POLLAK, B.A. (Hons. Classics), London, a Solicitor of the Supreme Court. Illustrated by Leslie Starke. (Stevens & Sons Ltd.: London. 1949. ix and 116 and (index) 17 pp. 6s. stg.)

The Law lends itself to lighthearted commentary as much as to profound reflection, and it is perhaps just as well that it does although the list of those who have attempted such diversions is not very long. Mr. Pollak, who will be remembered as having already given us his "Legal Fictions," has now written a further gloss upon the law, and lawyers will relish the reading of it.

The author prefers to relate his thoughts to the classics and is well qualified to do so. Not all the essays take us to beyond time

immemorial, for instance, to the Garden of Eden where "from the civil point of view the behaviour of Adam and his wife constituted a clear breach of covenant under the terms of their tenancy and eviction followed in due course as just retribution" and "the serpent was clearly an accessory before the fact, if not a principal in the second degree." There is also an excursus into the laws of Filmland, the English Town and Country Planning Act 1947, and Automatic Divorce. In all of this Mr. Pollak is able to show a considerable knowledge of the law, of letters, and of contemporary affairs.

It would be a pity to give the reader too much of an idea of what the book has in store for him—he had best read it for himself. Anyway, a delightful index which eventually directs the inquirer to what he seeks but least expects to find will also do that for him. Mr. Leslie Starke, one of Mr. Punch's artists, has capably illustrated some of the essays.

I.S.

History and Sources of the Common Law: Tort and Contract. By C. H. S. FIFOOT, M.A. (Stevens & Sons Ltd., London. 1949. xvii and 443 and (index) 3 pp. £2 5s. stg.)

Lectures in Legal History. By W. J. V. WINDEYER, C.B.E., M.A., LL.B. (Law Book Co. of Australasia Pty. Ltd.: Sydney, Melbourne and Brisbane. Second edition, 1949. xxiv and 344 and (index) 20 pp.)

Learning the Law. By GLANVILLE L. WILLIAMS, LL.D. (Stevens & Sons Ltd., London. Third edition, 1950. xiv and 192 pp. 12s. 6d. stg.)

It is a pleasure to welcome Mr. C. H. S. Fifoot's contribution to the explanation of the historical development of Tort and Contract in English law; our one regret is that he is not among the more prolific of contemporary writers since his work has, if he will allow us to say so, a vigorous literary quality so rarely found in books on the law. Among the difficulties experienced by the young law student are the strangeness of much of the terminology of the law and, it must be confessed, the uninspiring manner in which the law itself is all too frequently explained. It is too much to expect a constant succession of Maitlands, Pollocks, or Vinogradoffs, but fortunately there have been relatively few periods in which the literature of the law has not been raised to a higher plane by at least a few writers; the present, thanks to Mr. Fifoot and others, is not one of those dark ages. The publishers have made their contribution to the assured success of this book by the use of a very clear and legible type; the reviewer (who does not matter) and the teacher and student (who matter very much) can easily be discouraged, when

there is so much to read and so little time in which to read it, by poor type and unattractive presentation.

Mr. Fifoot's method is to close each chapter with a selection of authorities. It is true that these should be available in every good law library; but not all law libraries are good (particularly in Australia) and in any event it is not easy for the contemporary student to make sense of such of the older authorities as are in Latin or Norman-French nor, even if he has an adequate understanding of the languages, to sift the grain from the chaff. Without overloading the book the author has succeeded in incorporating in it the best features of the independent case book; his selection of authorities is catholic, and includes many references to other viewpoints with which he does not agree. We venture to predict that this book will be in great demand by teachers and students of legal history.

Mr. W. J. V. Windeyer modestly admitted, in the preface to his *Lectures in Legal History* when it was first published, that he made no claim to having blazed a new trail; but the usefulness of his work to Australian law students is proved by the appearance of a second edition. It is virtually impossible to compress into a single book an adequate account of the historical development of English law; Mr. Windeyer makes no claim to have been able to do so. His object is to present a picture of the main lines of development and to show, in his final chapter, their significance for Australian law, while leaving the important details to be ascertained from other and easily available sources. A century and a half of more or less independent development appears to the young Australian to be so long a period that he has much difficulty in appreciating why any study of the historical development of *English* law is basic; Mr. Windeyer's book will certainly help to bring enlightenment to him on this important point.

Dr. Glanville Williams' *Learning the Law,* now in its third edition, bids fair to become a legal best seller; his new chapter on "General Reading," though it may not command universal support for his selections, is a very useful reminder that much valuable and interesting information about the practical working of the law can be found outside the standard textbooks. He would, we think, be the first to admit that his suggestions for "learning the law" are not meant to be adopted literally and without exception of place and circumstance; for example, we disagree fundamentally with his views on note-taking, which we regard as a pernicious and dangerous habit at least for students in their first and second years. The writer of shorthand among students is *rarissima avis;* hence note-taking involves selection and compression—but few students are able, until they have mastered at least some of the basic subjects, to select what is important and reject what is subsidiary. The note-taking habit is impossible to eradicate, no matter how it may be discouraged; but it can be made almost unnecessary through the issue of a synopsis of the lecture course containing all essential references and a very

brief precis of significant material. This, however, is a matter of opinion and experience; that we differ from Dr. Williams on this and perhaps on a few other matters of detail does not lessen our indebtedness to him for a book which will make the good student better and the poor student almost tolerable. We have strongly recommended it to all our students in the Law School of the University of Western Australia ever since it was first published; and we are confident that those students who took our advice to read and digest it thoroughly were thereby enabled to commence and continue their study of the law much more intelligently and much more efficiently than they would have done without this valuable guide.

B.

Government by Decree. By M. A. SIEGHART, LL.B., Dr. Jur. (Stevens & Sons Ltd., London. 1950. xxix and 319 and (bibliography and index) 23 pp. £1 10s. stg.)

Administrative Tribunals at Work. Edited by ROBERT S. W. POLLARD. (Stevens & Sons Ltd., London. 1950. xx and 144 and (tables and index) 10 pp. 17s. 6d. stg.)

Principles of Australian Administrative Law. By W. FRIEDMANN, LL.D. (Melbourne University Press, Melbourne. 1950. 112 and (table of cases and index) 6 pp. 12s. 6d.)

There is a school of thought which appears to be convinced that every cabinet minister—and every civil servant, from the highest to the lowest—is a potential dictator, and that every judge, at least of the superior courts, is a staunch defender of the (usually undefined) liberties of the citizen. If the first premise were true—which we do not believe—all the valiant efforts of a mere handful of judges would not suffice to prevent the degradation of a democratic parliamentary system into a totalitarian regime; if the second premise were true—about which we must confess to being equally sceptical—a stronger case might be made out for subjecting all delegated legislation to ultimate judicial control by means of litigation in the ordinary courts. In reality, writers whose arguments are based on the validity of these premises are sighing for the moon; they would like to return to the mythical freedoms of the 19th century. It is somewhat ironical that very few of the contemporary writers who are afflicted with this nostalgia can have had any personal experience of the heyday of *laissez faire!*

That democratic procedures may be subtly and imperceptibly undermined by the ever-increasing flood of delegated legislation is undeniable; it is probable that the danger lies, not so much in the "lust for power" of the administrator, as in his impatience and lack of foresight when coupled with a laudable desire to "get things

done." The best checks on civil service rashness and dogmatism are public opinion and public esteem; a good service should get more ha-pence than kicks, because, consisting of susceptible human beings, it will then try to earn still more—but if its virtues are consistently ignored and its defects magnified it is likely to become first disheartened and then impervious to all criticism. The ministerial head whose enthusiasm leads him to believe that he knows exactly what his fellow citizens ought to want and then tries to provide it by means of the power to make regulations soon finds out that he cannot move much faster than the evanescent majority of the day wants him to go; the pressure of public opinion—from which judges are largely immune—calls a halt to many an ambitious but premature scheme.

Mrs. Sieghart concedes, though with some apparent reluctance, that delegated legislation is here to stay, and rightly draws attention to the very exiguous control which Parliament can exercise over the use of the very great powers which it is forced by circumstances to concede to ministers and their departmental advisers. She also performs a very useful service in giving a clear if necessarily brief description of the French system of public administration which may help to modify the views of those who still assume the essential validity of the opinions expressed in the earlier editions of Dicey. It may well be, however, that the comparative method is not so valuable in this field without some recognition, which the author does not stress, of the marked difference in attitude of the average Englishman towards the civil servant and of the average Frenchman to the *fonctionnaire*.

Though we do not share many of Mrs. Sieghart's fears and forebodings we cordially welcome her contribution to the discussion, if not to the solution, of a problem which cannot be lightly dismissed. But when the time comes for a second edition, may we plead for a revision of some of the terms used? "Government by Decree" has a strange sound; "Government by Regulation" has a much more vivid meaning in English. It is not always easy, we concede, to translate the technical terms of one language into another; but even a cumbersome circumlocution is often preferable to quotations from a foreign language with the technicalities of which the average reader is perhaps not very familiar. For instance, there must be many who do not know, though they may ultimately guess from the context, that "The *doctrine*" (page 280) means the views expressed by textbook writers and commentators, and that "The *jurisprudence*" (page 287) has nothing to do with the English concept of the word but can be more or less adequately translated by "case law" or "judicial decision." It is irritating, too, to find the invariable use of *"loc. cit."* in the footnotes where *"op. cit."* is intended. But these criticisms of detail, which can easily be corrected in a later edition, do not detract from our admiration of Mrs. Sieghart's courage in writing a comprehensive and provocative book in a language which, unless we

are mistaken, is not her native tongue and on a system of administration to which she has brought an acute mind trained on different principles.

The contributions to the symposium edited by Mr. Robert S. W. Pollard (who is also the author of the chapter on Tribunals for Conscientious Objectors) are for the most part content to be descriptive rather than critical. The joint authors can only touch the fringe of the subject of *Administrative Tribunals at Work,* since they write on some half-dozen of such tribunals whereas an appendix of thirteen pages gives, in small type, a list of existing tribunals which the editor admits is "possibly incomplete." But if those which they describe are typical of the remainder one is struck at once by the extraordinary lack of uniformity in composition, function, and independence of ministerial influence; the traditional English practice of setting up *ad hoc* bodies, staffed for the most part on a part-time basis and frequently by persons who have no personal interest in (or experience of?) the matters upon which they are called to adjudicate, appears to be given full rein. Paradoxically enough, the predominance of "unofficial" members of these tribunals, while it may appear haphazard and untidy, may in fact prove to be a greater protection for "the liberties of the subject" than the occasional intervention of superior court judges, simply because these members usually have no axe to grind and can bring to bear those factors of common sense and of a feeling for "equity" which are not the monopoly of the judicial mind.

We noted that the contributions are descriptive rather than critical; more than one writer assesses the efficiency and impartiality of the tribunals which he describes according to Professor W. A. Robson's "Nineteen Principles" as if these principles had achieved the same notoriety and recognition as Wilson's "Fourteen Points." They may be excellent principles; but until they have obtained much wider acceptance than appears to have been accorded to them, it is somewhat premature to use them as the major criterion for determining the merits or demerits of particular tribunals. Nevertheless, the Institute of Public Administration is to be congratulated on sponsoring the publication of this small book; may we hope that it will cast its net still wider in the near future?

A slim volume from Dr. W. Friedmann is, as its author explains in the preface, a "preliminary study" of Australian administrative law. In general, the High Court and the State Supreme Courts have been largely content to base their attitude to local administrative tribunals on the model provided by the English superior courts; this is mainly due to the exaggerated respect, almost veneration, which our Courts still pay to House of Lords and even Court of Appeal decisions, and does not necessarily mean that the problem presents itself in Australia in the same way, and with the same complexities, as in the United Kingdom. In one respect the problem is much older in Australia, where governments have long engaged in a great

variety of activities which until very recently were left to private enterprise in England; hence the need for a number of departmental tribunals was felt much earlier in Australia. Nevertheless, the virtual uniformity of the judicial attitude makes it possible for Professor Friedmann, on the assumption that many of his readers will be familiar with the broad outline of the English case-law, to reduce his statement of the tribunal-court nexus to its simplest terms. On the other hand, his task in reviewing the nature and activities of the existing tribunals is made more difficult by the fact that there are seven groups of them (the Commonwealth and the six States). The tribunals themselves frequently present superficial resemblances, but there are as often differences of detail, in function and practice, which defy orderly classification. While the list of tribunals which the author gives on pp. 87-95 is not as formidable as that presented in the appendix to *Administrative Tribunals at Work,* the comparison may be misleading because within self-imposed limits Professor Friedmann has only been able to survey "(the) most important aspects" of Australian administrative tribunals in ten selected fields.

The value of Professor Friedmann's work lies mainly in the stimulus and encouragement it should give to further investigation in this important field. After an all too short tenure of the Chair of Public Law in the University of Melbourne he has left us to take a similar appointment in the University of Toronto; but his stay was long enough to arouse interest in many topics of public law which previously had languished but which we believe has been re-awakened and re-invigorated under his able and at times provocative inspiration.

B.

The Victorian Solicitor: The Legal Profession Practice Acts, etc., in Victoria. By ARTHUR HEYMANSON, B.A., LL.B., K. H. GIFFORD, LL.B., and E. H. COGHILL, LL.M. (The Law Book Co. of Australasia Pty. Ltd.: Sydney, Melbourne and Brisbane. 1949. xxiv and 210 and (index) 17 pp. £1 17s. 6d.)

This book commences with a very useful introduction which explains the history of the legal profession in Victoria and then brings together in a convenient form the Acts and Rules of Court affecting the practice of the law in that State; it also includes the Rules of the Council of Legal Education (a statutory body in which the judges of the Supreme Court provide the largest coherent group), appendices on professional conduct and misconduct, and the "Counsel Rules" adopted by members of the Bar.

Victoria presents the interesting spectacle of the legislature fighting a losing battle against professional traditions in its attempts to abolish the division into two branches. The first shot was fired in 1891, by an Act which amalgamated the two branches; but it failed

to hit its target because the barristers of the day agreed among themselves not to exercise the statutory right to practise as solicitors. Likewise, the solicitors of 1891 (and their successors) have stuck to their task and have gone on practising—as solicitors. Even though the Legal Profession Practice Act, as consolidated in 1928, continues to give all members of the profession the right to practise in a dual capacity they continue to refuse the proffered gift; and the legislature is in fact forced to recognise the continued existence of the two branches by providing for representation of the Law Institute (the Solicitors' organization) and of the Committee of Counsel in the Council of Legal Education.

Under the enlightened guidance of its present Chief Justice, Sir Edmund Herring, Victoria has laudably taken the lead in attempting to establish complete and unconditional reciprocity among the States in regard to the recognition and admission of each other's "practitioners" (in New South Wales and Queensland the two branches are legally separate, in the remaining three States they are amalgamated in fact as well as in law). That the objective has not been fully reached is no fault of Victoria. This progressive attitude in regard to reciprocal admission is in marked contrast with the conservatism of the Council of Legal Education in regard to University graduates. Where service under articles is required, most of the States concede a shorter period to graduates of any *recognised* (i.e. reputable) university; not so Victoria, which grants this concession only to law graduates of the University of Melbourne. The result is that law graduates from other universities who decide that they would like to practice in Victoria find themselves in a quandary. If they want to obtain experience in Victoria and to take advantage of the short period of one year's articles obtaining there (a compromise between the needs of the two *de facto* branches of the profession), they must take the fourth year of the Melbourne University law course before they can be admitted to articles. Alternatively, they can serve a longer period of articles in the State in which they graduated, be admitted there, and then seek admission in Victoria under the rules as to reciprocity of admission of *practitioners;* but their knowledge of Victorian variations from the pattern of Australian law is necessarily very limited and may be a serious handicap for some time after admission. It is to be hoped that Victoria will abandon, in relation to law graduates, the parochialism from which it is completely free in regard to the reciprocal admission of practitioners.

This book, in addition to being a valuable *vade mecum* for the Victorian barrister and solicitor, should be carefully studied by every practitioner and graduate who contemplates moving to Victoria in order to continue or commence a professional career there.

F.

Current Legal Problems 1949. Edited by GEORGE W. KEETON and GEORG SCHWARZENBERGER on behalf of the Faculty of Laws, University College, London. (Stevens & Sons Ltd., London. 1949. ix and 282 and (tables and index) 6 pp. £1 1s. stg.)

Current Legal Problems 1950. Edited by GEORGE W. KEETON and GEORG SCHWARZENBERGER on behalf of the Faculty of Laws, University College, London. (Stevens & Sons Ltd., London. 1950. vii and 296 and (tables and index) 9 pp. £1 1s. stg.)

The editors, and the Faculty of Laws which they represent, would be the last to suggest that all current legal problems are included in their annual volumes, or that those which are considered are of equal significance. When time and space are available each year for little more than a dozen lectures it is inevitable that some topics must be omitted entirely and that others may receive more emphasis than they merit. Nevertheless both the practising lawyer and the teacher will find much food for thought in these volumes and will look forward to their regular appearance.

In some matters a partial solution of the problem posed has already been provided by legislation which has been passed in other parts of the British Commonwealth or elsewhere and which might have been quoted in support of the arguments for change. For example, in the 1949 volume Professor G. W. Keeton is properly very critical of the very expensive "or" in *Diplock's Case* which not only deprived several charitable institutions of valuable gifts but probably made a mockery of the testator's intentions. He would therefore ask for "a reduction in the disastrous effects of decisions such as *Re Diplock*. Where an obvious technical slip such as this has been made, I would ask for power for the Court to direct the application of the fund exclusively for charitable purposes." Victoria in 1928 (by the Property Law Act, sec. 131), New Zealand in 1935 (by the Trustee Amendment Act, sec. 2), and New South Wales in 1938 (by the Conveyancing, Trustee, and Probate (Amendment) Act, sec. 3), have all done what Professor Keeton wants. In virtually identical terms these three legislatures have provided for the severability of the charitable and the non-charitable objects; the trust is then to be given effect as if the instrument creating it contained no reference to non-charitable objects. Admittedly, in the opinion of some, even this legislation does not go far enough; it does not save from invalidity a trust instrument which, even in the existing state of uncertainty of the law, the courts could properly find to contain a charitable intent but which specifies a number of objects all of which must be deemed non-charitable.

The same author, in the 1950 volume, comments on the difficulties met by trustees in obtaining a reasonable income when limited to the investments permitted by the Trustee Acts, and points to the

growing practice of settlors to authorise a much wider range of investment. Although this was opposed to the Court's traditional attempts to guarantee the absolute security of capital investment (as if such security *could* be guaranteed in a changing world!), it is now conceded to afford protection to the trustee who acts carefully and in good faith; but it depends entirely on the foresight of the settlor (or his legal adviser) in endowing his trustee with the wider power. What of the settlor who omits to give this wider power but might well have done so had his attention been drawn to its legality? Consideration might well be given here to the practice in several American States (introduced mainly by legislatures, but sometimes by judicial action) of allowing trustees to invest in such securities as would be acquired by prudent men of discretion and intelligence who are seeking a reasonable income for themselves and the preservation of their capital. If a cautious settlor preferred to endow his beneficiaries with a smaller income from the more orthodox investments he could be permitted to deny his trustee the power to purchase "prudent man" securities.

We hope that Professor Keeton will not take it amiss that we have singled out his two articles for particular comment, but it so happens that he has dealt with matters in which we are specially interested. We hope, too, that he and his collaborators will extend the range of their investigations in future so as to increase the interest, already widely felt, in their contributions to the discussion of current legal problems.

R.

The Rent Acts. By R. E. MEGARRY, M.A., LL.B., of Lincoln's Inn, Barrister-at-Law. (Stevens & Sons Ltd., London. Fifth edition, 1950. xlix and 442 and (index) 18 pp., together with a Table of Abbreviations. £1 10s. stg.)

Megarry's *Rent Acts* is already a classic. The humour and elegance, as well as the scholarship, of everything that falls from his pen are becoming increasingly known to those learned (and not so learned) in the law. It can truthfully be said of him, as it was of an older writer, that he touches nothing which he does not adorn—even Snell's Equity, and (yes) even the Rent Acts. A quotation from the Preface to the Fifth Edition of this present work will serve both to illustrate these qualities and to explain why this cannot be a review in the accepted sense:

> "It is not recorded that one of the tasks assigned to Hercules was that of annually rewriting a substantial part of a book on the Rent Acts. But fact is often more brutal than legend, and the combined operations of Parliament and the Courts have made inescapable yet another edition of this book. . . . Recent Acts had to be included and 200 more cases than before, in-

cluding some interesting decisions from New Zealand. Yet notwithstanding the wealth of reported decisions on this subject I must regretfully record that I have yet to find a case of quite the unworldly beauty of the South American proceedings recorded in *The Times* of August 5, 1947. There, a tenant took a flat at a rent of 400 pesos rising to 500 pesos. Shortly before the increase was due to take effect, a rent-freezing law was enacted, whereupon the tenant insisted on honouring his word and paying 500 pesos, while the landlord insisted on obeying the law and accepting only 400 pesos. Both were adamant, and in the ensuing litigation the Court held that no more than 400 pesos must be paid. However, as some consolation to the gallant but unsuccessful tenant the Court accepted his splendid plea that he should be allowed to bear the costs of the proceedings."

Megarry dedicates this work "To the draftsmen of the Acts with awe and affection, and to the County Court Bench with a sympathy as profound as it is respectful."

He also records the following remarks (inter alia) by various exalted members of the judiciary: "the hasty and ill-considered language" of "this chaotic series of Acts," the horrors of which "are prematurely hastening many of the Judges to a grave" (MacKinnon, L.J.); "these difficult and embarrassing Acts" (Lord Sankey); "a byword for confused draftsmanship" (Lord Normand); and Scrutton, L.J., in one case regretted that he could not order the costs to be paid by the draftsmen of the Acts and the members of the Legislature who passed them, and said that he never gave a decision on them with any confidence. and found all cases under them of a most bewildering character.

Similar strictures have been laid by less exalted persons on the corresponding legislation in Western Australia, and it is therefore useless to pretend that anything is to be gained by an attempted comparison of the two sets of Statutes. Indeed, one would have to be a Megarry or a Hercules to attempt such a task. This book will therefore be of little direct service to the Western Australian lawyer; nevertheless the practitioner or the student will find both instruction and entertainment in the observations of the author on such general subjects as "separate dwellings," "shared accommodation," "furnished dwellings," "statutory tenancy" (a long and thorough discussion of this), "suitable alternative accommodation," and so on. Cases are quoted down to November, 1949. It is a book worth reading, and, for a really good library, well worth buying.

R.E.J.

The Law Relating to Stamp, Death, Estate and Gift Duties. By ROBERT C. SMITH, Barrister-at-Law. (The Law Book of Australasia Pty. Ltd.: Sydney, Melbourne and Brisbane. Second edition, 1950. xx and 348 and (index) 62 pp. £2 10s.)

This book, the work of a Sydney barrister, is intended primarily for the use of practitioners in New South Wales. As has been pointed out previously by reviewers in these pages, the practitioner and the student of law in Western Australia are at a considerable disadvantage in that there are few textbooks or works of reference which deal directly with local conditions; so that in his researches the Western Australian lawyer, being thrown for guidance on works based on English law or the law of other States, must often embark on an arduous comparative study before he can safely make use of the material at hand. This of course applies particularly when the subject concerned is mainly regulated by statute, and to this category the work under review belongs.

Nevertheless, this book deserves the serious attention of every practising lawyer. It falls naturally (from a Western Australian point of view) into two parts, of which the first (again from a Western Australian point of view) will be of less value than the second. The first 245 pages consist of the text, with annotations, of the New South Wales Stamp Duties Act 1920-1949 and two ancillary Acts, with the Schedules and Regulations printed in full; the next 103 pages comprise the (Commonwealth) Estate Duty Assessment Act 1914-1947 and the Estate Duty Regulations, and the Gift Duty Assessment Act 1941-1947 and the Gift Duty Regulations, all fully annotated.

Naturally enough, the author's main attention has been concentrated on the Stamp Duties Act, and here the annotations are both extensive and indicative of wide research. There are substantial differences between the provisions of the New South Wales and Western Australian Acts; but the Acts are nevertheless basically similar, and no practitioner could fail to gain considerable assistance from Mr. Smith's notes to any of the main provisions of the New South Wales Act. The section on conveyances, for instance, is particularly helpful. The annotations to the Federal Acts contained in the latter section of the book are not quite so extensive, but they are adequate, and in any case it is worth while to have these Acts, complete with their Regulations and Schedules (including Forms and a very handy Table of Death Duties), so conveniently collated in one place.

Much praise must go to the author for the thoroughness of his compilation, the care of his arrangement, and the breadth and detail of the research which quite evidently have gone into the making of this work. It is thoroughly up to date (cases are quoted down to late 1949) and, so far as applicable to Western Australian conditions, we believe to be completely reliable. There is an excellent and very full index.

R.E.J.

Law and the Modern Mind. By JEROME FRANK. (Stevens & Sons Ltd., London. First English Edition. 1949. xxxi and 362 and (index) 6 pp. £1 5s. stg.)

In this English edition, the text of the first edition of 1930 remains unchanged. All that is new is a preface which Frank wrote for the sixth printing in the United States. Since 1930 Frank has contributed a number of articles to the law journals;[1] the present reviewer believes that from those articles it is evident that Frank has changed his platform. It is surprising then to find in this new preface that Frank is attempting to show that what the reviewer would call the new platform amounts to what the author was really saying all along, and especially in *Law and the Modern Mind.* But the reviewer believes that Frank's new platform is far too important to be lost in a debate as to whether or not he has been consistent with himself. It can only be misunderstood if the old platform is offered as expressing the same views.

Within the class of legal realists, or "constructive skeptics," Frank himself distinguishes (i) rule skeptics and (ii) fact skeptics. Each is concerned to show that courts are rather poker-machines than slot-machines, but for different reasons. The rule skeptics seek to show that the law is not a body of precise and certain rules, and that therefore it is but rarely that the law dictates court decisions. The fact skeptics, on the other hand, are not very concerned about the precision and certainty of legal rules. They concentrate attention on trial courts and seek to show that these courts have such a wide discretion in fact-finding, that however precise and certain the rules may be they cannot dictate decisions.

Frank in 1930 was essentially a rule skeptic. Frank in 1949 is essentially a fact skeptic. Moreover, while in 1930 he gloried in his skepticism, he is now thoroughly unhappy about it.

In 1930 he wrote—"When human relationships are transforming daily, legal relationships cannot be expressed in enduring form. The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy. Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions; although changes cannot be made lightly, yet law must be more or less impermanent, experimental and therefore not nicely calculable. Much of the uncertainty of law is not an unfortunate accident; it is of immense social value."[2] He then went on to say that not only was this uncertainty of legal rule desirable but that we should all be told about it so that we can all grow up. So far as we are ignorant of it, we are victims of "the basic legal myth that law is, or can be

[1] They are listed on pp. xxvii and xxviii of the new preface.
[2] *Law and the Modern Mind,* 6-7.

made, unwavering, fixed and settled," a myth partly to be explained by the survival in adult life of "father-dependence."

The new platform is most evident in a book review published in *Law and Contemporary Problems* entitled *Cardozo and the Upper Court Myth.*[3] Frank there takes the rule skeptics to task for having confined themselves to "upper-court ways" and omitted the study of "juriesprudence." His special message is—"No matter how excellent the substantive legal rules and the social policies they embody, specific decisions will go astray, absent competent fact-finding."[4] And in his passion for fact skepticism, that rule skepticism which is so evident in *Law and the Modern Mind* seems largely to have been forgotten. Thus, so long as fact-finding is not involved, Frank would now agree with Cardozo that "nine-tenths, perhaps more, of the cases that come before a Court are predetermined—predetermined in the sense that they are predestined—their fate preestablished by inevitable laws that follow them from birth to death."[5] Yet in the opening pages of *Law and the Modern Mind* Frank wrote —"The law always has been, is now, and will ever continue to be, largely vague and variable."[6] Even more significant is that Frank is now thoroughly unhappy that he must be skeptical. In 1930 he gloried in rule skepticism. Now he would rather that there were no cause for his fact skepticism. He says—"Avoidable court-room mistakes about the facts ought to distress all men who believe in justice; and such mistakes—due not to the rules but to needless deficiencies in trial-court fact-finding—cause needless tragedies every day."[7]

It is then a different platform which Frank now adopts from that in *Law and the Modern Mind* and it would have been better if there had been a confession of it in the new preface. The denial of any change must lead to confusion and a misunderstanding of Frank's latest mission. As a fact skeptic he is now a campaigner for reform in court-house ways, committed to the improving of the technique of fact finding and thus to the lessening of the scope of his skepticism. As a rule skeptic, he was concerned to show the measure of rule-certainty but not to suggest that it was in most cases anything but desirable. *Law and the Modern Mind* is an important contribution to the study of the actual measure of rule-certainty and of the measure that is desirable—the study with which Cardozo was much concerned in *The Nature of the Judicial Process* and *The Growth of the Law,* and Pound in *An Introduction to the Philosophy of Law* and *Interpretation of Legal History.*

One might regret that having seen fit to give an exposition of fact skepticism in the new preface, Frank did not tell us more of what we are to do by way of removing the causes of his skepticism.

[3] 13 Law and Contemporary Problems (1948), 369.
[4] *Ibid.,* at 369.
[5] Cardozo, *The Growth of the Law,* 60.
[6] At p. 6.
[7] *Preface,* xxv.

He says—"If our judicial system is to move as near as is humanly practicable to adequacy in dispensing justice, I think we must, at least, overhaul our methods of trial, and provide special training for future trial judges."[8] It is true that he has given a lot of advice elsewhere about the education of lawyers but what should be done to improve the methods of trial does not appear. He is apparently content to leave this to others, and there are hopeful signs of activity in such books as Vanderbilt's *Men and Measures in the Law.* The reviewer earnestly believes that some of the greatest problems facing the lawyer at the present moment are in the field of adjective law. Frank quotes Judge Learned Hand—"I must say that as a litigant I should dread a law suit beyond almost anything else short of sickness and death."[9] Surely there is no cause for complacency. We accord the greatest respect to our judiciary, and yet lawyers, if they are worth their salt, advise clients to avoid our courts as the plague. Frank's plea for improvement in the techniques of fact-finding deals with one aspect, no doubt one of the most important aspects, of the thoroughgoing reform of the administration of justice that is wanting. We are told that justice requires opportunities for successive appeals. But the litigant who is dragged painfully through the hierarchy of courts to the Privy Council may have some doubts about it. Even though successful in the Privy Council, his solicitor and client costs will far exceed those between party and party which he is adjudged to be entitled to recover, if he can, from the defeated.

Withal the reviewer is an ardent admirer of Frank. The words that others have used of his writing, "provocative," "challenging," "keen," "cogent," are echoed enthusiastically. Frank is the enemy of all that respectable yet trite and stuffy nonsense which is so often trotted out as legal wisdom. He is an inspiration to any lawyer who is prepared to take up his challenge and whose soul is not therefore irrevocably committed to the uncritical worship of accepted ideas and institutions.

R.W.P.

[8] *Preface,* xxv.
[9] *Ibid.*

PUBLICATIONS RECEIVED

(Inclusion in this list neither guarantees nor precludes subsequent review.)

Death Duties. By K. McFARLANE. (This is the Law Series: Stevens & Sons Ltd., London. Second edition, 1950. viii and 106 and (index) 4 pp. 4s. stg.)

Double Taxation Conventions: Supplement to Vol. I. By F. E. KOCH. (Stevens & Sons Ltd., London. 1950. xv and 180 and (index) 6 pp. £1 5s. stg.)

Law and Custom of the Sea. By H. A. SMITH. (Stevens & Sons Ltd., London. Second edition, 1950. xii and 212 and (index) 4 pp. 12s. 6d. stg.)

Mercantile Law in Australia. By CLYDE ROGERS and L. C. VOUMARD. (Butterworth & Co. (Australia) Ltd., Sydney. Second edition, 1950. xvi and 460 and (index) 11 pp.)

Rating Valuation Practice. By PHILIP R. BEAN and ARTHUR LOCKWOOD. (Stevens & Sons Ltd., London. Second edition, 1950. xvi and 334 and (index) 9 pp. £1 10s. stg.)

CORRESPONDENCE

Editorial Committee,
Annual Law Review.

May I draw your attention to a curious error appearing in the note reviewing the Commonwealth Electoral Act 1948 in the Annual Law Review (No. 2)? That Act, it will be remembered, introduced proportional representation in Senate elections.

The error is in the following paragraph on page 325:—

> "One of the criticisms levelled at proportional representation is that it cannot, without great trouble and expense, fill a casual vacancy or provide for a by-election. The orthodox answer given by supporters of proportional representation is to be found in sub-section (2), which provides that in the event of a casual vacancy the remaining votes cast at the previous general election are to be counted afresh and the continuing candidate who, after further transfers have been carried out at this subsequent scrutiny, first receives the necessary quota is to be declared elected to the casual vacancy. The manner of effecting these transfers is that prescribed by the amended section 135."

The sub-section (2) referred to is sub-section (2) of section 9 of the *Senate Elections Act 1903-1922,* as enacted by the *Common-*

wealth Electoral Act 1948. According to the paragraph quoted, this sub-section provides that where a casual vacancy occurs in the Senate, it is filled by continuing the counting at the *previous* general election until a continuing candidate obtains the quota. In reality the sub-section relates only to a "long" casual vacancy—not to all vacancies—and prescribes the method of filling the vacancy at the *next* election held after the occurrence of the vacancy, as required by s. 15 of the Constitution. That section provides two steps in the filling of a casual vacancy. The first step is the filling of the vacancy by the Houses of Parliament of the State (or, if they are not in session, by the Governor of the State). The person chosen holds office until the next general election of members of the House of Representatives or the next Senate election. The second step is the filling of the vacancy at that election, the person elected holding office until the expiration of the term of the Senator whose place became vacant. Any attempt to fill a casual vacancy by continuing the count at the previous election would be inconsistent with section and invalid.

The method of filling a "short" casual vacancy, as provided by sub-section (1) of section 9, remains unaltered.

The *Senate Elections Act*, therefore, does not, and constitutionally cannot, provide any answer to the problem of filling a casual vacancy in the Senate under the system of proportional representation.

There is also a small error on page 338. The provision that orders of the Australian Broadcasting Control Board are not to be deemed Statutory Rules does not mean that they are not to be published in the annual volume of Statutory Rules, as stated in footnote 49. What it does mean is that the provisions of the Rules Publication Act for an abbreviated notification of the orders in the Gazette is not applicable; consequently the orders must be published in full in the Gazette, and will not be published in the numbered series of Statutory Rules. They may, however, if of sufficient general interest, be published in Appendix A of the annual volume of Statutory Rules.

In mentioning these errors, I do not wish to disparage the undoubted excellence of the Review. I thought it desirable, however, to point out the error relating to Senate elections, lest it should puzzle or mislead some student of constitutional law.

Yours truly,

J. Q. EWENS,

Parliamentary Draftsman.