REVIEWS AND NOTICES

The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America. By JOHN HENRY MERRYMAN. Stanford, California: Stanford University Press; London: Oxford University Press. 1969. ix and 165 pp. and (index) 4 pp. Board 63s.; paper cover 22s. net.]

Essays on the Civil Law of Obligations. Edited by JOSEPH DAINOW. [Baton Rouge: Louisiana State University Press. 1969. xii and 313 pp. (no index). U.S. $10.00.]

HERE are two books by North American scholars about the " civil law." The second grows out of scholarly interest in the civil law enclaves of Louisiana and Quebec and directs our vision particularly towards the mother system, France. The first gives a general account of civil law methods and tradition for the ordinary reader, the amateur of comparative law.

" Civil law "; what pitfalls lurk behind the use of this term. Merryman skirts them by setting out to give an account, not of German or French law or of any particular system, but of the " civil law tradition " which is in some degree common to Western Europe and Latin America. Indeed, he disclaims any special concentration on France and Germany, which he treats as atypical civil law systems, and makes good use of examples drawn from countries as diverse as Chile and Italy, on which he is an expert (see Cappelletti, Merryman and Perillo, The Italian Legal System).

Is the enterprise of distilling from all these countries a common tradition a viable one? If one transposed the question to the common law context, the answer would, I suppose, be " yes and no." Yes, because there are strong historical and methodological links between the common law jurisdictions; no, because there is a sharp division between the fifty or so United States jurisdictions and the rest, together with some important constitutional and structural divergences among the latter. *A priori* it might seem that the same was to be said of the civil law systems. A large group, including most of Latin America, reflect the institutions of France, the revolutionary tradition and the codes, while a smaller but important group follow the systematising, scientific and abstract tradition of Germany, or did so until the mother system changed its ways. Although Merryman's excellent book must count as weighted somewhat towards French rather than German civilisation, it convinces me that a sharp division of systems into two groups, such as would seem appropriate for the common law, would be misleadingly abrupt

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Merryman guides us carefully through the topics which will be familiar to "professionals," the historical antecedents drawn from Roman, canon and commercial law, the French revolution and the reaction against it, positivism and the theory of legal sources, the codes and their interpretation. A repeated theme, which it would be difficult to overstate, is the inferior social, financial and intellectual status of judges. Though there have been exceptions in the past, and many more are now emerging, especially with the trend towards constitutional courts with powers of legislative review, much in the history of these systems reduces to mistrust of the judge, not least the exaltation of the scholar.

Two chapters, somewhat out of the ordinary run, but perceptive and in a sense central to the analysis of the civil law tradition, deal with civil and criminal procedure. Merryman characterizes civil procedure in the civil law tradition as unconcentrated, mediate and written. There is no such thing as a trial; a typical proceeding is split up into several stages, for example a pleading stage, a stage for taking evidence and a stage for reaching a decision. By contrast the common law is concentrated, and this carries the corollary that the judge or official who investigates the facts also decides the case (*i.e.*, the system is "immediate" rather than "mediate") and that it is possible for the proceedings to be largely oral. All the characteristic features of the civil law in this area are under attack; there is now an impulse towards greater orality, immediacy and concentration. But in common law countries, at least in England, it is the reverse. Here the critics would like to dispense with trial by battle and ambush, to split the proceedings so that fact-finding could be a continuous process, to decide as many cases as possible on the papers. Where these trends will lead is difficult to foresee. It is at least one of the merits of contemporary comparative legal studies that they have been weaned from the point of view that the participants are engaged in a legal World Cup. Civil procedure is an area in which it may prove that there is much to be learned from and much to be avoided in the civil law tradition, provided a careful discrimination is made of different types of proceeding.

Merryman's book is an admirable example of the newer trends in comparative studies. He modestly says that his professional colleagues, in foreign and comparative law, are likely to find the work too elementary and too general to engage their interest. That is over modest. Generality need not be and in this case is not superficiality.

The book edited by Dainow on the Civil Law of Obligations grew out of a symposium at the Louisiana State University Law School under the combined auspices of the Bailey Lecture Series

and the recently founded Institute of Civil Law Studies. The lectures given by the four main speakers are printed together with the discussion which followed, and the book has been filled out by a second part in which scholars have been invited to write on some of the nodal topics in the law of obligations not covered in the main lectures. Despite the distinction of the lecturers (Rheinstein, Farnsworth, Crépeau and Landry) and of the other writers (Baudouin, Hood, Jackson, Saúl Litvinoff, Sachse, Sarpy and Yiannopoulos) the book did not produce on me an impression of great coherence, and as there is no index or table of cases it will be difficult to use. But it naturally contains much of interest.

Rheinstein deals with "Problems and Challenges of Contemporary Civil Law of Obligations." Should there be or continue to be a separate commercial code? Should contract law be formally separated from the law about transfers of property? Is the notion of cause to be consigned to the scrapheap? Farnsworth in an interesting essay analyses the development of the law of obligations in Senegal, Madagascar and Ethiopia. No comfort for the devotees of customary law here. All three states have adopted or are adopting western style codes. Yet none has been borrowed from an existing code in the manner of Turkey or Japan, not even from David's Ethiopian code, which he hoped other African states might look to. Nationalism plays a part here, but also the trend away from separate commercial codes. One result is a movement towards diversity. Thus the French requirement of a signed or notarial writing for contracts for NF 50 or above has been altered in Senegal so that an illiterate party may be assisted by two literate witnesses, whereas the illiterate Malagasy must register his contract with a local official.

Crépeau's contribution is entitled "Civil responsibility: a contribution towards a rediscovery of contractual liability." He traces the trend in France and Quebec towards reclassifying certain types of claim, for example, those of passengers injured in the course of transport and of patients wrongly treated by their doctors, as contractual rather than delictual. The story is well told, but it is difficult to endorse the rule of *non cumul*—that no action in tort will lie when in principle a contractual action could be brought. Surely Mazeaud and Tunc are right to argue (Responsabilité Civile no. 104) that the differences in the rules governing contractual and delictual actions have in most cases no *raison d'être*, once it is accepted that a valid contract can derogate from liability in tort. Can the rule of *non cumul* ever operate except to do injustice?

Landry's talk on the revocatory action in the Quebec civil code deals with the *action Paulienne* and contains detailed suggestions for reform. Of the special articles Baudouin's deals with imprevision and suggests that judicial revision of contracts in the light of unforeseen circumstances seems to have worked out very well indeed in Germany and Switzerland. This would require to be demonstrated in detail, and the cost of the uncertainty thereby generated to be

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assessed. Hood handles the difficult topic of subrogation in its Louisiana context. In discussing specific performance in Louisiana, past and future, Jackson rightly lays the emphasis on the powers of the court in case the party ordered to perform defaults. Since the Louisiana Code of Civil Procedure of 1960 the courts may judge a disobedient party in contempt of an order to do or refrain from doing an act other than the delivery of property. This places Louisiana squarely in the common law camp so far as the enforcement of judgments is concerned. It is difficult to summarise Litvinoff's scholarly treatment of " ' Error ' in the civil law ": perhaps the strongest impression is of a variety of paths leading to much the same destination. Sachse in his article on unconscionable contracts contrasts the meagre French provisions for protecting inadequate bargainers with the broad sweep of section 138 BGB and the still broader one of article 2–302 UCC. Sarpy traces the grant of injunctive relief in Louisiana back to 1825. Yiannopoulos investigates a peculiarity of Lousiana, the real obligation (Civil Code, article 1997) by virtue of which, for example, the purchaser of land can enforce a contract for improvements made with his predecessor in title and concludes that they would be better described as " duties incidental to, and correlative of real rights." This is clumsy enough to suggest that the phrase " real obligation " may have some future in civil law systems.

A. M. Honoré.

The Law of Property in the Later Roman Republic. By Alan Watson. [London: Oxford University Press. 1968. xii and 232 and (indices) 11 pp. 55s. net.]

This is the third volume of Professor Watson's exhaustive study of the law of the last two centuries of the Roman Republic and follows the pattern of the earlier volumes devoted to Obligations (1965) and Persons (1967). All texts offering direct evidence for the law of this period are set out and discussed in detail, but as far as possible the author avoids making inferences from texts deriving from an earlier or later period. The work is divided into eleven chapters, each devoted to a particular topic, such as acquisition of ownership, *possessio*, *damnum infectum*, servitudes, the interdict *quod vi aut clam*. Although each topic receives a separate essay and there is no attempt to expound the late Republican law of property systematically, there does seem to be more coherence and structure in this volume than in its predecessors. This may be because his readers have become familiar with Professor Watson's method (and the rigorous standards of textual analysis displayed in the exposition of Obligations and Persons are fully maintained here), but it may also be that already by the late Republic the law of property had acquired a more rational structure