THE LAW OF EXPROPRIATION

By Hon. G. S. Challies. Montreal: Wilson & Lafleur, Limited. Second edition, 1962. Pp. xiv, 630.

This is the second edition of the book which was first published in 1954. In the preface to the first edition the author had written:

> Should the book prove useful in practice, I shall be satisfied.

There can be no question of its usefulness; to have had the principles of Canadian expropriation law stated and classified for the first time has facilitated the examination of any expropriation problem. (The only part of the book, the usefulness of which may be doubted, is the collection of statutes which forms the 359 page Appendix "A", and which seems to add little except cost.) The legal profession is indebted to Mr. Justice Challies for his pioneering work, and this second edition will find a well-deserved place in every law library.

The contribution the book has made to the development of expropriation law, however, it is the licence, if not the duty, of a reviewer to assess. And anyone who has followed that development might be forgiven some feeling of disappointment that in the second edition as in the first the author's contribution to it has been less than it could have been. The work has remained essentially a compilation of case law, and, although it is an excellent one and not to be deprecated as such, it must be said that much more than this is sorely needed. Lest this statement may seem to some an unfair criticism, regard may be had to the state of Canadian expropriation law.

Now, as in 1954 when the first edition was published, several areas of expropriation law are in a state of flux. In these areas of uncertainty the critical analysis of an expert of the author's calibre would be of great value in influencing future development. On only one problem, however, has the author provided such a thorough analysis. In the first edition, he wrote an extensive and well-reasoned argument (Chapter XV) in favor of the granting, as of right, of an indemnity for forcible dispossession. His viewpoint did not find acceptance with the courts, however, and the decisions of the Supreme Court of Canada in *Drew* v. *Queen*,[1] and in contemporaneous cases appear to have settled the matter. In this circumstance, one would have hoped that the author would turn his undoubted ability to the critical and constructive analysis of the many important problems which remained. But, alas, this was not to be.

One important unresolved problem is the "value to the owner" doctrine. When the first edition was published this doctrine had been firmly established by the Supreme Court, but its meaning in practice

1. (1961) 29 D.L.R. 114.

remained a puzzle. Many lawyers had a vague but disturbing feeling that the direction expropriation law was taking would ultimately prejudice all public works by artificially inflating the costs of land acquisition. For although lip service was paid to the principle that "while the owner is entitled to full compensation, he is not entitled to more than that, and cannot be enriched thereby", the concept of "value to the owner" seemed incontrovertibly designed to permit just such enrichment. The early reaction of government lawyers to the "value to the owner" principle was that the legislatures must be asked to do what the courts refused: to define value in terms that admitted of no speculation or uncertainty. Whether this would best be accomplished by equating "value to the owner" with market value, or by enumerating those things for which compensation should be allowed, was widely discussed. The movements favoring these solutions failed to gain much momentum, however. Discussion has continued down to today and, ten years having elapsed, the situation is substantially unchanged, save that there is, perhaps, less hope than before that a solution is possible.

If one feels that the approach through statutory definition has little practical merit (and the experience in the United States would seem to indicate this) it must be noted that other approaches still hold promise of solution. One of these is the establishment of permanent arbitration tribunals, where these are lacking, staffed by experienced people; because part of the problem of unreasonable awards lies with the arbitrators, who, through lack of experience and lack of a judicial attitude towards the reception and assessment of the evidence upon which compensation is determined, can make legal principles worthless. Another, now being considered in one of the United States, is the enunciation of more restricted rules for the admissibility of "expert" evidence, which unfortunately cannot be controlled through the perjury laws, particularly with regard to potential or prospective value, special adaptability and like matters which necessarily admit of much speculation and encourage dishonesty in a witness. A third is the time-honored one of the gradual development and refinement of the present body of law, for it is not so much the trouble that there is anything wrong with the law as that it often is improperly applied, particularly at the arbitration or trial level.

It is this reviewer's opinion that the solution lies in combining all three approaches: the appointment of permanent competent arbitrators, the enunciation of stricter rules for the reception of opinion evidence, and greater understanding of the proper application of law to a given case. All of these must come together. The first two will require legislative action, but the third is the responsibility of the courts and of the legal profession itself. And it is with regard to this professional responsibility that this reviewer feels let down by the author, who offers little, if any, constructive or critical analysis of the principles he reports.

And a similar criticism may be made about the author's treatment of most controversial issues. As an example, regard may be had to the

situation where an owner claims both higher land value based on a different use, and disturbance of the actual use. In *Standard Fuel Co.* v. *Toronto Terminals Railway*,[2] the Judicial Committee of the Privy Council laid down the sensible rule that the owner could not have both. In *Re Coquitlam S.D. No. 43 Expropriation*[3] the court allowed this very thing to happen, by considering potential redevelopment as postponed five years—a dangerous precedent. In his section dealing with this matter[4] the author has cited neither of these cases; nor has he dealt with the possible inconsistency inherent in the process. Further illustrations could be given, especially with respect to compensation for leasehold interests. The point here being advanced is that the cataloging of legal principles alone is not sufficient. They are tools, it is true, but a manual for their proper use and maintenance should be included for the safety of the unwary.

At the same time, however, the author has continued his argument on the indemnity for forcible taking, against the decision of the Supreme Court, and has found it necessary to devote twenty pages to it—surely a disproportionate number. His suggestion that:

> The owner is entitled to full compensation, and full compensation is more likely to have been achieved if the allowance for forcible taking is made,[5]

is perhaps the understatement of the year. It is not the fear that the individual is suffering under the present law that is troubling governments today; rather it is the certainty that the taxpayer is too often being imposed upon by trumped-up claims based on hazy legal principles. The author is entitled to his opinion of course, and more such public expression is desirable; but one might have felt inclined to read it with more appreciation had the other legal problems been treated by the author with equal concern and vigor.

It is the present reviewer's opinion that the book leaves ample room for new treatment of the subject-matter. But perhaps the foregoing is hypercritical of what is essentially a good effort. The book is useful and will be widely used, and our debt to its author will remain.

R. A. L. NUGENT*

SALE OF GOODS

By P. S. Atiyah. London: Sir Isaac Pitman & Sons Ltd. Second edition, 1963. Pp. 252. $6.20.

When the first edition of this book appeared in 1957, the author expressed the object of stating "within a moderate compass the modern English

2. [1935] 3 D.L.R. 657.
3. (1960) 32 W.W.R. 513.
4. P. 116.
5. P. 225.

*Deputy City Solicitor, City of Winnipeg.