Reviews and Notices

The Doctrine of Unjustified Enrichment in the Law of the Province of Quebec. By THE HONOURABLE GEORGE S. CHALLIES, M.A., M.C.L., Justice of the Superior Court of Quebec. McGill Legal Studies No. 2. Second edition. Montreal: Wilson & Lafleur, Limited. 1952. Pp. xi, 216. ($7.50)

This is a second edition of a study originally prepared as a thesis at the Law Faculty of McGill University. The subject of unjustified enrichment has in recent years received increasing attention, especially in the countries which do not incorporate it specifically in their civil codes. This important study gives a full survey of both French and Quebec law. In both cases the development of the principle of unjustified enrichment through the actio de in rem verso has been entirely the work of *jurisprudence*, of the courts rather than the legislator. To a comparative lawyer it is particularly interesting to discover that the principles which have gradually emerged in the decisions of the French and Quebec courts are almost identical with those laid down in modern civil codes such as those of Germany and Switzerland.

The survey is clear, concise and amply documented by Quebec and French decisions. Unfortunately, there is not yet any decision of the Supreme Court of Canada. After a discussion of the various theories put forward to explain the underlying principle of the actio de in rem verso, the various conditions of the action are surveyed: enrichment; impoverishment; causal connection; absence of legal justification, and finally the alleged subsidiary character of the remedy. A chapter on the procedural aspects concludes the thesis proper. It is followed by a short survey of developments in nine other countries. Among the conclusions which emerge is that there are strict limits to the doctrine. It is no panacea for a cure of social unjustices: "unjust" means in effect "absence of legal title or cause". Another conclusion, emerging from a particularly thorough discussion in the book, is that the controversy whether the action is subsidiary or not is rather artificial. There is no reason why a plaintiff should not rely on this action rather than a parallel one in contract or tort, and the common practice is to plead the alternatives. But the action must not be used to circumvent an imperative legal rule.

This book is a very valuable addition not only to the science of the civil law of Quebec, but also to the literature of comparative law. It is not, however, strictly comparative. Other systems are not used to illustrate the French or Quebec position: only a cursory survey is appended. In a future edition this section might well be improved. It is difficult, for example, to agree with the learned author's claim that "reference has been made to substantially all relevant jurisprudence and doctrines in England": for example, the important case of *re Diplock* is not mentioned. Nor, with all respect, does the

learned author appear to have understood the function of *causa* in the German legal system. A full comparative treatment would obviously require a much larger volume. The reference to bibliographies, cases and writings about the foreign legal systems referred to is however a useful aid to further comparative study. This reviewer cannot forbear to express the hope that the author may, in his next edition, replace the barbarous terms "enrichee" and "impoverishee" by the old-fashioned and far more grammatical terms "enriched" and "impoverished".

W. FRIEDMANN*

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The Technique of Advocacy. By JOHN H. MUNKMAN. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1951. Pp. xiv, 173. ($3.75 net)

The author of any treatise on the art of advocacy faces at the outset one formidable difficulty, at all events when he deals with forensic advocacy, for we all have observed how closely interwoven are the personality of the advocate and his methods of advocacy. We have all seen many a competent advocate adopting a method and style which, coupled with his personality, are persuasive and effective but which, if employed by another equally competent, would be wholly ineffective. The cases of Carson, Isaacs and F. E. Smith, to mention only three who are no longer with us, illustrate this close interdependence of personality and method. The task of adopting the method best suited to the personality of any particular advocate is one which each advocate must work out for himself, and in that field text books can be of little assistance.

There are, however, basic principles which underlie all competent advocacy, and which every successful advocate should have at his command, and this reviewer has seen them nowhere stated with greater clarity and conciseness than Mr. Munkman has succeeded in doing in his comparatively small but extremely useful and interesting book. The author, in his modest preface, gives as the second of his two excuses for writing it that "this is exactly the sort of book which I should have welcomed myself when I was a law student and therefore it may appeal to others". In that object he has more than succeeded. Not only will students derive benefits from its perusal and close study, but the most successful lawyer in the field of advocacy cannot but derive both pleasure and profit from it.

Advocacy, the art of persuasion, is not of course solely within the province of lawyers. Mr. Munkman's book, however, deals with the specialized meaning of the word as used by lawyers, namely, the art of conducting cases in court. He has certainly compressed within the confines of its pages a really vast amount of helpful, interesting and suggestive material. He wastes no words, and as a result it is impossible to give anything like a summary of it. The book itself must be read.

Mr. Munkman deals with the technique required of the lawyer at all stages of his preparation for and conduct of a trial. This includes, of course, the examination, cross-examination and re-examination of witnesses, and the preparation and delivery of arguments. It is not unnatural that the space

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devoted to the technique of cross-examination (70 out of 173 pages) is much greater than that given to any other topic. The author's exposition of the principles underlying successful examinations-in-chief and re-examinations is helpful and discerning, but it is in the three chapters on the technique of cross-examination that he develops an approach which, while based on well-known and sound principles, is yet novel and refreshing. The techniques of probing, confrontation, insinuation (gentle and firm) and undermining are explained fully, and illustrated by quotations from the transcript of evidence in actual trials, most of them recent. The author does not make the mistake of setting out long quotations from evidence as is the habit of some authors in this field. He quotes sparingly and only in sufficient detail to illustrate the use of the particular technique with which he is dealing. The technique of examination-in-chief, the difficulties of which are sometimes under-estimated, is admirably dealt with.

Mr. Munkman's advice to the advocate, repeated throughout the book, is that he ought at least to make his case clear to the adjudicating tribunal, so that there is no possibility of it being misunderstood. The tribunal may not agree with the submissions of the advocate, but the advocate should endeavour to make sure that disagreement does not result from lack of understanding of the case. The use of clear language, of short questions that can be easily understood, and thorough preparation are enjoined upon the practising advocate.

Many other wise and useful hints are given in the book. The ethics of advocacy, particularly as applied to cross-examination, are dealt with, briefly it is true, but none the less with soundness and clarity.

The author has made one or two mistakes of fact. For example, at page 107 he states that Sir Norman Birkett's famous question "What is the co-efficient of the expansion of brass?" was the only question put by Sir Norman to the discomfitted expert to whom it was addressed. The record shows that, although it was the first question, it was not the only one, and was followed by a fairly lengthy cross-examination.

But this is really a small matter and certainly not one to detract from the uniform excellence of Mr. Munkman's work. The author himself is quick to acknowledge that skill in advocacy cannot be learned from text books, but must be acquired by experience. That is true, but there is no doubt that much can be learned both by the student and the experienced practitioner from a study of a scientific approach to the subject such as this book is. For his contribution to the subject, modest as he claims it to be, Mr. Munkman deserves the thanks of the whole profession of forensic advocates.

E. C. LESLIE*

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It's Libel or Contempt If You Print It. By THE HON. CHIEF JUDGE LEON R. YANKWICH of the United States District Court, Los Angeles. Los Angeles: Parker & Company. 1950. Pp. xxi, 612. ($6.75)

Chief Judge Yankwich has spent seventeen crowded years presiding in a very busy court, yet he continues to be one of the most prolific and interesting of

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law writers. A digest of one of his numerous law review articles appeared in the Canadian Bar Review for February 1952 at page 209. *The Nature of Our Freedom* (1951) and this volume on libel are probably the most widely known of his books.

California adopted English law as of April 13th, 1850, and British Columbia, as of November 19th, 1858, with somewhat similar limitations, so it is only to be expected that almost all the doctrines and principles in *It's Libel or Contempt If You Print It* are familiar. Of course, that does not mean that the book is a precision instrument for the Canadian law office, though it might be of suggestive help there in some doubtful case not dealt with in our books. But to the Canadian practitioner or law student, interested in a generalized view of the subjects as treated in another Western jurisdiction, the volume will have much appeal.

The 612 pages and 15 chapters are divided into two parts, part I being devoted to "The Newspaper and the Law of Libel". After discussing what is libel in chapter 1, the author gives a digest of 110 cases in the next chapter. It is not, however, an ordinary digest, for the cases, in five groups, are set up in a crisp style that makes them attractive and leaves a clear impression of what is libelous in California. Although in this chapter there is not much direct reference to English cases, the observation of Best L.C.J. on a libel respecting an illegal transaction was quoted (from 3 Bing. 440) and followed in a California case.

In other chapters, on "Certainty in the Law of Libel", "Words Charging Lawful Acts", "Libels Against a Corporation", "Defences in the Law of Libel and Criminal Libel", English references and quotations are fairly numerous. About 130 pages contain references to English cases; 70 pages have excerpts from English decisions, and there are some 130 references to the latest English textbooks.

Chapter VI on "Answering Libel with Libel" is almost a review of the English leading cases, the author remarking that the principle is finding slow but gradual recognition in American law, an Oregon case in 1933 going as far as any in adopting the view of English courts. He makes some interesting observations on *Adam* v. *Ward*, [1917] A.C. 309, on qualified privilege. It will be recalled that in the recent libel action by Premier Douglas of Saskatchewan, *Douglas* v. *Tucker*, [1952] S.C.R. 275, this case was relied on, without success however, since the Supreme Court considered that the repudiation went entirely beyond what was necessary to the refutation of the charge.

In part II, on "Freedom of the Press and Its Limitations and Responsibilities", the reader can feel the strong sense of social justice which pervades the same author's *The Nature of Our Freedom*. This section opens with Thomas Erskine's defence of Paine when charged with seditious libel for publishing *The Rights of Man*. The succeeding pages furnish a rather unusual examination of the subject, historically and to date.

All may not agree with Judge Yankwich, however, where he reviews constructive contempt: he advocates a narrower view of the court's power and regrets that Mr. Justice Holmes sanctioned the doctrine that truth is no defence to constructive contempt by one who is not an officer of the court. The Supreme Court of California (the court of last resort there) declared a section of the State Code of Civil Procedure to be an unconstitutional limitation upon the "inherent" power of the court to punish contempt. Judge Yankwich does not approve the decision from the viewpoint of "social ad-

vantage". On the lack of historical foundation for the theory of the "inherent" power of constructive contempt he refers to Sir John Law.

The large clear type, fine paper, handsome binding and a very full index and collection of notes and authorities make this volume the most attractive modern one on the subject known to me. An article in the Canadian Bar Review on defamation by radio is cited and so is an Ontario case. A later edition might include other Canadian cases and statute law, for example, on actionable libel that lurks in the headlines. The Manitoba case of *Tedlie* v. *Southam Company Ltd. et al. (No. 3)*, [1950] 2 W.W.R. 633, on a libellous newspaper report of an inquiry by the Board of Transport Commissioners, would add considerably to the interest of the discussion, and so would *Mitchell* v. *The Victoria Daily Times (No. 3)* (1943), 60 B.C.R. 39, which concerned newspaper comment on the plaintiff's arrest on a charge of murder.

H. R. HARRISON*

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Retrospect. The Memoirs of the RT. HON. VISCOUNT SIMON, G.C.S.I., G.C.V.O. London: Hutchinson. Toronto: The Ryerson Press. 1952. Pp. 327. ($6.00)

Viscount Simon's memoirs are the reminiscences of his public life; they contain little about his career at the bar. He regarded the bar "as offering a career which may enable a man without private fortune to enter public life and do his best there", which is an interesting confession by a great lawyer.

In 1910 John Simon, K.C., was appointed Solicitor-General. "If the choice had been mine", he says, "I should not have wished to get a legal post. For to me the main attraction of the profession was that it might provide the means for pursuing politics in the broader sense." In 1915 he refused the Woolsack and became Home Secretary instead, because he felt that to become Lord Chancellor at forty-two would mean "a removal at too early an age from the centre of parliamentary life to a bourne from which no politician returns, with the prospect, at best, of unnumbered years of dignified but unexcited judicial duty while my contemporaries would be still in the thick of the fight". He did not become Lord Chancellor until he joined Winston Churchill's cabinet in 1940.

In the course of his long political career, Lord Simon was Home Secretary under Asquith and Baldwin, Foreign Secretary under Ramsay MacDonald, Chancellor of the Exchequer under Neville Chamberlain, and Lord Chancellor under Winston Churchill. He was thus a cabinet minister in the early years of the First World War, in the decade between the wars, and throughout the Second World War. As such, he participated in major political events over a period of forty years. As Foreign Secretary, he represented Great Britain at the League of Nations when it attempted to deal with the Japanese aggression in Manchuria. He was Foreign Secretary when Hitler came to power, and he tried to negotiate with him. He was Home Secretary when Edward VIII abdicated and he prepared the memorandum of the series of steps to be taken in the unprecedented situation that then presented itself. And he was Chancellor of the Exchequer at the outbreak of the late war. He describes the events and activities in which he participated, admitting

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some mistakes in judgment but not hesitating to defend policies in which he believes. In a chapter on "Munich — and After" he sets out to justify Chamberlain's appeasement of Hitler.

Viscount Simon was Lord Chancellor from 1940 until the defeat of the Churchill Government in 1945. He writes of the history and duties of the office, "certainly the most anomalous" of all the ministerial offices held under the Crown. He considers that the first of the Lord Chancellor's duties is to preside over final appeals and deliver judgments on them. He regrets that, since the "black-out" of London during the late war, the House of Lords in its legislative and political capacity now sits during hours when appeals are heard in its judicial capacity, and he fears the results:

> "The danger is that if Lord Chancellors in the future are prevented by their other work and by this overlapping timetable from constantly presiding over appeals, the question may arise whether some rearrangement of duties is not required, which might lead to a demand for the appointment of a Minister of Justice, who would appoint and promote judges — a constitutional change which, I believe, would be very much against the public interest in this country. For a Ministry of Justice would never be one of the great offices in a Cabinet. The Minister might not be trained in the Law. There would be the creation of yet another department staffed by officials, who would be likely more and more to concern themselves with the judicial work of this country from the lowest to the highest courts. At present, this may be a distant development, but it is just as well to realise what the objections to it would be. The impartiality of the judicial office at all levels essentially depends on the judge being completely indifferent as to whether as the result of evidence and of his interpretation of the law, he decides against the Government of the day or in its favour. An English judge never is concerned to consider whether what he is deciding will please Ministers or not. He does his impartial duty and to him a Government department is just like any other litigant. This is the real basis of an important part of our individual liberties and is the great contrast between our system and that which prevails in some foreign countries. I feel sure it is far better, in the interests of the individual citizen, rich or poor, and of the level and fearless administration of justice, to keep our judicial system completely free from Ministerial interference, with the office of Lord Chancellor at the apex, notwithstanding his mixture of duties which at first sight seem so oddly combined. Indeed, I would go further. It is the fact that the Lord Chancellor, with his knowledge of the law and of the Bar, can impartially choose the men to be judges, combined with the fact that he is also in another capacity a member of the Executive, which is the great virtue of the existing system."

Lord Simon's views are shared by other authorities. They are forcibly expressed in *The New Despotism* by Lord Chief Justice Hewart, who also believed that the independence of the judiciary was incompatible with a system under which judges would be appointed by "an ordinary political Minister". Lord Simon is of the opinion that judicial independence will be best safeguarded by maintaining the present system "with the office of Lord Chancellor at the apex". It might be pointed out, however, that, although the Lord Chancellor nominates the judges of the High Court and appoints almost all County Court judges on his own responsibility, the Prime Minister

nominates the Lords of Appeal, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, and the members of the Court of Appeal. Mr. Claud Mullins, of the English bar, in his book *In Quest of Justice*, although not favouring a Ministry of Justice, makes the following appropriate comment on the situation:

> "The appointment of our highest judges to-day rests, as has been shown, with the Prime Minister, and there seems no necessary reason why a political Minister of Justice, with our safeguard of joint Cabinet responsibility, should be a more dangerous person than a Prime Minister".

H. CARL GOLDENBERG*

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Readings in Jurisprudence and Legal Philosophy. By MORRIS R. COHEN AND FELIX S. COHEN. New York: Prentice-Hall Inc. 1951. Pp. xvi, 944. ($8.50)

Without venturing on a treatise on the casebook method, I may safely say that it has many interpretations, and that current views may be divided, with some overlapping, into two groups: one views the case as contributing to the discovery or creation of a particular rule of law, and the other, the modern one, views the case as presenting a problem solved in this instance in a particular way, and invites the student's consideration of this and other ways of solving the same problem. In either view of the casebook method, the student starts with a problem represented by the case, and what happens then depends largely upon the breadth of view of his instructor and the accessibility of other materials to augment the reported case as the data for a discussion of the problem. In modern casebooks these additional materials may be other cases, statutes, government documents, or selections from non-legal treatises on sociology, psychology, economics or philosophy. The core of the whole thing is the problem and the facts of cases are of the utmost importance, since the solution of any problem may lie buried in the facts themselves if they are exhaustively analyzed and understood.

Then, one must ask, what are the problems of jurisprudence, and does this collection of readings raise the problems and provide adequate material for their discussion? Again, without venturing on a treatise on the province of jurisprudence, I may safely say that there are many different views about the subject too. The narrowest and probably the most barren is that of the positivist, who defines law as the command of the sovereign and jurisprudence as the examination of that proposition. The broadest and most fruitful is that of the functionalist, who views a law as a way of solving a problem of human society and jurisprudence as the examination of all the ways of solving such problems, that is, the processes of justice. In this conception of law and jurisprudence the problems of justice and the legal processes, contractual, legislative and adjudicative, predominate. The topic headings in this anthology indicate a conception of jurisprudence running somewhere between the two views just outlined.

Part I deals with "Legal Institutions" and includes chapters dealing with property, contract, torts and crime. So far, the student familiar with modern teaching of classes in property, contracts, torts and criminal law will find

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little that is new to him; at best he will be given the cream from his first year courses, separated and served pure, perhaps untainted by the rigorous analysis that accompanied his first exposure.

Part II deals with "The General Theory of Law", and includes chapters on the nature of law, the nature of the judicial process, and legislation. This part comes closest to what might be called the examination of the processes of justice. Yet nowhere here is the problem of justice itself dealt with. The selections in the chapter on "The Nature of Law" lead me to suspect that the editors[1] themselves sympathize most with one of the so-called "realist" conceptions of law, one which happens to consider justice as belonging to the realm of philosophy, not law. That is not to say that the editors dismiss justice altogether, for Part III deals with "Law and General Philosophy", including logic, ethics and metaphysics, which in turn presumably include justice. One is led to suppose that "law" is something different from "logic", "ethics" and "metaphysics".

Apart from the absence of any obvious section dealing with the problems of justice, there is nothing to indicate that there may be legal processes other than the judicial and the legislative process. What, one wonders, will the lawyer think of the absence of an examination of what might be called the contractual process? Many lawyers today do very little or no court work, and contribute to the drafting, passing or interpretation of no legislation, but find plenty of work helping their clients by a process that has virtually no direct concern with "authority". Surely there is a legal process at work here that deserves academic investigation? The fundamental problems raised by labour contracts under modern labour legislation would have made an excellent starting point for analysis and discussion; yet no selections touch directly on modern labour law.

Part III, which I have already noted, and Part IV, which deals with "Law and the Social Sciences"— history, anthropology, economics and politics — take the student away from the narrow conception of positive law, but always with the feeling that the broader philosophies are not law, that, in short, justice is not law, and that law is not a purposive striving towards justice. Rather the law "is", separate and distinct from what it "ought" to be. My own amateur probing into the nature of law convinces me that this separation of the "is" from the "ought" is possible only on the verbal level, and in fact those who work in the law cannot make the separation but have to live with a confusion of the two. If this is true, a realistic jurisprudence should surely reflect the confusion.

Despite this criticism of the absence of material on the problems of justice and the contractual process, and of the false security of a verbal separation of the "is" from the "ought", I am warm in my welcome of this deliberate association of law with the humanities, for no other humanity gets at the real problems of human society quite the way a legal problem does. The highest and noblest idea may be subjected to scrutiny by those daily engaged in the arts of the law. But whether this collection of materials can be used to realize the problems and their discussion in one academic year remains to be considered.

The editors themselves say that the "process of selection . . . has consisted in throwing a much larger mass of materials at their students and retaining those fragments that struck sparks". Almost two hundred and fifty

[1] M. R. Cohen died during the preparation of the volume and F. S. Cohen completed it alone.

fragments struck sparks, but many fragments are too fragmentary to enable the reader to know what is sparking him, the author's idea or a misconception of the idea gleaned from too short a passage to indicate the author's whole thesis. I cannot help thinking that students would be much better off to read fewer authors, but more of what each is saying, and to grasp, if he can, the basic problems of jurisprudence, so that he too is able to think through the same difficulties.

Instead of this relatively limited scope for a course in jurisprudence, the editors have, in effect, attempted something of a combination of law with philosophy and sociology, and I feel, with the greatest respect for two very distinguished American scholars, that they have produced too much of too little. When you extend the province of jurisprudence from the examination of the processes of justice to the examination of law in society you run into the problem of getting the facts. It is very doubtful, in my opinion, whether these facts can ever be brought within the compass of a single casebook, and if this examination is to take place in a special course called Jurisprudence, in addition to the regular courses in the modern curriculum, then much less must be attempted in much greater detail than is possible from these readings.

Whether or not the editors have met the need of university law students is one matter, meeting the needs of a busy practitioner is quite another, and I have no hesitation in recommending this anthology to the practitioner as a quick means of familiarizing himself with the main current of jurisprudential thought in England and America. The readings from continental authors are few indeed.

J. B. MILNER*

The Spiritual Needs of Our Times

Nor was he [Lord Macmillan] spiritually uprooted from the soil in which he first grew. Three years ago he wrote in *The Spectator* that 'the phenomena of the soul are just as much facts as the phenomena of the physical world. . . . The heresy of the age is that salvation can be found in economic security and equality. But no soul was ever saved by political economy. We shall not regain our mental and spiritual health until we learn that the best-intentioned welfare State which provides for all our physical needs can never satisfy our spiritual aspirations. The most sinister feature of the times is the attempted processing and rationing not only of our bodily but of our mental food. It is only by a moral and spiritual regeneration that we can hope to restore the nobility of our people and of such a revival there are as yet few signs. But we need not despair. The things that are unseen are eternal and despite temporary set-backs will always prevail in the end.' It is well for the man who in that faith goes forth to enter into his eternal inheritance. (The Law Times, Sept. 12th, 1952)

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