BOOK REVIEWS
REVUE DES LIVRES

The Law of Restitution. By ROBERT GOFF and GARETH JONES. London: Sweet & Maxwell. 1966. Pp. lxxx, 540. ($19.00)

Surely there have been enough judicial invocations of the principle of unjust enrichment in recently reported Canadian cases to have drawn the attention of the profession to this area even if the volume of commentary in this *Review* and other Canadian legal publications had not already done so. One imagines that the average practitioner is only too much aware that such a principle exists and is gaining recognition, and acutely conscious that he remembers nothing of that description from his law school days and can find little or nothing on the subject in the standard reference works. Clearly what has been lacking until now is a comprehensive and synthesizing study of the whole area in which the principle of unjust enrichment may be found to operate. That need is now perfectly filled by *The Law of Restitution* by Messrs Robert Goff and Gareth Jones. Buy it and read it.

You will find that the book's scope is enormous. This is in accordance with the authors' conception of their subject and their task: "Briefly, it is that the law of Restitution is the law relating to all claims, quasi-contractual or otherwise, which are founded on the principle of unjust enrichment. . . . We have cast our net very wide. Our account cuts across the boundaries which traditionally separate law from equity. We have included topics from such diverse fields as, for example, trusts, admiralty and many branches of commercial law; and we have considered proprietary as well as personal claims. Indeed it is our belief that only through the study of Restitution in its widest form can the principles underlying the subject be fully understood."[1]

At the same time, the detail which the book's discussion of the points covered unfolds, and the scope of the citation jammed into its footnotes leave one simply in awe of the magnitude of the authors' achievement. It would have been impressive enough if it had come from one of the American academic workshops with their production-line methods of research and their teams of devilling assistants. For two Englishmen (one a practitioner)

[1] Preface, p.v.

working for the most part completely alone, the accomplishment is overwhelming and fully equal to that of the very best English or American texts.

The authors' citation ranges from the *Year Books* to the most recent English, Commonwealth and American decisions, notes and articles. Canadian cases are to be found in significant numbers, (doubtless due at least in part to Mr. Goff's exposure to the more chauvinistic clamourings of Canadian post-graduate students, the present reviewer among them, in his evening seminars in Restitution at the London School of Economics and Political Science) often being discussed in the body of the text when they deal with a point otherwise uncovered by authority or illustrate a point more neatly than the English authorities on which they might be based. The discussion arising out of such catholic citation is, as might be expected, wide-ranging and replete with new approaches and fresh ideas. Consistent with their avowed "empirical approach", however, the authors have been scrupulously careful, in setting out their text, to separate their exposition of the law as it presently stands in England upon decided cases, from their criticisms, comments and suggestions for its rationalization, development and containment. For example, while they are beautifully lucid in their explanation of such classics as *Sinclair* v. *Brougham*[2] or *Minister of Health* v. *Simpson* (*Re Diplock*)[3] and leave no doubts as to the position of these cases as technical authorities, they could hardly be more scathing in their criticism of the illogicalities which these decisions introduced into the law of tracing and the defence of change of position. In view of the recent pronouncement in the House of Lords regarding the binding force of precedent in future, it may be hoped that some of the more hidebound texts and practitioner's manuals may now expand toward this type of approach.

The text and its invaluable footnotes are arrayed in a framework of four parts—three major and one (Restitution in Conflict of Laws) quite subsidiary. Part I is by way of introduction and would, even if standing alone, have constituted a significant contribution to the literature of the subject in its lucid exposition of fundamentals—for instance the discussion of the justice of the defendant's continued retention of the benefit has been arranged around eight suggested defences to or limitations upon the right to restitution.[4] There is a great need for a wider and better understanding of these defences, often felt and publicized by this reviewer and others, if this potentially all-engulfing principle is to be con-

[2] [1914] A.C. 398, [1914-15] All E.R. Rep. 622.
[3] [1951] A.C. 251, [1950] 2 All E.R. 1137.
[4] P. 16.

tained within sensible limits and justice be not done to one party at the expense of the legitimate claims to justice of another. The analysis of restitutionary proprietary claims and the extremely difficult puzzles of the proper spheres of money had and received and tracing at law and in equity are the fullest and best of any published to date with the exception of Scott's classic articles in the *Harvard Law Review* (which, by the way, Messrs Goff and Jones rather curiously omit to cite).[5]

In Part II under the heading The Right To Restitution, the authors take up the problems of obtaining restitution of money, chattels, land and services parted with in various circumstances. As this part constitutes the major portion of the book (400 of 540 pages) it is further subdivided into three sections raising in turn the considerations relevant when the defendant's benefit is acquired (i) directly as a result of some act by the plaintiff; (ii) indirectly, as from a third party in respect of which some duty to account to the plaintiff may be imposed upon him; and (iii) directly, again, but as a result of his *own* wrongful conduct. This classification differs from the treatment given the subject previously by the Reporters of the American Law Institute's *Restatement*,[6] and by the more recently published academics such as Dawson and Palmer[7] and Wade[8] and might be open to criticism—anticipated and in part met by the authors in their Preface and elsewhere, but it must be a matter of small importance, how the cases are arranged, given a consistent method and an index and table of contents as full and helpful as those provided here. The chosen arrangement appears to work very well and is particularly suited, I think, to exposing the material very quickly to a reader unfamiliar with the topic as a whole, by presenting him with an analysis based solidly on the facts of the problem with which he requires assistance.

Taking each of the sections in turn, Section One deals with cases in which the plaintiff, who conferred some tangible benefit upon the defendant was either mistaken or acting under some form of compulsion (whether duress, undue influence or some lesser degree of unconscionable conduct) or responding to some emergency (as an agent of necessity or as a complete stranger in what are called here cases of necessitous intervention into the affairs of another) or, finally, acting in reliance upon some ineffective transaction, which term the authors expand very fully in the chapters demonstrating the problems of effecting restitution of benefits transferred in accordance with failed trusts and gifts, and contracts gone awry for want of authority in agents, capacity in principals,

[5] Scott, The Right to Follow Money Wrongfully Mingled with Other Money (1913), 27 Harv. L. Rev. 125; see also (1953), 66 Harv. L. Rev. 872.
[6] (1938); see Seavey and Scott, Restitution (1938), 54 L.Q. Rev. 29.
[7] Cases on Restitution (1958).
[8] Cases and Materials on Restitution (1958).

or formalities of integration (where for instance *Deglman*[9] is referred to as an important case and discussed in passing); for mistake, or uncertainty or illegality or discharged by frustration or breach.

If Section One appears to the reader to have covered a fair bit of ground, Section Two (acquisition from third party placing defendant under a duty to account) ranges over even more diverse subjects such as the incidence of subrogation, attornment in bailment of chattels and situations such as the puzzling line of cases culminating in *Shamia* v. *Joory*,[10] claims by persons rightfully entitled after invalid dispositions under wills and intestacies and winds up with a consideration of perfecting imperfect gifts in favour of the intended donee and avoiding fraudulent preferences by impending bankrupts.

Section Three (acquisition by defendant's own wrongful conduct) covers the restitutionary remedies available in lieu of tort damages or in aid of criminal proceedings against the wrongdoer as well as the present means of depriving a defendant of benefits acquired in breach of contractual or fiduciary obligation. As I have attempted to demonstrate elsewhere,[11] as a result of a handful of decisions and *dicta* in our Supreme Court, Canadian lawyers need not share the difficulties felt by English academics in general, and by Messrs Goff and Jones, in administering constructive trusts and coping with the so-called problem of *Lister* v. *Stubbs*.[12]

In Part III the authors delve further into the very important area of the defences to actions of restitution, expanding on their treatment of the basic ideas already noted in the comments on the introduction. In a very real sense, as the authors are aware, it is unfortunate and artificial to lump the defences together at the end of the book in this fashion, but the inconvenience and repetitiveness involved in trying to bring them continuously forward into the discussion would be hard to overestimate. This solution represents a compromise consistent with the needs both of the spot researcher whose attention is drawn to this part by copious cross-references throughout the text, and the student reading straight through the book who is thus able to keep the flow of the context and hold over consideration of the defences until Part III. There are many more of these defences suggested here than might be anticipated by readers unfamiliar with the subject, many not peculiar to restitution—for instance *res judicata*, election, estoppel, illegality, *bona fide* purchase, limitation, laches as well as some more particularly associated with it such as change of possession and contracting

[9] *Deglman* v. *Guaranty Trust Company*, [1954] S.C.R. 725, [1954] 3 D.L.R. 785.
[10] [1958] 1 Q.B. 448, [1958] 1 All E.R. 111.
[11] (1965), 16 U.T.L.J. 240. [12] (1890), 45 Ch. D. 1.

out. Other defences which are recognized by the authors but not catalogued here with the others (such as voluntary payment in response to a threat of litigation; gratuitous intent and officiousness) are perhaps in some slight danger of getting lost, just as the "catalogue" itself is in some peril of hardening in its present form. Such a result would be unfortunate. But there are probably enough references throughout the text to Lord Mansfield's reminder that "the defendant may defend himself by everything which shows that the plaintiff *ex aeque et bono* is not entitled to the whole of his demand or to any part of it"[13] to keep the danger slight until the profession becomes more familiar with their use and accustomed to the beautiful flexibility of these actions.

It is obvious that there is a grave danger that an author who ranges over broad sweeps of legal materials will be led to adopt what might be called the lowest common denominator of analysis and, in commenting upon what are for his purposes the "leading cases", merely add onto an analytical framework taken from the most orthodox or least objectionable sources. This *has* occurred in Messrs Goff and Jone's book, but to a really surprisingly small extent. They make frequent reference to texts and other standard works, but nearly always only to supplement their own analysis and discussion which, as is observed above, is frequently filled with fresh ideas. It is only occasionally that one feels that a book with a narrower scope undertaken by these men might have produced more valuable analysis than the conventional wisdom which is offered as the basis of their discussion, for example of representations, warranties and conditions in conjunction with the sections on rescission, of mistake in contracts, or the *Halsbury's Laws of England* catalogue of fiduciary relationships on which they build their whole chapter on breach of fiduciary obligation. Elsewhere in the book they show their appreciation of the difficulties involved in characterizing and classifying in these areas. For modern lawyers it is not a problem of trying to rationalize the generalizations to be found in the judgments, but of attempting to predict what a court will do with a given set of facts. We are not given the authors' views on these basic inquiries which really matter. They stay rather safely above it all. Lest this be understood as a criticism of a big book for not being bigger, let it be added hastily that what is commented upon is rather the imbalance of the treatment given such matters as these, central to their thesis, and the extended analysis and discussion of such topics as maritime salvage and general average which have been so often pigeon-holed by courts refusing to apply their conclusions outside of their special context as to have lost most of their value even as analogies for the development of the common law of restitution.

[13] *Moses* v. *MacFerland* (1760), 2 Burr. 1005, at p. 1010.

At the same time one can welcome the extended treatment of restitution of benefits conferred under contracts containing some vitiating element, or made the instrument of an unjust enrichment by one party's premature resilement or discharge by breach. Traditionalists will object that this represents a simple poaching upon the law of contracts, but then, there is such a great pleasure to be enjoyed by students of restitution in seeing the tables thus neatly turned, quasi-contract and bits of restitution itself having so often in the past been rudely jammed by un-comprehending or unsympathetic authors into appendices or perfunctory chapters near the end of standard books on contracts, trusts and torts. It is trite that the law cannot be contained in tight analytical compartments and that cross-fertilization such as this can only prove beneficial, however, it does appear that the authors have, in places, let themselves be led rather far into these fields and away from their immediate business of restitution. For example, the two-and-a-half page essay on *uberrimae fidei* in insurance contracts in the chapter on rescission must be ninety nine per cent fat. The party most likely to be taking advantage of misrepresentation in this context is the insurer who certainly will not be seeking restitution of anything, but will want at the highest a declaratory judgment that he is no longer bound for the future. The coverage already extended is gone beyond recall.

But to comment at this length distorts the importance of the points intended to be taken. Few practitioners will regard the quantity of references to standard texts as anything but a time- and effort-saving feature, and the essays sprinkled throughout the book upon difficult points from bills of exchange, insurance, guarantee and suretyship, agency, land registry procedure and many others besides, may equally be regarded as a measure of the riches to be gleaned from these pages.

The book is certain to become the standard beginning point of reference for all research into problems of restitution. It is already a book which few practitioners can afford to be without.

BRADLEY CRAWFORD*

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Security Interests in Personal Property. By GRANT GILMORE, Professor of Law, The University of Chicago Law School. Boston and Toronto: Little, Brown & Company. 1965. Two vols. Pp. xii, 1508. ($45.00 U.S.)

It is surprising how few still are the Canadian lawyers that know anything about the American Uniform Commercial Code (UCC

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for short). Surprising and regrettable, for even if the Code were not the most impressive intellectual achievement in the sphere of commercial law in this century it has now been adopted in more than forty of the American States, including all the commercially important ones, and bids fair to become the law of all the States in another few years. This fact alone should impress even the most "pragmatic" lawyer, for he cannot hope, if he has a commercial practice, to correspond intelligently with American attorneys without at least a basic knowledge of the "new look" in business law across the border. If these arguments are not sufficiently compelling, there is another: at least some parts of the Code are sure to be copied in Canada. Article 9, which deals with secured transactions, has already found a hospitable haven in the Bill on Security in Personal Property which was recently given first reading in the Ontario Legislature,[1] and it can only be a matter of time before article 2 on sales leaves its imprint on a much overdue overhaul of our Sale of Goods Act.[2] And perhaps it will be the Bills of Exchange Act[3] after that, though we are more fortunate than the Americans in having only one negotiable instrument law and one set of banking laws to contend with.

We all know that before a branch of law can be successfully codified it must either have attained an advance state of maturity or the existing rules must have become so confused that nothing short of a thorough house cleaning will restore a semblance of sanity. There is another equally indispensable condition which is frequently lost sight of, and this is the existence of a corpus of highly competent scholars. The Americans have been particularly fortunate in this respect. The outpouring of literature of the Code—much of it of a high quality— has reached stupendous proportions, and there is no sign of a let up.

No part of the Code has received more sustained and critical attention than article 9—and justly so, for no other article in the Code introduced so many sweeping changes and is of such transcendent importance in the commercial life of a modern industrialized State. Three outstanding scholars (two of them practitioners, which is itself a phenomenon of the first importance) have easily led the field. Mr. Peter Coogan of Boston gave us his two volume collection of essays three years ago[4] and now we have Professor Gilmore's masterly study of the same topic. Now that Mr. Homer Kripke—the third member of the triumvirate—has joined the teaching profession we may no doubt expect him too to assemble his writings in book form.

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[1] Bill 189, 1966.

[2] See for instance R.S.O., 1960, c. 358.

[3] R.S.C., 1952, c. 15.

[4] Coogan, Hogan and Vagts, Secured Transactions under the Uniform Commercial Code, Matthew Bender & Company, 2 vols. (1963).

Professor Gilmore has unique qualifications as the author of the present work. He was one of the principal draftsmen of article 9 and was probably more intimately concerned with its various vicissitudes than any other living scholar. He did much original work in this field even before he became associated with the Code project and his earlier training as a littérateur has given him an unrivalled gift for lucid exposition coupled with a warm, if slightly sardonic, sense of humour. He is a considerable stylist.

His approach differs considerably from Mr. Peter Coogan's *magnum opus*. The latter is really a reprint of articles written over a period of years, and it reflects all the strengths and weaknesses of a collection of essays. Professor Gilmore, on the other hand, has undertaken to provide us with a systematic and balanced exposition of every aspect of article 9. The two works therefore complement rather than compete with one another and both constitute indispensable working tools for a proper understanding of the new law of secured transactions.

Professor Gilmore is at great pains to emphasize the historical antecedents of article 9 for, as he explains in the preface, the article grew out of the pre-Code law and in many cases reflects the structure of that law. His first eight chapters are therefore devoted to a description of the "independent" security devices (independent of what?) ranging from the pledge and chattel mortgage to security interests in intangible property and accounts receivable financing. The scene is now set for an analysis of article 9 itself and each of its five principal parts—terminology and classification of property, creation and perfection of security interests, priorities, and default rights—are subjected in logical sequence to an intensive examination. Much else is dealt with besides and, so far as this reviewer is competent to judge, no significant problem has been omitted. Most of them have a familiar ring to Canadian ears, but some of them are merely an intimation of problems with which we too, sooner or later, will have to come to grips—the relative priorities of a financing bank and a surety for the debtor, subordination agreements, the "negative pledge" clause and circular priority systems, to list but a few. All this may mislead the reader into thinking that he is merely dealing with "another" black letter textbook. Nothing could be further from the mark. Professor Gilmore is no complacent Blackstonian. He demonstrates throughout a lively awareness of commercial and social realities and he has little patience with dogma for dogma's sake. He has a story to tell and he tells it superbly.

Nor does he entertain any illusions about the infallibility of article 9, and he is quick to castigate the draftsmen (which of course often means himself) for inconsistencies and obscurities in language. The reader will be especially interested in his de-

scription of how certain sections acquired their final form and, in the case of UCC 9-104, how political and trade pressures were responsible for the exclusion of certain types of security transactions from the article. Of particular importance is his account of the history of UCC 9-312 (5), the subsection dealing with the general order of priorities between conflicting security interests, which makes it clear that it was never the draftsmen's intention that a secured party who has knowledge of a prior security interest should be able to obtain priority simply because he filed his financing statement first. The change was introduced—whether intentionally or not it is not clear—as a result of certain 1956 recommendations of the Editorial Board for the Code.

Professor Gilmore gamely suggests[5] that there may be some justification for the strict "first to file" priority rule, but such Anglo-Canadian decisions as *In re Monolithic Building Co.*[6] and *Lanston Monotype Machinery Co.* v. *Northern Publishing Co.*[7] would seem to show that its shortcomings greatly outweigh its merits. In any event, the Code is inconsistent in making knowledge a material factor under UCC 9-301 but not under 9-312(5). Unfortunately the Ontario Bill has uncritically copied these provisions,[8] thus proving that imitation is not necessarily the best form of flattery.

There are a number of instances where Professor Gilmore fails to explain why the Code's provisions depart from pre-Code law, and a number of others where even he underestimates the extent of the defective draftsmanship. One would have liked to know, for example, why the sponsors adopted "notice filing" for all types of security agreements and not merely those which envisage a continuous series of dealings and whether it has led to any abuses or difficulties in practice. Even more puzzling are the provisions of UCC 9-103(3) dealing with the removal of goods subject to a perfected security interest from another State into the Code State. The subsection says that the security interest remains perfected in the Code State for a period of four months and also thereafter if it is perfected in the second *situs* within the four-month period. Nothing is said about notice and, read literally, this would appear to mean that the secured party has a perfected security interest in the Code State for the whole four-month period even though he learned of the removal of the goods long before the expiration of the period and perhaps even consented to the removal. Under pre-Code law and under section 14 of the (American) Uniform Conditional Sales Act, as Professor Gilmore notes, the secured party was almost invariably required to perfect his security interest anew in the second *situs* as soon as he learned of the removal. Why then was this requirement deleted in article 9 and how did the exces-

[5] Pp. 901-902. [6] [1915] 1 Ch. D. 643. [7] (1922), 63 S.C.R. 482.
[8] See the writer's comments in (1966), 44 Can. Bar Rev. 104, at p. 122.

sively long four-month cut-off point come to be chosen? Surprisingly the learned author has nothing to say on these important points. This is one instance where the Ontario Bill[9] is superior to the Code, although the Bill has (again uncritically) retained the general four month cut-off period.

One of the most stimulating of Professor Gilmore's chapters is the one[10] in which he discusses the choice of law problems relating to the enforcement and default rights of the secured party. He dismisses the simple *lex situs* approach so long embraced by the archetypal conflict lawyers, and still retained in the tentative draft of the *Restatement of the Law of Conflict of Laws*, almost out of hand, and favours instead the buyer's place of residence (or, presumeably, the place where the chattels are to be used, where the two differ?) on the ground that it is the law both parties are likely to have in contemplation and also as being the place where the secured party will have to perfect his security interest. Professor Gilmore would apply the same rule where the chattels, subsequent to the original transaction, are removed with the secured party's consent into another jurisdiction. Now there is much to be said for his proposed solution—although he does not seem to be aware of its rejection in *Cook & Sons Equipment, Inc.* v. *Killen*[11]—but it is difficult to square with some of the provisions of article 9, Professor Gilmore's effort notwithstanding. The Code has no express choice of law clauses dealing with default rights, but the comment to UCC 9-103(5) makes it clear that an unperfected security interest in goods brought into the State becomes subject to all the provisions of article 9. The converse presumeably also applies and therefore if the security interest was perfected when the goods were brought into the State, Part V of article 9 will *not* apply for the first four months even though the secured party consented to the removal. On the other hand, if the security interest was unperfected Part V *will* apply even though the secured party did not consent to the removal of the goods. In both these cases therefore the Code's solution is at variance with Professor Gilmore's. The truth of the matter is that the draftsmen never properly considered all the conflict of laws ramifications of article 9.

I hope I have said enough to show that Professor Gilmore's exploration of uncharted seas is as vigorous as his delineation of the more familiar landmarks. That his work will become an indispensable *vade mecum* to every commercial lawyer in the United States I do not doubt. It deserves to receive an equally warm reception in Canada.

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[9] *Supra*, footnote 1, s. 7. [10] Chap. 44, §§44.10-11.
[11] (1960), 277 F. 2d 607.
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The Trust and Corresponding Institutions in the Civil Law. By CHRISTIAN DE WULF. Bruxelles: Etablissements Emile Bruylant. 1965. Pp. 197. (B. Fr. 680)

Here is a comparative treatise which offers great promise by its title and intended scope. For two reasons, its subject-matter is important. In the first place, there has long been a need for a comparative treatment of the trust and of parallel institutions. Secondly, the last word has by no means been said on the social function of the trust and of those institutions fulfilling a similar function. But the book is disappointing in its achievement. Those who were encouraged by its opening pages to expect a new assessment of the role of the trust will have to wait still for its arrival, for Dr. de Wulf's account will not fulfil their hopes. And this despite a great deal of very good material, through which he succeeds in showing how, in the words of Professor Limpens' Foreword, the "maid of all work" has become the "magic fairy".

The comparative treatment of the trust and other institutions in Part One is the better part of the book, although it does not recognise all the facets of the trust's "generality and elasticity" which have emerged since Maitland used those descriptive terms. Part Two attempts to deal with the social contexts in which the institutions operate, and here one's disappointment deepens. It is respectfully suggested that the two purposes of the book are, in the first place, not accurately designated by the chosen headings: "A vertical analysis" and "A horizontal analysis". It might be better to consider the trust as a phenomenon which began by being elongated vertically (the narrow but "tall" trust of the family settlement) and gradually became re-shaped as the modern commercial trust, which is "broad" in the sense that its beneficiaries are many and widespread and in which the settlor has virtually disappeared from significance. It is, in this connection, a pity that the author has omitted to refer to one outstanding example of the modern use of a trust, the retirement benefits scheme, in which the settlor is of no importance as such, and the beneficiaries may include the widow of an as yet unmarried employee of a company not yet associated with the principal company setting up the trust.

A good deal of basic material is reproduced here, material which can be found in a good trusts textbook. Oddly enough, the law relating to bankruptcy in relation to trusts is not covered, despite the emphasis at the end of the book on business aspects of the trust's use. Again, the social function of the trust is dealt with under the very narrow headings of "charitable trusts and trusteeship used as a structure for voluntary organisations". The importance of the social area is hardly indicated by such a limited consideration. There are some criticisms of the Settled Land Act

policy which seem to the reviewer to be based on an inadequate assessment of the purpose and achievement of that policy, and the trust for sale is much too summarily dismissed.[1]

Unfortunately, the author's mode of expression is often such as to let a good idea slip away between the words. The good ideas are there, and so in plenty is material on French practice which an English reader will not readily find elsewhere. So much more could have been done with it.

There is a very full bibliography, containing much that is not strictly relevant. On the other hand, some things which should be there are not. Professor Keeton's *Social Change in the Law of Trusts* is missing,[2] as also is the important *Current Legal Problems* discussion of "Trusts and Taxation" by Mr. E. H. Scammell.[3] The Table of English Cases is short of a number one might expect to find there; the absence of *Chapman* v. *Chapman*[4] is indicative of a gap in the author's coverage as a whole. Indeed, the suspicion is raised by the whole book that some deeper awareness of recent developments in the trust law of England, and especially the Variation of Trusts Act[5] and its use in practice would have led to a better balance in this treatise. The absence of an index is a pity in any book of this kind. It is especially so here, where the scope of the text is so wide.

K. N. S. COUNTER*

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Economic Analysis and Combines Policy: A Study of Intervention into the Canadian Market for Tires. By STEFAN STYKOLT. Toronto: University of Toronto Press. 1965. Pp. 111. ($3.95)

This small volume, published as one of the Canadian Studies in Economics series, is a posthumous publication of the late Dr. Stykolt's doctoral thesis which was completed at Harvard in 1958. The central argument of the study is that "a public policy which is based on studies of market structure and behaviour is more effective in removing restraints on competition than a policy which is not".[1]

The Canadian tire market was selected for the industry depth study largely because the rubber companies had, in 1956, just

[1] Pp. 127, 129. [2] (1958). [3] (1958), p. 167.
[4] [1953] Ch. 218, [1953] 1 All E.R. 103, aff'd [1954] A.C. 429, [1954] 1 All E.R. 798.
[5] 1958, 6 & 7 Eliz. 2, c. 53.
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[1] P. 3.

finished in the Supreme Court of Canada a long bout with the anti-combines law which travelled the whole course of combines administration in Canada.[2]

Following a brief Introduction are three chapters devoted to the industry's structure, competitive behaviour, and the role and extent of collusion respectively. There is not very much new factual material in these chapters, as they deal largely with information already public knowledge, much of it so as a result of the Commissioner's *Report* of 1952. However, Dr. Stykolt has described the structure and operation of the industry in a considerably more intelligible fashion than did the Commissioner. The *Study* does such things as isolating the product submarkets which exist in the tire industry and, through an analysis of cost factors, showing why each tire manufacturer depends for its very existence upon orders from the large purchasers.

The Canadian tire industry is typical of those that give nightmares to Mr. Walter Gordon. With one exception, it is composed of subsidiaries of United States parent companies. That one exception, Dunlop, is a subsidiary of a British parent. While the Canadian subsidiaries doubtlessly benefit from the research facilities of the parent company, top-level management is foreign and directs the price policy and export plans of the subsidiary. The only Canadian entrant into the tire market, Gutta Percha, was late to enter and early to withdraw. The essential reason for its early withdrawal was its inability to secure either large orders or effective distribution. The large purchasers are vehicle manufacturers centred in the United States, and the large distribution outlets for the replacement market are the service stations, also largely owned abroad. Gutta Percha was unable to crack the informal alliances formed outside Canada between established tire manufacturers, purchasers and distributors.

The main thrust of the book is contained in chapter five which analyzes the detriment to the public and proposes remedies. By Dr. Stykolt's analysis, the detriment to the public in the tire industry case consisted of discriminatory prices and misuse of resources. To improve market performance in these respects he proposes two alternative lines of remedial action, neither depending upon prohibition of collusion in price setting. His attack on the remedies actually imposed characterizes the publicity of the Commissioner's *Report* as ineffective, the fine as symbolic only, and the prohibition order as next to useless. One of his conclusions is that "the process of combines policy has produced

[2] Report of the Commissioner on Rubber Products, Dept. of Justice, Ottawa (1952), Parts III and VIII. *R.* v. *Goodyear Tire and Rubber Co., et al*, [1953] O.R. 856 (H. C.); [1954] 4 D.L.R. 61 (C. A.); [1956] S.C.R. 303. The companies pleaded guilty to the indictment.

remedies which seem inadequate in relation to the cost of securing them".[3]

The author concludes that the best way to restructure the rubber tire industry would be to remove the duty on tire imports for a period. Alternatively, he proposes publication of all prices charged, prohibition of certain agreements, and formulation of rules concerning brand names.

According to the editor's foreword, Dr. Stykolt had intended to revise his analysis to date prior to publication. Presumably this would have involved treatment of the Tires, Batteries and Accessories (T.B.A.) *Report* of 1962, which went to the discriminatory distribution practices of oil companies through their leased service stations.[4] However, this updating was not really critical to Dr. Stykolt's submission.

The Combines Investigation Act,[5] as applied by the cases, really creates several almost *per se* offences against competition, and price agreements between competitors are penalized. As an economist, Dr. Stykolt deplores this view, and urges that the Restrictive Trade Practices Commission perform its designed function according to section 19(1) of the Act in order to bring some economic sense to Canadian combines policy.[6] If Canada is to utilize remedies capable of molding market structure and behaviour, the body designed to analyze these things must do so and design the appropriate remedy. Traditionally, the Commission has in fact performed little more than a legal function and has tried to determine whether, in light of the cases, an offence has been committed. This, of course, is done by both the Director of Investigation and Research and by the regular courts.

The book is a readable and realistic contribution to Canadian combines law and policy. It is the second relevant industry depth

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[3] P. 70.

[4] Report on an Inquiry Into the Distribution and Sale of Automotive Oils, Greases, Anti-Freeze, Additives, Tires, Batteries, Accessories, and Related Products, Ottawa (1962). The central recommendation of this Report was that the Combines Investigation Act should specifically prohibit undesirable exclusive dealing and tying arrangements. On February 2nd, 1966, the President of the Privy Council assured a questioner that a government decision on the Report would be made in "the near future". See House of Commons Debates, February 2nd, 1966, p. 578. However, in July, 1966, this problem was submitted together with the whole law of competition and industrial property to the Economic Council of Canada for comprehensive review.

[5] R.S.C., 1952, c. 314, as am.

[6] *Ibid.*, s. 19(1): "The Commission shall as soon as possible after the conclusion of proceedings taken under section 18, make a report in writing and without delay transmit it to the Minister; such report shall review the evidence and material, appraise the effect on the public interest of arrangements and practices disclosed in the evidence and contain recommendations as to the application of remedies provided in this Act or other remedies."

study furnished by the Canadian Studies in Economics series,[7] though it is the first to deal specifically with the application of the combines law to correct an undesirable situation.

Although criticism may be levied upon the institutions presently administering the anti-combines law, with suggestion as to how they might more constructively fulfil their various functions, this reviewer is of the opinion that more fault lies with the legislation than with the administering personnel. Regardless of whether federal control of competition is or is not in a constitutional straightjacket the administration has an awkward statute to administer. The undue effect of an agreement, which is one of the statutory tests for criminality, is a complicated economic question for which the regular courts are untrained and yet they must decide the issue. Little wonder that we have, in effect, *per se* offences against competition in Canada.[8] This issue, handled properly, is almost as difficult as having to tailor the remedy to cure the economic evils of the situation before the court.

BRUCE C. MCDONALD*

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An Antitrust Primer: A Guide to Antitrust and Trade Regulation Laws for Businessmen. By EARL W. KINTNER. New York: The Macmillan Company. 1964. Pp. xx, 316. ($8.80)

Administrators of trade regulation laws have created a tradition of sustained personal effort to educate the businessman to the philosophy and requirements of the laws governing competition. The *Antitrust Primer* represents a new and different approach in that campaign.

Mr. Kintner was for six years General Counsel to the Federal Trade Commission and for almost two years, during the Eisenhower administration, was Chairman of that Commission. He has been a frequent contributor to such periodicals as *Business Lawyer*, and during his twenty months as Chairman made three hundred speeches to businessmen on antitrust subjects. Mr. D. H. W. Henry of the Combines Branch in Ottawa utilizes a similar tech-

[7] The first was W. G. Phillips, The Agricultural Implement Industry in Canada: A Study of Competition (1956).

[8] In the recent case of *R.* v. *Beamish Construction Co. Ltd.* (1966), 59 D.L.R. (2d) 6, Mr. Justice Jessup in the Ontario High Court held that regardless of the intention of the accused companies, the agreement was not "undue" because the accused had not in fact the power to carry on their business without competition. The companies were therefore acquitted. This is the first time a combines prosecution for conspiracy has failed on this ground.

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nique with Canadian business. In the United Kingdom, the Federation of British Industries commissioned its own explanatory guide to their restrictive practices legislation, but the result was little more than a sketchy paraphrase of the legislation.[1]

The *Primer* sprang from a conviction that speeches were too ephemeral and their audiences too limited. As a book, the object is to alert the decision-making business executive to "danger areas" created by the United States antitrust laws. An exercise in preventiveness, it proceeds upon the stated assumption that many businesses get into antitrust difficulties innocently and unwittingly. Sceptics will be inclined to question this assumption, but no doubt it is true to some extent, particularly in the case of single proprietorships and other small enterprises which have neither a private legal department nor even a lawyer-secretary.

The *Primer* is not designed to teach the businessman to be his own lawyer, but rather to tip him off as to when to retain a lawyer. It was written to assist senior corporate executives in making use of specialists to arrive at their decisions, and to acquaint even the small businessman with the rights, duties and remedies of price-fixing, price discrimination, distribution practices and advertising. Such a small book could not, of course, even pretend to displace the lawyer. For example, although there is brief mention of the problems of trade associations in relation to price fixing and the Webb-Pomerene exemption for foreign trade, there is no attempt to define the tightrope which trade associations must walk if they are to be of some use and yet avoid the antitrust laws.

The book therefore is descriptive in nature. Aimed at the businessman, it avoids the agony and the ecstasy of tortuous "scholarly analysis", as well as the tangles of footnotes. Mr. Kintner's objectives are to be lucid, accurate and readable. He succeeds admirably. Such a bent does lead to a few bald statements with which the expert antitrust economist or lawyer might pause to quarrel. An example is the assertion in the Prologue[2] that the philosophical basis of American antitrust law is economic pluralism. However, given the objective of the *Primer*, these statements can scarcely be criticized as weaknesses of the book. As observed in the Foreword by Associate Justice Clark of the Supreme Court of the United States, many antitrust questions cannot even be answered by the experts, and are only answered by the Supreme Court because of its finality in the judicial process. It is desirable that Mr. Kintner tie the often maligned proscriptions of the law to their underlying political and economic principles. It is also desirable that he face in some way the theoretical paradox of preserving

[1] Restrictive Trade Practices Act, 1956: A Guide for the Industrialist (London, 1956).

[2] P. xiii.

"free competition" by government intervention. The volume also had to be kept within manageable size. The first two chapters (out of twenty-two) and the Epilogue are devoted to general observations on free competition and the role of government in a democratic and free enterprise economy.

The book is well organized, with separate chapters on the whole range of substantive antitrust law and its enforcement. The chapters on price discrimination and advertising are disproportionately long, perhaps because those subjects are particularly within the personal experience of Mr. Kintner, but also perhaps because they are the sections of trade regulation laws that touch most businesses. Other chapters deal with price fixing, monopolization, mergers, patents, exclusive dealing and interlocking directorates, among other topics. All the chapters are written in an interesting fashion, with judicious and intelligent use of examples. Most examples are actual decided cases, and are used secondarily only by way of illustration.

A Canadian might wish to quarrel with Mr. Kintner's contention that ". . . antitrust and trade regulation laws had their origin in American ingenuity".[3] The fact that the United States, like every other "antitrust" country had a business and political history which led up to its antitrust statute hardly makes antitrust a unique American institution. Indeed, the first national antitrust law (the word "antitrust" has always been a misnomer) was passed in Canada in 1889.[4] The Canadian House of Commons seemed to feel they were codifying the common law.[5] Parliament was, admittedly, aware at the time of a bill which had been presented to the New York State Legislature. A possible American influence on the original Canadian legislation was betrayed by a split infinitive which remained in our Act until 1952. However, antitrust laws were as much a logical development from the common law as they were from anything else.[6]

No antitrust guide for the businessman would be complete without a description of the enforcement procedures, and the *Primer* devotes four chapters to this area. Four chapters may sound extravagant to a lawyer familiar only with the enforcement provisions of Canadian combines law, but the United States has developed several relatively sophisticated techniques for negotiation, guides, merger clearance and the like. Indeed, the wide array of available remedies and procedures in the American antitrust law, representative of a real attempt at economic realism, makes a

[3] P. 15.
[4] S.C., 1889, c. 41.
[5] House of Commons Debates (1889), pp. 1113, 1428.
[6] The common law has played a critical role in the interpretation of the Sherman Act, and the well known "Rule of Reason" owes much to this influence. See particularly the judgment of Taft J., in *United States* v. *Addyston Pipe & Steel Co.* (1898), 85 Fed. Rep. 271 (6th Cir.).

Canadian envious. Mr. Kintner barely mentions the thorny problems of co-ordination of the enforcement efforts of the Antitrust Division and the Federal Trade Commission,[7] and perhaps his treatment of it betrays its real delicacy, but this is excusable. The function of the volume is simple exposition rather than misdirected criticism.

The three chapters on advertising, obviously closest to Mr. Kintner's real interest, go beyond mere exposition of law, to advocacy of policy. Particularly in the chapter on "Deceptive Schemes and how they Operate", the author's personal involvement with the Federal Trade Commission is betrayed by his subjective and private support of certain specific Federal Trade Commission orders. This departure from the general tone of the rest of the book is unnecessary, but it is also harmless. In many ways the chapters on advertising were to this reviewer the most interesting in the book, even though they depart somewhat from its objective.

Several very basic issues are involved in the control of advertising. For example, where should the line be drawn between freedom of contract and its negotiation on the one hand, and protection of a somewhat gullible consumer, on the other? The author seizes the occasion to stress the importance, even to the selfish interest of the vendor, of taste, honesty and honour in his advertising campaign. How persuasive this might sound to an advertiser is difficult to estimate, but it makes excellent reading, and the alternatives to such a self-imposed sense of responsibility are not pleasant.

Although the book is designed for the American businessman, it may be read with profit by anyone, including a lawyer, who wishes to gain painlessly a basic familiarity with American antitrust laws and its business realities. The text is supplemented with a sixteen page selected bibliography. Since antitrust law is statutory, however, Canadian businessmen would not find much of direct benefit in the *Primer*. Admittedly, Mr. Kintner is only concerned to alert businessmen to possible danger areas without trying to define too many answers, but necessarily the framework must be the American statutes. All countries face in their own way the standard problems of price-fixing, monopolies, mergers, advertising and distribution practices.

BRUCE C. MCDONALD*

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[7] This iceberg surfaced in the Report of the Attorney General's National Committee to Study the Antitrust Laws (Washington, 1955), pp. 374-377.

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The Principles of Canadian Income Taxation. By F. EUGENE LABRIE. Don Mills: CCH Canadian Limited. 1965. Pp. xx, 818. ($25.00)

During the past twenty years Dr. LaBrie has written a number of texts on the subject of taxation in Canada and has taught taxation at the undergraduate and post-graduate levels at the University of Toronto. He also carried on consultant work during that period and has now left the University to devote his entire time to practise as a taxation consultant. The text which he has published therefore represents the mature and considered thought of a man with great experience in the Canadian income tax field, and it reflects the style of a person who is at home when discussing the subject. It is extremely well written and contains some highly critical and well reasoned statements concerning our Income Tax Act.[1] The book also has some thoroughly amusing comments on the Act.

Insofar as they exist, the text discusses the principles of Canadian income taxation and with a few exceptions follows the organization of the Income Tax Act. The book contains an analysis of each area of the Act, a discussion of its legislative history and judicial development and provides a thorough commentary by the author on its possible basis in principle or fact. This analysis is not available in any of the tax services or texts presently in existence on the subject and therefore forms an extremely valuable contribution for the practitioner who may from time to time be called upon to do some original thinking on the subject as it offers some guidance to the thought processes of the author and a number of ideas on many areas of the Act from which to commence working.

In writing his new text, Dr. LaBrie has retained the disconcerting habit of describing the fact situation of a case and giving the citation of the case without stating the decision. This practice occurred much more frequently in his earlier text *Introduction to Income Tax Law Canada*,[2] and it might possibly be of some assistance to a student in a university library or to a practitioner reading beside a set of complete tax cases, but it is of no value to a person who is reading the book or an area of it for the purpose of finding some answers to a problem, and who does not have a complete set of tax cases at hand. The text contains a number of typographical errors, most of which are either misspellings or errors in section numbers and will be self-evident to most readers. It is unfortunate that Dr. LaBrie did not deal with comparative tax legislation in Canada and other countries, since the comparisons and analyses of which he is capable would be most welcome. However the

[1] R.S.C., 1952, c. 148, as am. [2] (1955).

limitations of time and space no doubt forced this restriction in a work which as it stands is over eight hundred pages long.

In conclusion, the text is well worth reading and is a valuable addition to the works available on income tax in Canada.

DAVID W. BEAUBIER*

* * *

A General Theory of Tax Structure Change During Economic Development. By HARLEY H. HINRICHS. Cambridge: International Tax Program of the Harvard Law School. 1966. Pp. xvi, 154. (No price given)

Occupancy of Tax Fields in Canada. By MARION H. BRYDEN. Toronto: Canadian Tax Foundation. 1965. Pp. 66. ($2.00)

These two small books, dealing with quite diverse aspects of the general subject matter, taxation, are very timely.

Diverse they are; yet they complement each other in a way which should commend them to anyone interested in Canada's current introspection into her tax mentality. Mr. Hinrichs' book, in the course of constructing the general theory described in the title, extrudes some valuable tax philosophy and explodes some hoary myths. Here, then, the theory to which Canadian tax observers might well have regard. The fact background against which Canadian readers might ponder Mr. Hinrichs' theory is provided by Miss Bryden's book. Here is the compilation of data on current tax patterns at all levels of Canadian government.

And small though these two books are, they contain substantial fodder for the ruminant tax observer. Indeed, in respect of Miss Bryden's work, one is tempted to repeat that classic criticism that this book gives one more factual data about taxation in Canada than one cares to have.

However, such a cavil would be unfair to Miss Bryden whose painstaking efforts have produced far more than a collection of data. She has also constructed tables and charts which interpret the data in terms of sharing of the tax power by the Dominion, provincial and municipal governments. Again, the tables and charts are explained and discussed in terse, informative text.

Nor is all the data "taxily" dry and remote from warm, breathing humanity. For example, in the Summary (Part IV) one learns that the provincial revenue from alcoholic beverages, expressed as a percentage of sales, ranges all the way from 48% in Prince Edward Island to 23% in Ontario. Ontario with the lowest tax burden

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on alcohol! Here is a sociological discovery worth mentioning when next the conversation turns to this province's antiquated drinking laws, and the "obviously puritan" rationale therefor.

Mr. Hinrichs' book not only contains an impressive collection of data concerning tax patterns of societies in various stages of economic development, and explanatory text, it also develops a theory of tax structure movement and includes a substantial amount of interesting tax history.

Mr. Hinrichs' major aim is to debunk the traditional view of tax structure development as moving from indirect to direct taxation, and to emphasize the cyclical nature of development. The old view, he points out, was formulated from studies of too limited a sample of societies over too short a period. (Chiefly Europe during the seventeenth to twentieth centuries). The danger of this "wobbly-founded" view is that it can "lead to over-simplified policy conclusions". The author cites Afghanistan's disappointing experience with "modern direct" taxation as a case in point.

To emphasize even more dramatically the danger of becoming too rigid in tax thinking, Mr. Hinrichs exposes the fallacy of today's favoured myth that direct taxation is inherently superior to indirect taxation on grounds of tax equity, by pointing out that even within the unrealistically narrow model adopted by most of the classic tax theorists (that is modern Europe) it is possible to find refutation of this simple dogma. For example, because of the impossibility of properly administering and enforcing direct taxes against the wealthy and powerful interests in the Middle Ages, tax equity was viewed then as residing in more indirect taxation, to the end that tax evasion by the rich and powerful might be minimized.

Mr. Hinrichs' reminders are particularly pointed for us at this time when we will be examining our entire tax structure and planning its revision. Not only does he do us a service by reminding us to discard dogma from our deliberations, he also provides us with some interesting data, particularly in the area of taxation of the foreign trade sector of the economy. It is classically supposed that the proportion of government revenue derived from foreign trade declines with the maturing of the economy to a state of full development. Mr. Hinrichs demonstrates that the pattern is a curve, first rising and then declining, but—and this is very significant for Canada—the ratio is partly determined by population size. It being assumed that the "critical" population level for this purpose may be about fifteen million,[1] it is understandable that Canada's ratio of tax on foreign trade as a percentage of total government rev-

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[1] See note 24, p. 31.

enues is significantly higher than that of most "developed" countries.[2]

JAMES A. RENDALL*

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The American Jury. By HARRY KALVEN JR. and HANS ZEISEL. Toronto: The Canada Law Book Company Ltd. 1966. Pp. x, 559. ($10.00)

Pursuant to a magnificent grant by the Ford Foundation, the University of Chicago Law School has produced the first comprehensive research into the jury process in United States. In preparation for over ten years, under the directorship of Professors Kalven and Zeisel ably assisted by a team of researchers, they have studied every aspect of this unique system of the administration of justice functioning in co-operation with laymen. Many will be constrained to agree with their conclusion "whether or not one comes to admire the jury system as much as we have, it must rank as a daring effort in human arrangement to work out a solution to the tensions between law and equity and anarchy".[1]

The present work entitled *The American Jury* deals exclusively with the criminal law. The second work will be ready in about eighteen months and it will deal with the civil jury.

While the civil jury in Canada may be under attack and in practical disuse in some provinces, the criminal jury must always remain as the final tribunal in serious criminal cases and as the optional arbiter in most felonies. Therefore, this study is of especial value to judges, lawyers and students because it is an analysis of problems common to our Anglo-American system of criminal justice.

The methodology of the research project is intriguing. Using well recognized sampling techniques the research teams selected 3,576 actual trials in forty-two types of serious crimes where the judge disagreed with the jury's verdict and using the judge as the assessor they studied each case in depth. The project took over ten years and 555 judges from all courts participated.

It was decided to disregard those cases in which the judge and jury agreed. The survey showed that they agreed to acquit in 13.4 per cent of all cases and to convict in 62 per cent of all cases, thus yielding a total agreement rate of 75.4 per cent. Enquiry into the

[2] See Table V, p. 25.

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[1] P. 499.

basis for agreement would be of little value and almost impossible, while enquiry into the disagreements through conferences with the trial judge provided a reliable source of information and an opportunity to enquire into the actual decision-making processes by juries and judges. Thus the authors were able to answer the question when do trial by judge and trial by jury lead to divergent results.

Analysis of the area of disagreements showed that the jury in the remaining 24.6 per cent of all cases disagreed with the judge on 19.1 per cent and hung or could not arrive at a verdict in 5.5 per cent. The Canadian lawyer will find the 5.5 per cent of hung juries startling and nothing comparable to the experience in Canada and England where a hung jury is a rarity. To me the answer is quite simple. English and Canadian judges are required to summarize the evidence and are permitted to comment on it for the assistance of the jury, and invariably they do so. Few American judges have this privilege, and still fewer exercise it.

So our interest is really centred on the 19.1 per cent of the cases where the American judge disagrees with the verdict of the jury. This figure also requires a further division. In 2.2 per cent of the cases the judge would have acquitted where the jury convicted, and in 16.9 per cent he would have convicted where the jury acquitted. A defendant in the United States has a 16.9 per cent better chance of acquittal before a jury than before a judge.

It is in the analysis of the disagreements that the authors make such a marked contribution to our knowledge of criminal jury trials and techniques. Each conclusion is well documented and proven where possible by cross-checking. Here are a few of them.

1. A jury verdict is a group decision often reached for a number of individual reasons. The conventional and official role of the jury as being the trier of the facts and nothing else just does not operate that way in practice. There are three areas of disagreement:

(1) The facts alone 34 per cent.
(2) Values and facts 45 per cent.
(3) Values alone 21 per cent.

By values the authors outline an extensive list of elements ranging from the jurors' view of the equity of the situation to his polite quarrel with the law. Often a jury can achieve an equitable result not available to a judge bound by the strict rules of law.

2. On facts alone the jury has a different standard of reasonable doubt from a judge. The jurors' threshold is higher. They tolerate less doubt, and in cases where their values differ from those of the law, the jury search for doubts.

3. The jury is prevented by our rules of evidence from knowing many facts ruled inadmissible by the judge which nevertheless affects the judgment of the judge. Thus the jury system makes

exclusionary rules possible by providing a trier of facts insulated from forbidden knowledge.

4. If we take the average of cases where the defendant has no record as against the cases where he has a record, the acquittal rate declines from 42 to 25 per cent when this record becomes known to the jury, and the authors have produced some interesting tables on cases where the accused does not testify.

5. A jury is responsive to variations amongst individual defendants and their families which a judge may ignore. The young and old have a special position, the jury is reluctant to mar an unblemished future and in the case of the old to mar an unblemished past. No defence lawyer studying the chapters on sentiments about a defendant will overlook the value of members of the accused's family not only as witnesses but as silent and suffering bystanders.

6. Contributory fault of the victim is rarely overlooked by a jury who do not find it easy to distinguish between tort law and the criminal law. They tend to weigh the conduct of the victim in judging the guilt of the defendant. The authors say:[2]

> It bears repeating that it took centuries for the law to come to the position that the State is the other party in a criminal case, a view which, as we have seen, the jury does not entirely embrace. The jury's point which connects the negligent homicide to the fraud to the rape to the drunken brawl is that insofar as the victim is disqualified from complaining, there is no cause for intervention by the state and its criminal law.

7. In rape cases the jury tends to redefine the crime of rape in terms of its notions of assumption of risk and will convict of a lesser offence if possible. If forced to choose between total acquittal and finding the defendant guilty of rape it will usually choose acquittal as a lesser evil. (The authors recommend the proposal in the new Austrian Code which provides for a lighter penalty "if the offence on account of the woman's relation to the man or for some other reason, may be considered less serious".)[3]

8. Reluctance of the complaining witness to prosecute is important to the jury. Presumably in these cases the jury's logic again is that if the victim does not want to prosecute there cannot be very much harm done and there is therefore no reason why the State and the criminal law should intervene. Apparently this is a very potent factor in fraud cases.

9. The concept that the defendant has been punished enough by the time of trial is seen in many forms. We get a glimpse of the profound but disturbing idea that at times the crime may be its own punishment. The victim may be a close relative or friend whose death must always be on the conscience of the accused. Or there may be a long term of imprisonment while awaiting trial,

[2] P. 257.

[3] P. 254.

or the accused was severely injured at the same time of the offence. These and many others the authors study. Usually they are recognized by the judge in the sentence but the jury consider them in the guilt finding process. They feel that a sequence of misfortunes visited upon the defendant stem from the commission of the crime and to be so extreme as to make the defendant appear to be the victim of divine retribution.

10. Analysis of the cases where a judge would acquit but the jury convicts leads us to the conclusion that the jury is not so much an institution with a built-in protection for the defendant, but rather as an institution which is stubbornly non-rule minded. The judge tends to give greater effect to such matters as the corroboration rules in the case of accomplices and offences against females while at the same time overlooking evidence of vulgar conduct in the accused where his guilt is in doubt. The jury is disinclined to give the benefit of the doubt in close cases to those defendants whose behaviour it finds offensive.

The foregoing are by no means exhaustive of the findings, rather they are ten examples of many findings made by the researchers and are set forth solely to whet the appetite of the serious student to make this book his own. In my opinion this work is the most revealing delineation available today on the character and workings of the criminal jury and is essential to judge, counsel and student who would work more effectively with this great institution.

The authors conclude with a most provocative question. In these areas of disagreement why does the judge and jury react differently to the same stimuli? Why does the judge not move over to the jury view, or the jury stay with the judge? They tell us the following:[4]

> The answer must turn on the intrinsic differences between the two institutions. The judge very often perceives the stimulus that moves the jury, but does not yield to it. Indeed it is interesting how often the judge describes with sensitivity a factor which he then excludes from his own considerations. Somehow the combination of official role, tradition, discipline, and repeated experience with the task make of the judge one kind of decider. The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude.
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> The better question is the second. Since the jury does at times recognize and use its de facto freedom, why does it not deviate from the judge more often? Why is it not more of a wildcat operation? In many ways our single most basic finding is that the jury, despite its autonomy, spins so close to the legal baseline.
>
> The study does not answer directly, but it does lay the ground for three plausible suggestions. As just noted, the official law has done

[4] P. 498.

pretty well in adjusting to the equities, and there is therefore no great gap between the official values and the popular. Again, the group nature of the jury decision will moderate and brake eccentric views. Lastly, the jury is not simply a corner gang picked from the street; it has been invested with a public task, brought under the influence of a judge, and put to work in solemn surroundings. Perhaps one reason why the jury exercises its very real power so sparingly is because it is officially told it has none.

The jury thus represents a uniquely subtle distribution of official power, an unusual arrangement of checks and balances. It represents also an impressive way of building discretion, equity, and flexibility into a legal system. Not the least of the advantages is that the jury, relieved of the burdens of creating precedent, can bend the law without breaking it.

The difficulty we encounter in any study of the jury is that we compare it with the only alternative, namely, the judge trial as representing a base line in the law. Are we correct in assuming the judges are right and the jury is wrong when they disagree? Until an equal, full and candid story of the judge is available, we have only half the knowledge needed. Until that is provided we must content ourselves with the remarks reputed to Lord Bramwell:[5] "One third of the judge is a common law juror, if you get beneath the ermine."

E. L. HAINES*

* * *

The Indecent Publications Tribunal. By STUART PERRY. San Francisco: Tri-Ocean Books. 1966. Pp. 169. ($4.95 U.S.)

Assuming that society requires some reasonable protection from prurient pictures, lewd literature, bawdy books and so on, what is the best technique to use in order to achieve it? Should the necessary control be the indirect result of criminal prosecution in the ordinary courts, or should the whole matter be the direct responsibility of an administrative tribunal? Arguably, the area is an ideal one for the application of administrative expertise. Admittedly, a determination whether or not a given book or other publication is "obscene" or "indecent" (assuming that the words are synonymous) involves subjective considerations. Are we not better off to trust the judgment of critics, academics, librarians, and so forth rather than the case-hardened conscience of a judge or the whim of a jury? And if we let the experts decide the issue are we not apt to end up with a more liberal atmosphere—one in which there will be greater freedom to write and publish without the dead hand of censorship hanging over our typewriters?

[5] See The Community and the Law (8th ed., 1958), p. 5.

*The Hon. E. L. Haines, of the Supreme Court of Ontario.

The argument has some attraction. New Zealand accepted it in 1963 with the passage, in that year, of The Indecent Publications Act.[1] This statute applies to books, magazines and pictures. It charges an administrative tribunal with the duty of determining whether or not they are indecent within the meaning of the Act. The ordinary criminal law of New Zealand does not apply to any book or document coming under the statute, and while it creates various offences having to do with the sale and publication of any indecent work any court trying a person for such an alleged offence must refer the issue of indecency to the tribunal and is bound by its decisions on that point. In addition, the Act also gives the tribunal a preventive jurisdiction. That is, it permits certain named officials, or any person with the permission of the Minister of Justice, to refer a book or document to the tribunal for a decision as to whether it is indecent or not. Such a reference may be made—and indeed the Act contemplates that it will be made—in the absence of any prosecution or even threat of prosecution.

The Act does not attempt to remove (and what statute could?) the subjective elements involved in a determination of whether or not a given book or other publication is obscene or indecent. It does not define the word "indecent" save to provide that it "includes describing, depicting, expressing, or otherwise dealing with matters of sex, horror, crime, cruelty, or violence in a manner that is injurious to the public good". The Act does, however, go on to provide a number of general yardsticks which the tribunal is to apply in arriving at a decision. In so doing the famous, or infamous, *Hicklin* test[2] is not abrogated. Indeed, one of the yardsticks written into the Act is the question "whether any person is likely to be corrupted by reading the book . . .".[3] However, these sections of the statute make it clear—and the tribunal has so interpreted it—that the public good is the dominant consideration. Thus, and specifically, the Act in part provides that, notwithstanding any other provisions, "where the publication of any book . . . would be in the interests of art, literature, science, or learning and would be for the public good, the Tribunal shall not classify it as indecent".[4]

This book, in a concise and readable way, summarizes the legislative history leading up to the enactment of The Indecent Publications Act, 1963 and seeks to point to the major social factors in New Zealand influencing the course of the legislation. It then deals with the activities of the tribunal, quoting *in extenso* the judgments handed down by it with respect to the books and other publications with which it has so far had to deal. In this connection it is of some interest to compare, as far as one can,

[1] 1963, No. 22.
[2] *R.* v. *Hicklin* (1868), 3 Q.B.D. 360.
[3] *Supra*, footnote 1, s. 11(1)(e).
[4] *Ibid.*, s. 11(2).

the decisions arrived at by the tribunal with those of Canadian courts in dealing with the same publications. For what it is worth, such a comparison hardly supports the view that literary experts take a more liberal view of what amounts to obscenity than judges. Thus, hear the tribunal on the subject of *Fanny Hill*: in a judgment dealing compendiously with this book and two others it said:[5]

> Although these books would make little impression on the mature mind, and would be regarded by many simply as trash or rubbish, yet what effect, if any, they had would be in the direction of encouraging the acceptance of abnormal, cruel or depraved conduct as normal behaviour. . . . Our view is that each book is designed to pander to prurient appetites. . . . While there is nothing itself decent or indecent in sex, nudity or earthy language, there is considerable significance in the way in which these things are handled and the values they are given. Their treatment in these books is offensive to say the least. . . . On an overall consideration of all the features, these books warrant a finding that each is indecent. In spite of our doubt as to whether a reading could fairly be said to deprave or corrupt an adult reader, we think a general ban is called for.

Compare this passage to Porter C.J.O.'s views where he delivered the majority judgment of the Ontario Court of Appeal in *Regina* v. *C. Coles Co. Ltd.*:[6]

> The freedom to write books, and thus to disseminate ideas, opinions, and concepts of the imagination—the freedom to treat with complete candour of an aspect of human life and the activities, aspirations and failings of human beings—these are fundamental to progress in a free society.In my view of the law, such freedom should not, except in extreme circumstances, be curtailed. . . . I think the author of "Fanny Hill" [wrote] with the serious purpose of presenting in the form of a novel, an accurate picture of a certain seamy side of the life of his time. This he did with humour, integrity and realism. This book is not a great novel. It has some historical value. In my opinion, the book, read as a whole, has not about it that aura of morbidity nor that degree of suggestive pruriency which might render it obscene. . . .

The foregoing comparison, if one can validly generalize from it, may commend to some the Canadian approach to literary censorship as against any attempt to follow the New Zealand example. Obviously, however, there is a fair body of opinion in Canada which supports a stricter approach—feeling that *nihil obstat* should not too readily be granted, Witness the 76,000 ladies from all provinces who signed a petition last year asking Parliament "to stop the domination [of the Canadian Broadcasting Corporation] by a minority which uses television to spread perversion, pornography, free love, blasphemy, narcotics, violence and crime". To the extent that the New Zealand legislation may limit the publica-

[5] Pp. 108-109.
[6] (1964), 49 D.L.R. (2d) 34, at p. 40, (1965), 44 C.R. 219.

tion of questionable books, magazines, and pictures to a greater degree than is the case in Canada these ladies, and others sharing a similar view, may take some comfort from the fact that two Canadian provinces have taken a small step in the same direction. Ontario has its Attorney General's Committee on Obscene Literature; Alberta an Advisory Board on Objectionable Publications.

Each of the above provincial bodies has an advisory function only. Neither does more than give an opinion to interested publishers or distributors as to the nature of certain printed material. Probably a province could go no further. It seems fairly clear that, if public opinion in Canada was to support legislation of the New Zealand type it would have to be enacted by Parliament. Having in mind the time which that institution has spent of late discussing such matters as corruption in high places and the sexual misconduct of persons in high office it might turn with alacrity to consider a suggestion that the federal administration machine be enlarged by the addition of a Canadian Indecent Publication Tribunal. If so, perhaps the collective wisdom of our Parliamentarians could produce a more acceptable title. How *dreadfully* embarrassing to have to confess to membership in a tribunal with such a handle!

ROGER CARTER*

* * *

The Defendants Rights under English Law. By DAVID FELLMAN. Madison: University of Wisconsin Press. 1966. Pp. x, 137. ($4.00 U.S.)

Prefaces are wonderful things. They not only provide authors with a unique opportunity to make public protestations of love and devotion to their wives but also to set their own terms of reference. Professor Fellman spares us the maudlin sentiments of husbandly devotion but states his objective to be a description of those rules in England which "we in the United States come to regard as the constitutional rights of persons accused of crime". *The Defendant's Rights under English Law* is a scholarly and comprehensive fulfillment of this task.

The reviewer's main criticism of this book is that the area covered does not readily lend itself to solely a descriptive analysis. Descriptive statements on the rights of accused persons have a phoenix like quality giving birth to more problems than they appear to solve. To take a minor example, in Chapter IV when discussing the duties of the prosecution the author states "in the interests of

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justice the prosecution is not free to withhold any evidence bearing on the case".[1] But as this involves an element of discretion in determining what is of importance to the defendant's case, should it be reviewable? Even if this discretion be exercised with the utmost integrity the prosecution may unwittingly withhold evidence which would be helpful to the defence. To overcome this defect should the defendant be given power to serve letters of discovery on the prosecution? Perhaps the merit of Professor Fellman's book is that it continually stimulates the reader to pose these questions. In all fairness it should be noted that the book does contain a number of critical passages but these tend to be a reporting of the criticisms of English commentators couched in conclusory form.

This small book is comprehensive in its coverage ranging from such diverse topics as arrest, confessions, search and seizure, *habeas corpus* and double jeopardy to the archaic custom of judges and counsel wearing gowns and wigs. The lacunae that do exist are more matters of emphasis than serious omissions. In the section on arrest it is unfortunate that no mention is made of the illegal but common practice of detaining suspects for questioning as this involves the problems of the extent to which the police should be permitted to exploit ignorance. Should the police be compelled to inform a suspected person that they possess no powers of detention without prior arrest? The use of ignorance as an aid in obtaining evidence raises the interesting jurisprudential problem of whether or not a person possesses rights in a meaningful manner if he is unaware of their existence.[2]

While every full blooded Scotsman would rightly resent being associated with the sassenach south of the border it is unfortunate that the author did not note the interesting doctrinal developments in Scotland. Such cases as *Chalmers* v. *H. M. Advocate*,[3] *Lawrie* v. *Muir*,[4] *McGovern* v. *H. M. Advocate*,[5] are worthy of mention.[6]

It is also difficult to accept Professor Fellman's interpretation of the effect of Rule I of the new Judges' Rules. Rule I reads as follows, "when a police officer is trying to determine whether or by whom, an offence has been committed he is entitled to question any person whether suspected or not, from whom he thinks the useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it". According to the author the effect of this is to

[1] P. 69.

[2] For an interesting situation in which this problem was graphically brought into relief see: *R.* v. *Tass* (1946), 87 C.C.C. 97.

[3] [1954] S.L.T. 177. [4] [1950] S.L.T. 37. [5] [1950] S.L.T. 133.

[6] Since publication of this book it would appear that Scots courts as regards the determination of voluntariness are gravitating more towards the English position. See *Brown* v. *H. M. Advocate* [1966] S.L.T. 105.

relieve the police of the necessity "to caution a person before they have charged him or made up their minds to charge him so long as his responses are voluntary".[7] While a strict reading of the language of Rule I could support this interpretation surely it must be read in conjunction with Rule II which obligates the police officer to administer a caution once he has "reasonable grounds for suspecting that a person has committed an offence". To accept Professor Fellman's interpretation of the effect of Rule I would nullify the intended effect of Rule II.

As this book reflects both conscientious and painstaking scholarship it is unfortunate that there is no index of statutes and cases which would make this scholarship more readily available to the reader. Professor Fellman's book should serve as an admirable introduction for American readers and should, it is hoped, provide a framework for a more critical comparative analysis of the rights of accused persons in England and the United States.

D. PRENTICE*

* * *

Shawcross and Beaumont on Air Law. Third Edition. By PETER B. KEENAN, LL.B. (Manchester), B.Litt. (Oxon), Barrister-at-Law, ANTHONY LESTER, B.A. (Cantab.), LL.M. (Harvard), Barrister-at-Law, and PETER MARTIN, LL.B. (London), Solicitor, with a chapter on space law by J. F. MCMAHON, M.A., LL.B. (Cantab.), LL.M. (Harvard), Barrister-at-Law. London: Butterworth & Co. (Publishers) Ltd. Toronto: Butterworth & Co. (Canada) Ltd. 1966. Volume 1. Text. Pp. xxix, 736; Volume 2. Appendices, Tables, Index, Service (loose-leaf). Pp. ix, 252 (Appendix A), 179 (Appendix B), 305 (Appendix C), 17 (Appendix D), 156 (Tables of Statutes, Rules and Regulations and Cases; Index). ($77.50 post paid)

Since the second edition of this book appeared in 1951 there have been many important developments in the field of air law. At the same time, the law of outer space has, within the brief period of its existence, developed an extensive literature.

New material on air law since 1951 includes the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (1952), the Hague Protocol to Amend the Warsaw Convention (1955), the Guadalajara Convention, Supplementary to the Warsaw Convention (1961), the Tokyo Convention on

[7] Pp. 40-41.

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Offences and Certain Other Acts Committed on Board Aircraft (1963), at least three multilateral joint financing agreements covering facilities and services in the North Atlantic area (The Paris Agreement of 1954 and two Geneva Agreements of 1956), a multilateral agreement on commercial rights of non-scheduled services in Europe (1956) and one relating to certificates of airworthiness for imported aircraft (1960).

The period of 1951-1956 has also witnessed the economic resurgence of Europe and a development of community-oriented thinking in a large part of that continent. In the aviation field, this thinking gave birth to the European Civil Aviation Conference, which has very close links with the Montreal-based International Civil Aviation Organization, a specialized agency in relationship with the United Nations. Also, regional organizations specifically concerned with the furnishing of air navigation services have come into being. Thus, there are EUROCONTROL which, with its headquarters in Brussels, has air traffic control jurisdiction over much of the European airspace, the *Agence pour la Sécurité de la Navigation Aérienne*, which supplies air navigation facilities and services among a number of French-language States in Africa, and, finally, the Corporation for Air Navigation Services in Central America (COCESNA) all of which bear witness to the levelling of national barriers by the technical requirements of aviation. According to recent news, ICAO is now engaged in sponsoring the development of an African Civil Aviation Conference.

The concept of liability has also undergone a marked change in international conventions due to new technological notions. The Paris and Vienna Conventions on Nuclear Liability of 1960 and 1963 respectively have introduced a concept of liability which channels liability in practically all cases to the operator of a nuclear installation. Another wave of change is under way in the field of aviation liability. An ICAO subcommittee has been studying the possible revision of the Rome Convention of 1952, while the threatened United States denunciation of the Warsaw Convention on the air carrier's liability and its rejection of the Hague Protocol (which it did not ratify) has brought about a searching and apparently far-reaching examination of the whole Warsaw system.

Against this background, one may now examine the two volumes of this monumental third edition. First of all, it may be useful to take a *vue d'ensemble* and see what these volumes contain. Then it may be appropriate to examine particular subjects on a sampling basis in order to ascertain to what extent the third edition has kept up the tradition of excellence established by the first two.

Like the second edition, the third one contains a vast array of subjects. The number of chapters of the narrative text, which is

in volume 1, has increased from thirty-six to forty-two and the twelve parts of the second edition have increased to fourteen in the third. This text occupies 736 pages compared to 559 pages in the second edition. The fourteen parts deal with such matters as the nature, sources and scope of international air law and of English air law; the administration of English law relating to aviation and air transport services; the laws restricting and regulating the right to fly; the international and English law of carriage by air; surface damage, collisions and other instances of liability arising from the operation of aircraft; the law of master and servant in connection with use and operation of aircraft; airports, aerodromes and air navigation facilities; aircraft and aviation insurance; crimes on board aircraft and space law.

Volume 2, which is in looseleaf form, contains 762 pages of appendices (as compared to 677 pages of appendices in the second edition). These include a statement of the status of treaties and conventions, the texts of international conventions and multilateral treaties, United Kingdom statutes and subordinate legislation, the International Air Transport Association (IATA) Conditions of Carriage, tables of statutes, subordinate legislation and cases, as well as an index to volumes 1 and 2.

In view of the many developments in air law since the first edition, it is not surprising that one half of the text is new or has been entirely rewritten; in particular, the chapters on carriage by air have been almost entirely rewritten and new material has been added. Also, there have been changes in the footnoting technique. Whereas the second edition contained footnotes keyed to the numbered sections of the book and they were found only following the respective sections, the third edition follows the more convenient arrangement of ensuring that footnote material is on the same page as the text to which it refers. Reference is made to English, United States and Commonwealth decisions on aviation matters as well as to articles appearing in legal periodicals and to other relevant literature.

As volume 1 contains the descriptive material on air law (as distinct from the treaty and legislative material found in volume 2) it is proposed for the remainder of the review to place the emphasis on volume 1. Although it is not practicable to discuss the contents of volume 1 in detail, an attempt will be made to indicate a few of the points which might be borne in mind by its prospective users.

The authors have been careful to continue the tradition established by the first edition of stating the common law in some detail This makes the book much more useful to the Canadian lawyer than it might otherwise have been since, today, much of the English law of liability in respect of domestic aviation operations is covered

by statutory rules. This is not so in Canada which, unlike England, does not apply the Warsaw Convention rules domestically. Nor does any Canadian jurisdiction have the equivalent of section 40 of the United Kingdom Civil Aviation Act, 1949[1] which to a great extent displaces the common law rules concerning trespass, nuisance and surface damage in so far as concerns air navigation. In Quebec, of course, civil law rules would apply not only in the three cases just named but also in the case of domestic carriage by air.

On the side of administrative law, the authors have a sage comment to make born of the detailed regulatory material required to govern the complex technology that is aviation, thus: "The great volume of subordinate legislation in the air law field puts respect for the maxim that everybody is assumed to know the law in great jeopardy."[2] The average taxpayer would probably use much stronger language in relation to the Income Tax Act and regulations made thereunder.

The exhaustive and practical description of government departments and local authorities concerned with civil aviation and as well as of the functions, powers and duties of the Ministry of Civil Aviation[3] will now have to be read in light of the fact that, in 1966, most civil aviation functions of the Ministry were transferred to the Board of Trade, Civil Aviation Department.

In dealing with the right to fly, the authors have wisely decided to include the ICAO Council's definition of the expression "scheduled international air services" as well as the analysis, made by the Council, of the rights of non-scheduled flight conferred by article 5 of the Convention on International Civil Aviation.[4] Another good example of the useful material included in volume 1 is the reproduction of the criteria adopted by ICAO to be used by States as a guide in determining reportable differences to Annexes to the Chicago Convention.[5]

The comprehensive statement of the English law relating to the establishment and operation of air transport services is useful for an operator who contemplates flying into the United Kingdom.[6]

Of use to the student of bilateral air transport agreements is the concise statement of various types that may be encountered.[7]

The best part of the book for the "Main Street" lawyer contains the law governing liability in respect of carriage by air, surface damage, collisions and related matters. The Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air (1929), which has been accepted by more than eighty States, has been applied by the United Kingdom to non-

[1] 12, 13 & 14 Geo. 6, c. 67.
[2] P. 104.
[3] Pp. 121-164.
[4] Pp. 195-201.
[5] Pp. 215-216.
[6] Pp. 295-352.
[7] Pp. 281-289.

international carriage since 1952. But fortunately for the common law lawyers of Canada the volume nevertheless contains a clear discussion of the English liability rules that would be applied in Canadian common law jurisdictions in the absence of the domestic application of the Convention.[8] Such is the detail of the treatment that the examples of negligence in connection with aircraft cover a page and a half of fine print.[9] Similarly, the book gives thirty examples of cases in which the maxim *res ipsa loquitur* has arisen: in sixteen of these thirty it was applied.[10] Of particular interest to all Canadian lawyers, whether common law or civilian, is the masterly discussion of the Warsaw Convention which, as stated above, applies to international carriage by air, this Convention being implemented in Canada by a federal statute.[11] There is also a good coverage of the Hague Protocol of 1955 which amended the Warsaw Convention. Canada is a party to the Protocol, although the United Kingdom is not. Also examined is the Guadalajara Convention of 1961, Supplementary to the Warsaw Convention, the Guadalajara text covering the case where international Warsaw carriage is performed by a carrier other than the contracting carrier.[12] It is not surprising that the discussion of the Warsaw system features prominently in the book, since the late Major K. M. Beaumont, co-author of the first and second editions, was so renowned an expert on the subject that, at one stage, it was suggested that a revised Warsaw Convention be called the "Beaumont Convention". Of late, the Warsaw system has been called into question due to the unwillingness of the United States of America to accept the Hague formula which increased the passenger limit from $8,291.00 (U.S.) to double that amount. As a result of the IATA special arrangement, which became effective on May 16th, 1966, carriers with flights touching United States territory are now subject to a passenger limit of $75,000.00 (U.S.), including legal fees and costs, or $58,000.00 (U.S.), excluding legal fees and costs and bear a burden of absolute liability instead of the presumed liability of the old system. An ICAO Panel of Experts has been appointed to study the question of passenger limits and held its first session in January 1967.

The IATA Conditions of Carriage for Passengers, Baggage and Cargo are explained in considerable detail.[13]

Aside from the items mentioned earlier in this review, the volume contains useful statements of the law concerning ownership, manufacture, possession, hire and other commercial dealings in aircraft. Under the heading of crimes, there is a good summary of the Tokyo Convention on Offences and Certain Other Acts

[8] Pp. 370-399. [9] Pp. 371-373. [10] Pp. 376-379.
[11] The Carriage by Air Act, R.S.C., 1952, c. 45.
[12] Pp. 333-348, 400-477. [13] Pp. 482-494.

Committed on Board Aircraft (1963) which Canada has signed, but not yet ratified.[14] The status of the hovercraft or air cushion vehicle comes in for brief consideration when it is submitted that "as the hovercraft relies directly on the surface of the land for its support when on land and directly on the surface of the water when travelling over water that it is preferable to regard it as a land vehicle when on land and as a ship when travelling over water".[15]

The volume has a few shortcomings which in no way detract from the excellence of the third edition. There are a number of points on which a little more research in obvious sources would have made the book somewhat more complete and there are a number of typographical errors. None of these defects will impair the usefulness of the book for the practising lawyer, although they may prove to be a source of minor annoyance to the student. On the side of incompleteness here are some examples: (1) There is a discussion[16] of the London Convention concerning Exemption from Taxation for Liquid Fuel and Lubricants Used in Air Traffic (1939), which did not come into force; but there is no mention of the fact that the ICAO Council, in 1951, adopted a resolution with a view to ensuring implementation of certain provisions of the Convention. Indeed, in November 1966, it adopted a further resolution amending the earlier resolution. (2) Reference is made to the obligation of States under article 21 of the Chicago Convention on International Civil Aviation to supply certain information to ICAO, *inter alia*, concerning registration and ownership of aircraft registered in that State.[17] But no mention is made of the Council decision of 1950 that no such action should be taken at that time by ICAO pursuant to article 21 of the Convention. Nor has such action yet been taken. (3) Reference is made to the requirement of the Chicago Convention that every aircraft engaged in international air navigation must carry, *inter alia*, its journey log book.[18] But it is not stated that, in 1956, the ICAO Assembly adopted Resolution A10-36 which provides that the General Declaration referred to in Chapter 2 of Annex 9 (Facilitation) to the Chicago Convention, when prepared so as to contain all the information required by article 34 of the Convention with respect to the journey log book, may be considered by contracting States to be an acceptable form of journey log book; and the carriage and maintenance of the General Declaration under such circumstances may be considered to fulfill the purposes of articles 29 and 34 with respect to the journey log book. (4) The chapter on space law[19] does not bear out the statement in the preface that the law "is stated in general as at 1 July 1965 but later developments have been noted where possible", since the last information given dates

[14] Pp. 701-715. [15] P. 408. [16] P. 293.
[17] P. 218. [18] P. 222. [19] Pp. 716-731.

from the end of 1963. There were important meetings in the United Nations in 1964 concerning the legal aspects of outer space activities.

There are two small factual errors which require correction: (1) The Warsaw Convention came into force for Canada in September 1947 and not in July 1947 as indicated in footnote 20 on page 117; (2) The reference to "*Canada:* The Civil Aviation Act 1952, as amended" found on page 118 would more properly be: "*Canada:* Aeronautics Act 1952 as amended".

The treaty and legislative material in volume 2 is well presented and is most convenient for reference. The tables of statutes and cases are well prepared. Needless to say, the exhaustive index to the volumes will save endless hours for the user.

Shawcross and Beaumont on Air Law, third edition, is a credit to those who prepared it and a tribute to those whose pioneering spirit led them to prepare the first and second editions. The book is by far the best of its kind in any language and any shelf on air law publications will be woefully deficient without it.

GERALD F. FITZGERALD*

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The Canadian Yearbook of International Law. Vol. 4. Edited by C. B. BOURNE. Vancouver: University of British Columbia. 1966. Pp. 340. ($12.00)

The fourth volume of the *Canadian Yearbook of International Law* is well up to the standard set by its predecessors, although the 1966 issue lacks the usual contributions in French, and this year there is somewhat less emphasis on specifically Canadian oriented issues.

Professor Rohn of the University of Washington contributes a global survey of "Canada in the United Nations Treaty Series", pointing out that there is a twenty-three per cent gap between the *Canada Treaty Series* and the *United Nations Treaty Series*, with the latter containing nothing that is to be found in the former. He is of opinion that the gap is not very important, and is by no means as extensive as that of a good many other countries, tending to be largely confined to treaties which are less formal in character and short in duration. The author contends that while the gap may be insignificant from the law point of view, it can be serious in so far as the academic researcher is concerned, particularly the one looking for "trends" in treaty-making and style. The other paper which is specifically concerned with Canada is Dr. Mackenzie's

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paper on anti-dumping duties. He points out that since there is no statutory requirement of injury, the Canadian legislation appears completely ruthless and that any manufacturer could theoretically force a foreign competitor from the market by reducing his prices below the level indicated by section 6 of the Customs Tariff Act.[1] He implies that the only protection that exists against such narrow protectionism is "a judicious use of administrative inertia"! He would like to see the language of the anti-dumping legislation brought into line with that of GATT. As a matter of realism he emphasises that, while there may be some ground for this type of legislation in view of the proximity of United States competition, it must be remembered that a liberal trade policy is in Canada's interest and that if a rigid protectionist line is pursued at home, a similar confrontation is likely to be met abroad.

Canadian problems are more adequately represented in the "Notes and Comments" where Mr. Poeliu Dai presents a somewhat factual account of Canada's role as a member of the Supervisory Commission in Vietnam; Professor McWhinney contributes a brief summary of the 1965 meeting of the Canadian Branch of the International Law Association which considered coexistence on the national and international level; and there are further statements on Canadian practice in international law contributed by Professor Lawford and Mr. Gotlieb, the former having compiled his record from public statements, primarily in the House of Commons, while the latter relies rather on the correspondence and statements of the Department of External Affairs.

In the wider field of international law, Dr. Rodley analyses some of the aspects of the Convention on the Settlement of Investment Disputes drawn up by the Executive Directors of the World Bank. It will be interesting to see how the proposed arbitral tribunal will deal with some of the problems the author raises. Another international organisation which is discussed in the current *Yearbook* is the International Law Commission, with Mr. Gotlieb combining a review of Dr. Briggs' recent monograph on this body with a critical appraisal of its ability to contribute to the development of an acceptable international law, particularly at a time when there appears to be a definite retreat from the World Court. Mr. Amerisinghe contributes the remaining paper on the work of the United Nations, providing a careful assessment of the *travaux préparatoires* of the Charter from the point of view of the power of the Organisation to use armed force—a problem which may become of increasing importance when it is found that the economic sanctions against Rhodesia fail to bring about the downfall of the rebellious régime. His review of the documents leads him to a conclusion which is not as restrictive as that sometimes put

[1] R.S.C., 1952, c. 316, as am.

forward and he finds some support therein for the advisory opinion on expenses, as well as for a right in both the Security Council and the General Assembly to resort to peacekeeping measures and military action outside the scope of article 43 of the Charter.

Finally, the present reviewer examines the development of the relations between Malaya, Singapore and Malaysia, paying particular attention to the problems of State competence, succession and continuity.

The non-Canadian matters discussed in the Notes are the Dominican crisis, with Mr. McLaren looking at the issue from the standpoint of the Organisation of American States as a working institution; and the American notice of denunciation of the Warsaw Convention in respect of the liability arising from the international carriage of passengers by air. The note is valuable since Dr. FitzGerald who wrote it is Senior Legal Adviser to ICAO and he points out that if air law is to remain important it must keep pace with the times and not allow itself to become redundant as a result of being outrun by technological developments.

Although the Canadian interest content of the *Yearbook* may be less than previously, the range of papers and the manner of treatment is such as to emphasise that the decision to introduce a *Canadian Yearbook of International Law* some four or five years ago was more than justified, even though a large number of established annuals already exist.

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