Canadian Constitutional Law In a Modern Perspective. By J. NOEL LYON and RONALD G. ATKEY. Toronto: University of Toronto Press. 1970. Pp. vi, 1351. ($25.00)

The new textbook *Canadian Constitutional Law in a Modern Perspective* edited by J. Noel Lyon and Ronald G. Atkey is likely to have a marked and immediate influence on students and teachers of that subject and later on the behaviour of Canadian lawyers and judges. Its publication is thus an event of both such academic and public importance that a political scientist feels the urge to step outside his own field of professional competence and comment on it.

The most explicit development of the Lyon-Atkey policy orientation occurs in their treatment of human rights. It appears to me that this analysis is based on both errors and unexamined and questionable assumptions about the nature of human rights and how rights can and should be protected. More importantly perhaps, there is the argument that so far as human rights are concerned, Canadian judges should substitute their own preferences for legal precedent and constitutional principle.

The explicit aim of the Lyon-Atkey text is to "expand the role of the lawyer and the scope of law"[1] through providing a technique of analysis by which lawyers and judges can more openly and more effectively than now articulate the "shared goals of Canadian society".[2] At present these Canadians have "no frame of reference that is sufficiently objective to serve the purpose of translating shared values into formal decisions",[3] and "our best legal minds . . . often display an inability to subordinate the technical frame of reference to the larger context of community values within which basic constitutional questions must be approached".[4] This judgment is made:[5]

> Whether or not judges utilize logical analysis as a strategy in making

[1] P. vi.
[2] P. xiii.
[3] P. v.
[4] P. vi.
[5] P. 53. Emphasis in text.

> public decisions it is important that they understand and articulate the real policies which are at stake in any given case. Too often the members of the Canadian judiciary in deciding public law cases rely *exclusively* on the superstructure of logical analysis in existing legal materials, which to the layman appear to be but a facade of legalities. Existing legal theory thus imposes upon judges a narrow concept of law which defines as outside the realm of "law" most of the significant values and activities in the community. In too many cases judges will decline to undertake meaningful inquiry into the implications of the choices they are making in terms of community values and goals. The only thing that keeps the whole superstructure from collapsing is the fact that generally our judges are educated and experienced human beings who read their newspapers and history books when they go home in the evening.

In the Lyon-Atkey view, the prevailing traditions of the judiciary have had some of their most unfortunate effects in cases involving human rights. For the most part, the explicit grounds of decision have followed the "division of powers" approach and have gone no further than to determine whether or not Parliament or the provinces have encroached on each others' jurisdiction.[6] In explanation, it is suggested that perhaps in some instances "the judges have known exactly what they were doing and . . . have adopted the division of powers approach only as a form of judicial expedient to reach a desired result in a given situation".[7] Or again, "The division of powers approach might . . . be one way of reconciling legislative supremacy with the invalidation of legislation denying certain fundamental human rights".[8] Alternatively, this approach might be based on the "confusion" of Canadian judges about "the very nature of human rights".[9] This judgment is reached:[10]

> Whether the division of powers approach is the product of the confusion or the cause of it is not easily determined. But what appears clear to us is that the approach has not fostered the sort of systematic judicial response to fundamental rights issues that is necessary for the fullest protection of basic shared values in Canadian society. To us, there are certain shared values in Canada which are fundamental: opportunity for self-development and self-expression, a share of the national wealth, and participation in public decisions, for example. If our constitutional system will not protect these and other shared values, and do it openly rather than by indirect judicial expedient, it is submitted that we will be unable to develop from our present situation the quality of civilization to which we aspire.

Lyon and Atkey suggest for Canadian judges a very new kind of prescription, ". . . the issue as to whether fundamental rights

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[6] Pp. 375-377.
[7] P. 375.
[8] P. 376.
[9] *Ibid.*
[10] *Ibid.*

are within exclusive federal or exclusive provincial competence is largely irrelevant. The vital question in public decisions directly affecting the individual should be 'What basic shared values of the people are worthy of protection in this case?' not 'Which level of government is competent to deny this man's fundamental rights?'".[11] Thus:[12]

> If a fundamental rights issue is clearly perceived, a court should attempt to meet the issue head-on, and should be loathe to allow *any* level of government to deny this right through claims that it is merely acting within its proper sphere of legislative jurisdiction. This is no easy task for a court in view of the wide sweeping nature of some of the heads of jurisdiction of sections 91 and 92. . . . Yet we believe this task can be performed imaginatively and well by legally trained men willing to apply their minds to the creation and preservation of a free society.

Lyon and Atkey are not very specific as to how imaginative judges would rationalize this new kind of decision-making about fundamental rights but from time to time there have been three such kinds of justifications.

1. *Some qualification on legislative supremacy is implied by the preamble to the British North America Act.* The leading example here is of course the Duff-Cannon dicta in the *Alberta Press* case[13] to the effect that the preamble to the 1867 Act asserting that the original provinces desired to be united "with a Constitution similar in Principle to that of the United Kingdom" implies a restriction on provincial power to encroach on human rights. Lyon and Atkey say of these dicta: ". . . the judgments of Duff C.J. and Cannon J. in the *Alberta Press* case were an invigorating departure from the sterility of traditional judicial analysis. An implied bill of rights in the B.N.A. Act meant that, for the first time fundamental rights and liberties were capable of enjoying a separate constitutional existence apart from the enumerated heads of legislative power."[14]

2. *Legislative supremacy is qualified by the prescriptions of natural law.* Lyon and Atkey quote part of the judgment of Casey J. A. in the *Saumur* case:[15]

> What concerns us now is the denial of appellant's right of inviolability of conscience, a denial that is coupled with or affected by . . . active interference with his right to control the religious education of his children. . . .

[11] *Ibid.*
[12] P. 377.
[13] *Re Alberta Statutes,* [1938] S.C.R. 100
[14] P. 392.
[15] *Saumur* v. *City of Quebec and A.G. of Quebec,* [1953] 2 S.C.R. 299. P. 407. Mr. Justice Rand was of course the most distinguished natural law theorist of recent Canadian jurisprudence.

> The rights of which we have been speaking, find their source in natural law. . . . If these rights find their source in positive law they can be taken away. But if, as they do, they find their existence in the very nature of man, they cannot be taken away and they must prevail should they conflict with the provisions of positive law.

3. *Legislative supremacy is qualified by enlightened international practice and declarations of intent.* In *Re Drummond Wren*[16] Mackay J. of the Ontario High Court referred to what he regarded as enlightened aspirations and practices outside Canada in invalidating a restrictive covenant forbidding the transfers of certain lands to "Jews or persons of objectionable nationality". Among the references were the San Francisco Charter, the Atlantic Charter, wartime statements of Churchill and de Gaulle and the Constitution of the Soviet Union.

Such rationalizations as those outlined above impose almost no restrictions on the discretion of judges in securing what they variously regard as fundamental rights and thus overcoming the alleged rigidities of the division of powers approach. This, it seems, is the way Lyon and Atkey want it even if striking a blow against, say, anti-semitism judges bolster their preferences by referring to the Constitution of the Soviet Union. It is stated that: "The heads of legislative power in sections 91 and 92 were never intended by the framers of the B.N.A. Act to serve as instruments for the protection of human rights."[17] This statement is historically accurate if it means to affirm that the Fathers of Confederation assumed that human rights would continue to be protected by the safeguards of the civil and common law systems supplemented, extended and from time to time altered by the enactments of Parliament and the provincial legislatures. Lyon and Atkey say of the *Alberta Press* case: "That the B.N.A. Act contained the principle upon which the existence of some form of a bill of rights could be implied was a novel theory in constitutional jurisprudence in 1938. Neither the Judicial Committee of the Privy Council nor any Canadian court had previously dealt with civil liberties issues in such a manner."[18] It might reasonably be asked from whence came the judiciary's authority in 1938 and onward to effect such a fundamental change in the Canadian constitution.

There is of course the awkward matter of the principle of legislative supremacy and, as we have seen, Lyon and Atkey realize that "the wide sweeping nature of some of the heads of sections 91 and 92" will impose challenges if not obstacles to judicial creativity in establishing fundamental rights as independent

[16] [1945] O.R. 778.
[17] P. 375.
[18] P. 392.

constitutional values. Disparagingly, they refer to the adherence of Canadian judges to the "English notion of parliamentary supremacy"[19] and on the basis of three recent United Kingdom cases conclude that "the rule of law is the central working principle of the English constitution, whatever theoretical significance positivist theory claims for the supremacy of Parliament".[20] Thus with a wave of the hand is dismissed the whole Diceyean formulation of parliamentary sovereignty *and* the rule of law as complementary and interlocking principles of the British constitutional system. In the Canadian setting parliamentary sovereignty is of course qualified by a constitutional division of legislative powers and by a very few specified matters in respect to which no legislature can enact laws. As in the United Kingdom, there are certain judicially-imposed restrictions on the powers of legislatures to remove acts of themselves from review by the courts. To resort to casuistry, one can claim that legislative supremacy is qualified by the circumstance that legislatures cannot enact *ambiguously* in encroaching on human rights or in changing the common law because when they do so courts will interpret such legislation to favour such rights and the common law.

Contrary to Lyon and Atkey, legislative supremacy in Canada is something other than a "theory" or an "English notion" perpetuated by positivist judges. As qualified by a division of legislative powers and by a very explicit exception it has been from the first the central operating principle of the Canadian constitutional system. Lyon and Atkey admit as much by their assertion that until the Duff-Cannon dicta of 1938 there was no recognition in Canadian judicial interpretation of human rights as an independent constitutional value. The principle of legislative supremacy asserts no more and no less than that the final and authoritative public decisions of the Canadian community, including the recognition and ranking of what are alleged to be human rights, are to be made by Parliament and the provincial legislatures within the respective jurisdiction of each rather than by the courts of law. If this regime is to let it be changed in the directions suggested by Lyon and Atkey, let it be changed by constitutional amendment rather than judicial subterfuge.

Lyon and Atkey are preoccupied, almost obsessed, with protecting what are referred to again and again as "shared values". Public institutions as such are "stable, long-term instrumentalities for the protection of the fundamental shared values of the Canadian people".[21] The courts of law have a crucial role here:[22]

[19] P. 376.
[20] P. 66.
[21] P. 65.
[22] P. 68.

> In order to provide continuity of basic values a high degree of formalization is required, and this means that a technique is necessary before ultimate decisions can be arrived at. Thus there develops a body of decision-makers who evolve and perpetuate the necessary technique without which basic community values could not be guaranteed against erosion. We call these men judges and put the full power of the community behind their decisions. Access to these central positions of community power is, needless to say, open only to those who have demonstrated without a doubt a skill in the objective perception of community expectations coupled with a capacity to subordinate subjective criteria to perceived community expectations.

Thus the credentials of our judges are not a refined technical knowledge of legal rules and sensitivity and impartiality in applying these to individual circumstances but rather their abilities to be guided by their "objective perception of community expectations". How to divine such expectations is admittedly difficult but:[23]

> . . . we do sense in what vague way the general direction in which we want to evolve as a people. The strange part is that this sense comes not from formal statements but from the expression of the artist, the poet, the playwrite (sic) from our experience of the sensed world. This is not so strange, really, for the formal statement is merely the reflection of our values, not the source. These basic values do not change from one generation to the next. On the contrary, they are reaffirmed as the genuine pursuit of enlightenment proceeds.

On the surface, it does indeed seem strange that Lyon and Atkey should emphasize "shared values" within the context of proposals for the more effective protection of human rights. For it is in this area of public decision where conflicts about values and their ranking most characteristically occur. What does the prescription to be guided by "an objective sense of community expectations" mean to a judge considering the validity of Sunday observance legislation when some in the community regard such enactments as the public recognition of a divine imperative, others as an intolerable restriction on the fundamental rights of non-Christians and yet others as a utilitarian device to better secure a common day of rest and relaxation? It may be conjectured, perhaps unfairly, that Lyon and Atkey proceed on the assumption "that encroachments on human rights are always unequivocal and that disinterested and liberal persons will be able to agree when such encroachments have been made".[24] Or are they really trying to revive a very ancient tradition that law is not to be created but discovered?

Some judges, and others of us who are not, may read their "newspapers and history books" as well as the contemporary ex-

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[23] *Ibid.*

[24] Donald V. Smiley, The Case Against the Canadian Charter of Human Rights (1969), 2 Can. J. of Pol. Sc. 290.

pressions of artists, poets and playwrights and come to much different and less sanguine conclusions about Canadian society than do Lyon and Atkey. According to this other perspective it is not so much a question of articulating and safeguarding "shared values" but of governing a society where there has been a progressive erosion of values on which people agree. The most difficult problems of public decision are not of sustaining consensus but of giving authoritative resolution to conflicts.[25] These conflicts are of an increasingly fundamental nature and often involve what are claimed to be human rights.

(Lyon and Atkey nowhere give any account of why lawyers and judges are more capable than other educated people of articulating community values and on the basis of their argument a case might be made that a training in law, at least of the positivist variety, would be a disavantage to a judge.)

Even a casual reading of the times reveals ever more strident demands for new claims alleged to be human rights and demands that existing rights be ranked differently. Evolving electronic, medical and genetic technologies contain unprecedented challenges to the rights of the person. We are involved in a progressive redefinition of the methods and limits of lawful social conflict. Historically disadvantaged groups demand to participate more fully in the political and economic systems. We define and redefine the economic rights of property-owners, employees and consumers. In such circumstances there is more likely to be agreement on generalities than on the specific competing claims which are the preoccupation of both courts and other agencies of public decision. Lyon and Atkey assert: "The participants in the constitutional process also function under certain minimum shared value premises. For example, no responsible public decision-maker in Canada would ever advocate the elimination of all welfare measures to the extent that people would starve or not have shelter against the elements".[26] Perhaps. But important decision-makers in Canada—responsible or not—*have* in the past months suggested that public assistance be denied to persons in the population whose indigency is allegedly self-inflicted; strikers and their families, persons who will not move their residence to take available employment, adolescents who prefer not to live at home, young people who have taken up a nomadic life-style. In our kind of society, the protection of human dignity involves consideration of competing demands in very specific circumstances.

[25] A touch of realism can be added here by one policy-oriented Canadian lawyer, Alan Borovoy, who is General Counsel of the Canadian Civil Liberties Union. Rebuilding a Free Society, in Power Corrupted, Abraham Rotstein, Ed. (1971), pp. 99-117. Mr. Borovoy's argument is for widening the lawful means of non-violent dissent and conflict.

[26] P. 117.

The new demands that are being advanced as fundamental human rights are in part a resultant and in part a symptom of the breakdown of shared values in Canadian and other western societies. In Canada as elsewhere we face again the old problem of how government can adopt itself to the demand of hitherto relatively quiescent groups for fuller participation in the processes of public decision. Such groups characteristically press their claims in ideological terms more or less disruptive of the relative agreement on certain key values prevailing in the society which they are trying either to remake or to join as full and participating members. Political conflict becomes increasingly ideological and one of the thrusts of ideology is to make new and unprecedented claims on society in terms of fundamental human rights. Where are the "shared values" of Atkey and Lyon as applied to those who proclaim "abortion is murder" and those who press for "abortion on demand"? Or the unilingualists of Quebec and those parents who demand the unconditional right to choose the language in which their children are educated? Or between police chiefs and those whose values appear not to include law enforcement at all?

Apart from human rights, Lyon and Atkey are less concerned than other students of Canadian constitutional law about the rule of judicial review in umpiring the federal system. Only about a third of the book is devoted to the federal-provincial distribution of legislative powers and of this a considerable amount of the text is from non-judicial public documents. This is in marked contrast to successive editions of Laskin's *Canadian Constitutional Law* whose subtitle is "Cases, Text and Notes on the Distribution of Legislative Power".[27] In the Lyon-Atkey view of this aspect of judicial decision,[28]

> If the purpose of a constitution is to promote those values to which people of the country overwhelmingly and permanently subscribe, then the specific terms of the constitution must be interpreted and understood to reflect those values. For this reason, we propose that the distribution of powers in Canada's federal system be studied and organized in terms of real value processes as opposed to the abstract heads of power in sections 91-5 of the B.N.A. Act.

The "value categorizations" are the following—"power, wealth, well-being, respect, enlightenment, rectitude, skill and affection".[29] To me, these are a good deal more "abstract" and generally less meaningful than the enumerated headings of sections 91-95 of the British North America Act as elucidated by more than a century of judicial interpretation and by the kind of more ortho-

[27] (3rd ed., 1966).
[28] P. 702.
[29] P. 703.

dox organization of Mr. Justice Laskin's text. What use the Lyon-Atkey typology would be a judge in attaining an "objective perception of community expectations" remains obscure.

The prescription of Lyon and Atkey is essentially American: the must crucial function of judicial review of the constitution is not the progressive delineation of the powers of the two levels of government but rather enacting prohibitions against certain kinds of conduct by *all* governments. Here is how they describe the *other* political tradition of the English-speaking world:[30]

> There is nothing wrong with the English constitution, and ours is clearly built upon the solid base that had developed by 1867. However, the Canadian nation is sufficiently different from the English that a process of adaption is called for, and if the 'me too' is our dominant response to the challenge of developing a Canadian nation, it could be argued with force that we would have been better advised to remain a colony. Here, however, we do not hesitate to declare our commitment to the development in Canada of a public order of human dignity. And one essential feature of such an order is the self-respect that is enjoyed only by those who are self-governing.

It is the most arrant nonsense to suggest that Canada's desire to retain the British rather than to install the American forms has anything at all to do with our being self-governing: most of the members of both the Old and the New Commonwealths have voluntarily made such a choice. Somehow too, it seems illogical for Lyon and Atkey in their Preface to so denigrate the applicability of English constitutional experience to Canada and then later to enthuse over the Duff-Cannon dicta in 1938 which finds in the phrase "with a Constitution similar in Principle to that of the United Kingdom" the source of human rights as a separate constitutional value in the British North America Act.

The present seems particularly unpropitious for recommending that the Canadian judiciary and in particular the Supreme Court of Canada assume an American-type role. I would argue that American judiciary has been able to assume their role in review of the constitution—and this role continues to be contentious—because the United States constitution over nearly two centuries has become the central and symbolic focus of allegiance to the American political community.[31] It is quite otherwise in Canada. In particular the existing Canadian constitution and the previous Canadian constitutional experience has been under sustained attack in the past decade—from various kinds of Quebec nationalists, from those who argue that because the constitution is a century

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[30] P. v.

[31] For one of the most perceptive accounts of the constitution of the United States as an institution see Max Lerner, America as a Civilization (1957), particularly pp. 441-452 on the Supreme Court "Keepers of the Covenant".

old it is *ipso facto* obsolete, from those who believe it a useful personal project to rewrite the constitution from whole cloth, from those who argue that we must substitute for experience, precedent and settled constitutional principle some nebulous process in the "objective perception of community expectations". The prevailing denigration of the Canadian constitution thus denies the Canadian judiciary the clerico-judicial source of legitimacy available to their American counterparts.

Among Canadian judicial activists of a generation ago there was a clearer sense of purpose. In the formulations of these critics the needs of the Canadian community required a strengthening of the powers of the national government and a restriction of those of the provinces. This appeal for judicial creativity was usually argued on terms of an interpretation of Canadian experience which affirmed that a centralized political union had been established at Confederation and that this kind of regime had been distorted if not destroyed by subsequent judicial review. But Lyon and Atkey do not proceed from either experience or any set of substantive values. They affirm that the constitutional traditions of another country are more relevant to Canada than those it has made its own. Their elaborate typologies of values provide no normative guidance for lawyers and judges in choosing among conflicting values. If, as happily seems unlikely, Canadian judges should follow this prescription it might sometime in the future be said of them "They are ordained of God because they arrange the ordination".[32]

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Milner's Cases and Materials on Contracts. Second Edition. Edited by S. M. WADDAMS. Toronto: University of Toronto Press. 1971. Pp. xxxii, 958. ($25.00)

What is the purpose of a casebook? It has been said that in the history of the development of casebooks there was initially emphasis upon including leading cases only; that the historical course of the law, and the conceptual chapter approach should be used, with inclusion of social policy materials; and that in the course of the growth of casebooks more editing of cases and inclusion of non-legal materials became prominent, with a view to enlarging the scope of legal education.[1] Clearly "the modern case-

[32] L. T. Hobhouse, Liberalism (1964 ed.), p. 10.

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[1] Harno, Legal Education in the United States (1953), pp. 64-70.

book is determined by the gifts of its editor, the notions he has about legal education, and, on occasion, by his idiosyncracies".[2]

By all standards the second edition of Milner's *Cases and Materials on Contracts* edited by S. M. Waddams has to qualify as one of the finest to appear on the Canadian legal scene.

It is easy to wax eloquent about this casebook because it has everything a law teacher could ever ask of a casebook: leading cases; notes of secondary cases; perceptive questions; inclusion of appropriate selections from articles and statutes; exciting organization; and an introduction explaining what law is all about which is not only worth the price of the book but should be compulsory reading for all law students, and could be of much help to many practising lawyers (and judges).

The casebook begins with the treatment of remedies for breach of promise, then kinds of promises legally enforced; and then agreement, third party beneficiaries, assignment, agency, third parties and mistake in dealings between others, written contracts and standard forms, obligations excused, and concludes with unexpected changes in circumstances.

The cases, which are edited, are carefully selected from Canadian and English and other sources. The narrative by the editors is concise, precise and illuminating.

If I were given the opportunity to again commence the study of the law of contracts I would hope that my law professor would choose this casebook to teach from.

The chapter on Agency is illustrative of the foregoing. It begins with *Midcon Oil and Gas Ltd.* v. *New British Dominion Oil Co. Ltd.*[3] under the heading "Relationship of Principal and Agent" and includes short notes of *Boardman* v. *Phipps*[4] and *Peso Silver Mines Ltd.* v. *Cropper*;[5] and then under "Relationship of Principal and Third Party" contains an extract from Seavey's classic article "The Rationale of Agency";[6] and under "Undisclosed Principal" the other-side-of *Watteau* v. *Fenwick*[7] is included in *McLaughlin* v. *Gentles*,[8] and there is also *Campbellville Gravel Supply Ltd.* v. *Cook Paving Co. Ltd.*;[9] parts of the Ontario Factors[10] and Sale of Goods[11] Acts are found under "Agents and others in possession of Goods"; "Ratification" in-

[2] *Ibid.*, p. 65.
[3] [1958] S.C.R. 314.
[4] [1967] 2 A.C. 46 (H.L.).
[5] (1966), 58 D.L.R. (2d) 1 (S.C.C.).
[6] (1920), 29 Yale L.J. 859.
[7] [1893] 1 Q.B. 346.
[8] (1919), 46 O.L.R. 477.
[9] (1968), 70 D.L.R. (2d) 354 (Ont. C.A.).
[10] R.S.O., 1970, c. 156.
[11] *Ibid.*, c. 421.

cludes *Keighley, Maxstead and Co.* v. *Durant*,[12] and *Crampsey* v. *Deveney*;[13] "Relationship of Agent and Third Party" includes *Kelner* v. *Baxter*,[14] *Collen* v. *Wright*,[15] another piece from Seavey's "Rationale of Agency", and *The Swan*.[16] For one who teaches the subject of Agency it is pleasing and pleasant to find such a diverse, yet comprehensive and adequate collection of agency cases and materials all in the space of some fifty-three printed pages in most readable print. The first year law student who meets this material will be sufficently exposed to the agency area.

All of the best "biggies" are to be found in this casebook. A student studying the materials of this casebook will have a broad concept of the whole area of contracts as it touches upon and intertwines with other areas of the law and this is one of the great merits of the casebook. How pleasant to see the student exposed at the outset of his contract reading to the intriguing problems raised by *Howe* v. *Smith*[17] and *Stockloser* v. *Johnson*[18] which are found in the first chapter which deals with remedies. How pleasant to see an opening chapter dealing with remedies instead of the pedestrian approach which opens with offer and so on. How pleasant to see the inclusion of materials dealing with restitution.[19] One could go on and on multiplying similar instances.

The value of this casebook is simple: any student who reads it is bound to learn some law; his mind will be excited by the materials; and a teacher of law cannot help but find it a joy to use as a teaching device. The practitioner too can partake of its worth as its depth and breadth of coverage of the law of contracts (not in a restricted and narrow sense, as already indicated) will illuminate many facets of the area.

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Cases and Materials on Company Law. By J. J. PALMER and D. D. PRENTICE. Toronto: Butterworths. 1969. Pp. xi, 782. ($28.50)

Cases and Materials on Company Law was published in late 1969;

[12] [1901] A.C. 240 (H.L.).
[13] (1968), 2 D.L.R. (3d) 161 (S.C.C.).
[14] (1866), L.R. 2 C.P. 174.
[15] (1857), 8 El. & Bl. 647.
[16] [1968] 1 Ll. R. 5.
[17] (1884), 27 Ch. D. 89.
[18] [1954] 1 Q.B. 476 (C.A.).
[19] See, for example, p. 948.

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and although it is now some considerable time since its publication, it is not inappropriate that the book now be reviewed. Normally, a book is reviewed immediately upon publication and the review ideally serves the purposes of informing the general reading public of the availability of the new publication, of indicating the general content of the book, of placing the theme of the book in context with the general area of interest to which the book appertains, and of analysing critically the merits and demerits of the book as to suitability for readers to whom it is directed as well as the general style, context and approach of the author. However, a book review that is prepared sometime after the publication of the book should not only be directed to the above-stated objectives, but should, and be able to, indicate how the book has been received and to what degree the stated purposes of the author have been realized.

The purpose and objective of the book is stated at the very beginning of the Preface[1] thus: "As in many areas of law in Canada, heretofore no case book has been produced in hardcover on company law. The present volume therefore, is an attempt to fill this gap." Compilations of "cases and materials" are invariably directed towards only one section of the general reading public, that is, law students although it is not inconceivable that on occasions, a practitioner might indulge in this more esoteric and academic type of reading. Thus, an evaluation of a book of cases and materials must necessarily be viewed from the point of whether or not it is suitable for a law student. That in so many areas of the law, there is a painful lack of Canadian textbooks is a fact that all law teachers are fully aware of; and with a few exceptions,[2] there is also a lacuna so far as formally published cases and materials are concerned. Generally, law teachers resolve the problem by utilizing such texts or case books as are reasonably capable of adoption in Canada or compiling their own cases and materials or alternatively adopting another law teacher's compilation for class distribution and use. Most of these collections of materials, however, unfortunately tend to have a distinctly provincial concentration.

Palmer and Prentice's *Cases and Materials on Company Law* is, as indicated by the authors, the first formal publication of such a book in Canada on the subject of company law and the authors

[1] P. v.

[2] The more notable exceptions are Cecil A. Wright's Cases on the Law of Torts (Butterworths) now in its fifth edition which has been restyled as The Law of Torts and is edited by Professor Allen Linden (1971); this publication has the rather unique distinction of being adopted widely in other Common Law jurisdictions including England; and Professor J. B. Milner's Cases and Materials on Contracts (U. of T. Press, 2nd ed., 1971 by S. M. Waddams).

are to be congratulated for contributing to the slowly growing pool of law books written for Canadian consumption; and also they should be commended for keeping a reasonable balance in the materials used such that it can suitably be used by a law student in any province. However, given that the publication is directed towards and for the use of Canadian law students, it appears incongruous that the book is available *only* in hardcover and is priced at the rather exorbitant price which clearly places it outside the purchasing range of the majority of students.[3] The result of this is that although one heartily recommends the book to one's students, one cannot expect more than a handful to have the book on hand at classes in order that discussion of the materials may take place. The logical corollary to this fact is that a work which is unique, useful and undoubtedly painstakingly prepared finds only restricted usage and an even more restricted market.[4] One finds it rather incomprehensible why the publishers could not have published the work in both casebound as well as limpbound—a practice they have adopted for a number of their other Canadian student texts.[5]

Many, upon seeing Palmer and Prentice's *Cases and Materials on Company Law*, immediately conclude that it is a mere formal publication and updating of the original LaBrie and Palmer, *Cases and Materials on Company Law*—a work which although published[6] in mimeograph form, and despite its relative antiquity nonetheless still commanded wide recognition, acceptance and usage throughout Canada.[7] The present authors are quick to point out the fallacy of the conclusion.[8] Since, in their own words, "the present book is, . . . in most respects, materially different and new types of materials have been introduced to give the student perspective in those areas not as yet the subject of extended analysis by the

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[3] Bearing in mind, of course, that students in any given year have to spread their book purchasing allowance over anywhere between five to ten courses. However, there is a special students' price of $19.50. The reduction from the list price is considerable and the publishers should be commended for making the reduction, but even as reduced, bearing in mind the aforementioned factor, the price is too high for the average student.

[4] I am one of two teaching the Law of Business Organization at the Faculty of Law, University of Manitoba to second year students. A rough poll taken indicates that less than twenty per cent of classes of approximately 100 students bought the book in each of the two years since the book was published. This is despite the fact that both utilize and recommend the publication.

[5] *E.g.* Studies in Canadian Tort Law, edited by A. M. Linden (1968). Studies in Canadian Company Law, edited by J. S. Ziegel (1967). Studies in Canadian Business Law, edited by G. H. L. Fridman (1971).

[6] University of Toronto Press.

[7] (1961).

[8] Preface, p. v.

courts . . .".[9] The authors however pay tribute to Professor LaBrie "who pioneered this area of law and by his brilliant teaching inspired a generation of students",[10] and indeed the layout and emphasis of the two works are significantly different.

Palmer and Prentice, *Cases and Materials on Company Law* is comprised of nine chapters;[11] three of which take up over three-quarters of the book. The three chapters are Chapters 6-8, dealing with Corporate Management, Shares and Shareholders, and raising and maintenance of capital respectively. The rest of the book can roughly be divided into two halves—one half being Chapter 9 dealing with organizational changes and one half covering the rest of the materials included in the book.[12] This concentration on the more complex aspects of internal management, corporate structure and financing is perhaps indicative of the authors' "decision . . . to delete coverage of partnership law, and, generally, the small corporation, emphasis being placed on the larger, public corporation".[13] As is usual with a decision such as this to depart from the traditional approach[14] there raises both positive and negative aspects. The positive aspects of this decision is that the content and approach of this new emphasis reflect the current trend of the growing importance of public corporations and conglomerates. One should perhaps understand the fact that so many lawyers have passed through all their basic training without being ever exposed to the operation and functioning of these large public corporations which control certain sectors of our lives. The emphasis on corporate management, shares and shareholders' rights to capital raising, structure and maintenance including prospectuses and promoters all serve to better prepare for a new breed of corporate lawyers, or at least, lawyers who will at least be reasonably familiar with these new types of corporations so that one need not be a specialist in order to advise a client on matters pertaining to these corporations. To that extent, the preponderance of materials on this sector is commendable. However,

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[9] *Ibid.*, pp. v.-vi.

[10] *Ibid.*, p. v.

[11] Ch. 1: Constitutional Problems; Ch. 2: Corporate Entity; Ch. 3: Doctrine of Ultra Vires; Ch. 4: Criminal, Tortious and Contractual Liability of Companies; Ch. 5: Incorporation and Pre-incorporation Management; Ch. 6: Corporate Management; Ch. 7: Shares and Shareholders; Ch. 8: Raising and Maintenance of Shareholders; Ch. 9: Organization Changes.

[12] Chs 1-5, see footnote 11.

[13] *Ibid.*, footnote 10.

[14] The traditional approach which is taken by most textbooks and casebooks is to run through the gauntlet of background of companies, the concept of the legal entity, the formation of the company, the various liabilities of a company in contracts, torts and crimes, to share and capital structure, management and finally winding-up. All these aspects being given roughly equal attention.

the reverse is also true in that we cannot ignore the fact that the majority of companies today are still the small company, often private, and that the majority of lawyers will be dealing with, not the large corporate mammoths, but with the small companies on a day to day basis, and as such therefore this heavy concentration on one side of the course is improper, particularly, bearing in mind that in Canada, for which this book is intended, is not as yet ruled by these conglomerations, and the commercial world is still by and large, composed of the smaller companies. In mitigation, however, perhaps one can say that a person who can manage large public companies will be able to easily handle smaller companies,[15] and also that in this age of growing international trade and multi-international corporations, some training in anticipation is not a bad thing.

The authors are, quite independent of all else, to be congratulated on the chapter on constitutional problems. It is a delightfully written chapter—which serves its purpose well. One can only regret that it was not perhaps a little bit more detailed.

This brings one on to another aspect of the book—its selection of materials. By and large, it is felt that the cases were well chosen and well edited. The supplementary cases are also carefully selected to either supplement a point of view or to provide a contrary outlook. It is, however, somewhat disappointing that more of these supplementary cases were not expanded upon. So far as the materials other than cases are concerned, again one finds praise in the reference materials that one is referred to and particularly, it is refreshing and in good taste to include some American materials since undoubtedly, the Americans are more sophisticated than we are here in Canada, at least, for the time being, so far as development of thought and materials relating to large public corporations are concerned. Generally, there is a well-balanced selection of cases as well as materials from Canadian, British and American sources, and there is a balance in the cases selected so far as provincial jurisdictions are concerned. All this having been done without any loss of quality in the relevance of the cases and materials used.

In concluding, I have no hesitation in subscribing to the words of a fellow reviewer[16] who said that: ". . . from a point of view of the selection of cases, editing of cases, relevance of the notes, subject matter covered, sequence of subject matter, supplementary materials, usefulness of index, quality of printing and proof read-

[15] A debatable point since obviously different needs and circumstances require different approach and techniques and understanding of the workings of one does not *pro tanto* mean an understanding of the working of the other.

[16] (1970), 4 Man. L.J. 226.

ing . . . the book emerges as a first rate publication." I for one have no hesitation in recommending it to my students, and subject to the few qualifying factors mentioned above, for instance, as to making it more readily accessible to student means, I would add only the plaintive cry I have heard more than once, both from students as well as non-students: "The case and materials are excellent, but I wish there was more of Palmer and Prentice." Perhaps the authors would like to give their thoughts more thought in their next edition, which hopefully will not be too long from now.

K. W. CHEUNG*

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A Casebook on Company Law. By H. R. HAHLO. London: Sweet and Maxwell. 1970. Pp. xxxiii, 592. (Hardcover $17.10; Paperback $9.90)

In this latest book of Professor H. R. Hahlo,[1] *A Casebook on Company Law*, he is assisted by Professor M. J. Trebilcock.[2] There is also a foreword written by Professor L. C. B. Gower.[3]

When reviewing a book, it is perhaps best first to ascertain the origins and objectives of the book. One is given an excellent summation of both by the author himself in his Preface, which reads in part thus:

> When several of my friends suggested to me that an English version of my COMPANY LAW THROUGH THE CASES might be of some use to students of company law in the United Kingdom, I thought the conversion from a casebook orientated towards South African law to one concentrating on English company law would be a simple task. Today, I know better. There are so many differences . . . though much of the material contained in [this book] was drawn from COMPANY LAW THROUGH THE CASES, it differs from it substantially in arrangement and content, and deservedly received a different title.
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> Most of the extracts are, naturally, from English cases. . . . In order to render these materials more useful to lawyers in Australia and New

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[1] Professor, Faculty of Law, McGill University; Director, Institute of Comparative and Foreign Law; and author of South African Law of Husband and Wife (3rd ed., 1969); Company Law Through the Cases (1958); The Union of South Africa (1960); The South African Legal System and Its Background (with Ellison Kahn) (1968).

[2] LL.B. (N.Z.), LL.M. (Adel.): Associate Professor of Law, McGill University.

[3] Solicitor, Law Commissioner and former Cassel Professor of Commercial Law at the University of London; and author of the classic on company law, now in its 3rd edition, Modern Company Law (1969).

Zealand, statutory references from these jurisdictions have been included.[4]

Although there is a substantial wealth of publications available on British company law, it has always taken the forms of either textbooks,[5] monographs on particular aspects of company law[6] or articles. There has hitherto been a lack of "scholarly materials-books on company law . . . which can be used as a basic text for those teaching by the casebook system and as a supplementary tool by those adopting methods more traditional in our Law Schools".[7] This present publication of Professor Hahlo's therefore fills a long neglected gap in British company law literature. It remains, however, to see how well this gap is filled, and to what degree, the words of Professor Gower in the foreword is justified—that "it will . . . add a new dimension to the study of company law in England".[8]

The approach adopted by the author is a fairly orthodox and traditional one. He commences with an introductory chapter[9] followed by the constitution of the company,[10] promoters;[11] then one is presented with a general treatment of shares and shareholders.[12] Directors are then dealt with at some length, covering appointment to The Rule in *Royal British Bank* v *Turquand*.[13] The book then ends with chapters on minority protection[14] and finally reorganization and accounts.[15] Each chapter is divided into distinct sections according to subject-matter and each section is then dealt with with an introductory text written by the author, followed by the second subdivision of each section, that is, the cases and materials, which comprise the bulk of the book.

The text in each instance may well be described as a simplistic summation of the law on the particular subject-matter as shown

[4] P. vii.

[5] *E.g.* Notably Modern Company Law, *op. cit., ibid.* Company Law (2nd ed., 1967), by R. R. Pennington; Palmer's Company Law (21st ed., 1968), edited by C. M. Schmittoff and J. M. Thompson; Topham and Ivamy's Company Law (14th ed., 1970), by E. R. H. Ivamy; Charlesworth's Company Law (6th ed., 1968), by T. E. Cain.

[6] The most recent example being The Criminal Liability of Corporations in English Law by L. H. Leigh (1909).

[7] P. v. See Foreword by Professor L. C. B. Gower: "There are, of course, collections of potted cases some of which have been well selected and are useful to students, particularly those of business subject, who do not have ready access to law libraries." One of the best available is Casebook on Company Law by R. S. Sim, now in its 3rd edition (1971).

[8] *Ibid.*

[9] Chapter 1 deals with the legal nature of a company and makes comparisons with partnership.

[10] Ch. 3 dealing with Memorandum and Articles of Association.

[11] Ch. 4.

[12] Chs 4 to 8.

[13] (1856), 6 E. & B. 327, Chs 9 to 13.

[14] Chs 14 to 15.

[15] Chs 16 and 17 respectively.

by the ensuing cases and materials. However it goes further than that. The author has indicated in his preface that: "In order to render these materials more useful to lawyers in Australia and New Zealand, statutory references from these jurisdictions have been included."[16] and it is here in the "text" sections that there is invariably a paragraph dealing with the relevant Australian[17] and New Zealand[18] legislation. There is also reference to comparable provisions in English legislation.[19] The law as such is then summed up in simple statements followed by a reference to the relevant pages of cases and materials appertaining to the particular point. On many occasions, rather than making a general statement himself, the author quotes a sentence or two from cases where judges have made particularly revealing or succinct remarks on the point. This has the advantage, of course, that the ambit and number of cases referred to is thereby greatly increased, and indirectly, the materials as such become more extensive.

On the text material as a whole, it may be said of it that it is invariably well done, and it is believed that it serves the beginner an admirable starting point from which to venture forth into the more complex material. Furthermore, as the book is undoubtedly intended to other than the law student,[20] it can be said that a fairly good general overall picture of company law can be obtained by just the reading of the text alone. Naturally, there are generalizations and ambiguities involved in such simplifications, but one believes the doctrine of caveat emptor should apply to he who merely reads the text without following up the references.

The cases and materials, which contribute the bulk of the book require more comment. To begin with, in many instances, the author, following his orthodox and methodical approach, has subdivided the cases and materials under subheadings. For example, in Chapter 6, dealing with "Dividends and Profits",[21] the chapter is firstly subdivided into two sections, "Dividends" and "Profits Available for Dividends". Then each section is subsectioned, as indicated previously, into "text" and "cases". In this instance, "cases" under "dividends" is further subgrouped into "general"; those dealing with when "dividends may not be paid out of profits"; then those answering the question "must available profits be distributed?"; and subsequently, the question "what form may a distribution take?". This leads one to make a comment that one finds the index and the chapter content tables of

[16] P. vii.
[17] State Uniform Companies Acts (N.S.W. 1961, *viz.* 1961; Qld. 1961; S.A. 1962; W.A. 1961; Tas. 1962; A.C.T. 1962).
[18] Companies Act 1955 (N.Z.).
[19] Companies Acts 1948 and 1967.
[20] See the author's preface, p. vii.
[21] Pp. 181 to 224, esp. at p. 181.

some considerable excellence. The former is detailed and easy to use; whilst the latter provide a most useful guide in reading the book. Combined together, especially with the innumerable cross-references which punctuate the whole length of the casebook, one finds great ease in utilizing the book to its fullest capabilities inasmuch as one can expect to be referred to other cases of immediate relevance. It has been pointed out[22] that on occasions, there have been erroneous cross-indexing. However, one would attribute this to hasty proof-reading rather than error on the part of the author; moreover, bearing in mind this is the first publication, it is not unusual for a few, what can only be described as technical, inaccuracies to creep into what is an otherwise superior system of cross-indexing.

There are more cases than there are materials, but one finds that the cases are well chosen, cover a wide ambit and the editing of judgments to be precise, succinct and relevant. There are some interesting materials included which spice the book with a delicately new flavour—for instance, in dealing with the legal nature of a company, there are, apart from the more traditional cases, extracts from the charter of the Levant Company[23] and *Corpus Juris Justinian*.[24] What is amazing is that in a book of fairly standard length, the author has managed to include an inproportionate number of cases. In many instances, this is done by merely extracting a particularly suitable quote from a judgment; and in other instances, it is achieved by a highly superlative summation of facts which manages to convey in a few lines the basics of often extremely complicated cases. The precis of case facts are delightful and masterful.

The cases selected are by and large predominantly English cases—which include the so-called "leading cases" in each area plus a general selection made by the author. In the latter category the author has referred to or included a large number of cases from other jurisdictions. There is, of course, a great number of South African cases,[25] which is understandable since this present book is, despite its new arrangement and objectives, based on the author's original *Company Law Through the Cases*, which was intended for use in South Africa. Also, there are many references to Australian cases and some New Zealand cases. However, it does not stop there, there are extracts of cases from the United States,[26] Rhodesia,[27] and Canada.[28] The advantage is that usage of

[22] (1971), 34 Mod. L. Rev. 473.
[23] P. 2.
[24] P. 5.
[25] See, for example, pp. 78, 117, 292, 300, 354, 391, 414, 428.
[26] *E.g.* at p. 186, *Dodge* v. *Ford Motor Co.* (1919), 170 N.W. 668.
[27] *E.g.* at p. 294, *Ex. p. Harrod*, 1954 (4) S.A. 28.
[28] *E.g.* at p. 342, *Rinquet* v. *Bergeron* (1960), 24 D.L.R. (2d) 449.

the book would not only educate one as to the basic tenets of English company law, but also acquaint one with some of the company law jurisprudence of associated jurisdictions.[29]

Although the body of the "Cases and Materials", is comprised mainly of cases, there are extracted many passages of materials which are sometimes interesting,[30] sometimes informative,[31] and sometimes comparative,[32] but always relevant. These additional materials extracted complement the selected cases.

However, quite apart from cases and materials so far described, the author often concludes a section with "Notes" which although invariably brief, contain a wealth of materials. Here in these notes, small but important points are indicated and additional cases are referred to and often extracted. More vitally, however, is the fact that in these notes, the author has attempted, and succeeded, to a surprisingly considerable degree to make the book universally adaptable for use in the Commonwealth and incidentally provide excellent comparative materials. It is here in these notes that one is referred to so many cases that one reviewer was driven to say that it almost "prohibits proposals for addition".[33] Apart from the cases, however, this is the place where one is referred to additional materials, articles, and books. The author is to be commended that the references provided come from a great variety of sources and many are very important publications emanating from North America.

The end result of this structuring of the book is that one is provided with many levels. One can stop after reading the text—the first elementary step. Then one can proceed to the cases and materials, which provide a good basic knowledge and insight into company law. The third level is to contemplate and digest the additional materials provided for in the "Notes" which advances the student's thoughts to inquire and to think. Then, if one wishes still to further advance one's knowledge, then follow up the excellent references provided in the notes. Thus in this one volume, there is provided a multiplicity of levels and this has been done with the best of taste and finesse in division.

In conclusion, it can only be said that Professor Hahlo is to be congratulated upon a most distinguished and excellent book which will undoubtedly admirably serve its stated objectives. There is no doubt also, that the book will find considerable acceptance not only in England, Australia and New Zealand, but

[29] *Vide infra* comments regarding "Notes".
[30] *E.g.* p. 5, Blackstone, Commentaries on the Laws of England (17th ed., 1813), Vol. 1.
[31] *E.g.* p. 488, The Report of the Ontario Select Committee on Company Law (1967).
[32] *E.g.* p. 444, The Ghana Companies Code, 1963.
[33] See *supra,* footnote 22.

also in other Commonwealth jurisdictions. There are, of course, cases and materials which one would have liked to see extracted and included in the book, but this perhaps reflects more a question of personal choice, preference and emphasis and does not detract from the commendability and quality of the book. One final comment that one wishes to make is this: it is observed that both Professors Hahlo and Trebilcock are law teachers at a Canadian Law School, and as such are probably well aware of the great need that Canadian students have for publications which are orientated towards their needs. There is no doubt that the author had them in mind when references were made to Canadian sources;[34] but it is probably obvious to the author that the book cannot satisfactorily be adapted as such for use in Canada since so many fundamental issues of Canadian corporate jurisprudence are not even mentioned.[35] Bearing all this in mind, one feels rather a tinge of disappointment that the author chose to direct his attention towards jurisdictions which possess considerably more available materials—albeit it is granted that this present publication is the first cases and materials book on company law published for those jurisdictions. I am not alone with my feelings and it is hoped that the author, having so successfully converted his classic on South African law to English law, will possibly contemplate a second conversion from the English to Canadian.

K. W CHEUNG*

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Legal Status of Collective Agreements in England, the United States and Canada. By B. L. ADELL. Kingston, Ont.: The Industrial Relations Centre, Queen's University. 1970. Pp. xxxi, 237. ($10.00)

Although in many respects England, the United States and Canada share a common legal tradition, and in each of them collective bargaining as an economic fact occupies a central position in industrial relations, the law relating to collective bargaining has developed along different lines in England on the one hand, and the North American jurisdictions on the other. There are also divergencies between the United States and Canada.

With these factors in mind, Professor Adell sets out to explore the contractual and normative effects of collective agreements in

[34] *E.g.* the many references to Ziegel, Studies in Canadian Company Law (1967).

[35] To name but one: letters patent.

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each jurisdiction. He is not concerned with the social and economic reasons for the divergent developments but with "law in the narrow sense". As he indicates in his preface, much of the study was written over the period 1961-1964 for his doctoral thesis and it "retains the indelible imprint of the purpose for which and the period when it was written".[1] Both points are perhaps most noticeable in his treatment of English law.

The English position is dealt with in Chapters 2 to 4. The study deals briefly with the traditional attitude of English law towards collective bargaining — one of non-intervention — and proceeds in Chapter 3 to examine at length the "Contractual Effect of Collective Agreements". This embraces the lack of contractual capacity of trade unions, their capacity to sue and be sued, the impact of section 4 of the Trade Union Act 1871,[2] and the intention to create legal relations — issues which are considered in their Canadian context in Chapter 10. The following chapter covers the normative effect of collective agreements through express or implied incorporation into individual contracts of employment. After referring to civil law jurisdictions which create statutory norms based on collective agreements, Professor Adell briefly discusses section 8 of the Terms and Conditions of Employment Act[3] (which provides for the extension of collective agreements to non-parties and the incorporation of terms of collective agreements into individual contracts), the Wages Councils Acts[4] (the English machinery for establishing minimum wages and so on) and the Fair Wages Resolution[5] of the House of Commons.

The examination of the English position is perhaps the least satisfactory part of the book, but such adverse criticisms as one may make are directed mainly to matters of technical detail rather than to the broad picture created. Thus section 4 of the Trade Union Act 1871 forbids actions brought with the object of directly enforcing or recovering damages for breach of certain specified agreements. These include agreements imposing restrictive conditions,[6] for the application of funds to provide benefits to members[7] and "any agreements between one trade union and another".[8] Professor Adell suggests[9] that although the statutory definition of trade union covers and organisation of employers, Parliament probably did not contemplate actions between a labour union and an em-

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[1] P. ix.
[2] 34 & 35 Vict., c. 31.
[3] 1959, c. 26.
[4] 1945, 8 & 9 Geo. 6, c. 17; 1948, 12 & 13 Geo. 6, c. 7; 1959, c. 69.
[5] (1945-46), 427 H. of C. Deb. 5th ser., cols 619-620.
[6] S. 4(1).
[7] S. 4(3)(a).
[8] S. 4(4).
[9] P. 20.

ployer organisation when it passed sub-section (4) of section 4. This is deduced, second-hand, from the proposition that multi-party bargaining was not very common in the seventies, and from the context of other parts of section 4 which deal with a union's "domestic arrangements". So far as the second point is concerned it may be pointed out that, apart from sub-section (4) of section 4, sub-sections (2), (3)(b), (3)(c) and (5) of section 4 are not confined to purely internal matters and, indeed, are clearly designed to deal with the relationship between unions and non-members as well. So far as the first point is concerned, it is clear that employers' organisations were not unknown. Both they and cartel arrangements come within the definition. The origins and history of the legislation show clearly that the intention was to legalize trade unions but at the same time to relieve the courts of the invidious task of enforcing agreements which were in restraint of trade and which the courts had condemned in the strongest terms. Thus a union rule forbidding a member to work alongside a non-unionist is caught by sub-section (1) of section 4. If Professor Adell's conclusion is correct an action would be at the instance of a labour union against an employers' organisation, to enforce a union security clause and force the dismissal of non-unionists. I find it inconceivable that Parliament intended to sanction such proceedings.

The judicial approach to the interpretation of "directly enforcing" has changed, and the cases are difficult to reconcile; the treatment of this point[10] not only fails to dispel the confusion but leads Professor Adell to a conclusion which in my opinion is patently incorrect. Two issues have to be separated if sense is to be made of the case law. The first is what agreements fall within the section. The second is whether any particular form of remedy is "direct" or "indirect". After discussing the authorities Professor Adell states that the courts will "grant declarations and injunctions where the effect of those remedies is to acknowledge the existence of the contract and to prevent its breach rather than to order performance of its terms".[11] It may be argued that a mere declaration as to the meaning of an agreement is not enforcing it at all. Professor Adell seems to suggest that the courts could grant an injunction to restrain breach of an agreement between a labour union and an employers' organisation on the basis that this relief would be merely "indirect" enforcement.[12] The case cited for this interpretation does not bear it out. One line of authorities deals with efforts to restrain the misapplication of funds. The courts have held that to restrain *misapplication* of funds does not compel a union to *apply* its funds on any

[10] Pp. 17-19.
[11] P. 19.
[12] That this interpretation of his position is correct is borne out by footnote 116 on p. 87.

purpose, and sub-section (3) of section 4 only prohibits the latter course. So far as the expulsion cases are concerned it is suggested that the proper interpretation of them is that the contract of membership *per se* is not caught by the section although certain types of agreement embodied in union rules are covered. The courts have indicated that they will not grant an injunction in such terms that it will in effect amount to specific performance of an agreement within section 4. Surely an injunction to restrain a union from breaking a no-strike agreement would fall into that category? Professor Adell's conclusion seems to be inconsistent with the position taken by the courts. If a distinction is drawn between the contract of membership and its incidents, as suggested above, (and this has the support of Australian cases too), there is no conflict between *McLuskey* v. *Cole*[13] and the *Braithwaite*[14] case[15] as suggested by the author.

Further, it is a little misleading to find the *Braithwaite* case cited for the proposition that "in granting an injunction to prevent the breach of a collective agreement they were not 'directly enforcing' that agreement in contravention of s. 4 . . .".[16] The *Braithwaite* case is authority for the proposition that the courts may restrain a wrongful expulsion of a member from a trade union. It was not concerned with the enforcement of collective agreements, and in fact there appears to be no case in which the courts have considered the impact of sub-section (4) of section 4 in that situation. A slight departure from the author's usual standards of accuracy.

These criticisms may be laid to my special interest in the 1871 Act. I have always thought that in explaining the paucity of litigation in England on collective agreements, commentators have placed far too much emphasis on sub-section (4) of section 4. It serves to emphasize the point made by Professor Kahn-Freund, and quoted,[17] that the real reason lies in the absence of any intention to attach legal sanctions to collective agreements. But for the fact that the book is probably intended primarily for the North American market, one would have thought a much less detailed treatment of section 4 to have been justified. As it is, the balance is about right. Finally, with the statement that "there are two types of trade unions to which the 1871 Act did not initially purport to apply — unions which did not register under its provisions. . ."[18] the learned author departs from his usual standards of clarity. As

[13] [1922] 1 Ch. 7 (C.A.).
[14] *Amalgamated Society of Carpenters & Joiners* v. *Braithwaite*, [1922] 2 A.C. 440 (H.L.).
[15] Pp. 20-21.
[16] P. 187, footnote 116.
[17] P. 23.
[18] P. 15.

he acknowledges elsewhere, some of the provisions of the Act apply both to registered and unregistered unions.

The source materials reviewed on contractual intention indicate a thorough examination of existing comments as far as it goes. Since 1964 various published works have witnessed the unearthing of a number of unreported English cases which touch upon the enforcement of collective agreements. It is a minor point, perhaps, but there is no mention of their existence. Further evidence in support of the traditionally held English view may be derived from the Parliamentary Debates on the Unemployment Insurance Acts of 1924 and 1927.[19] In the former year a provision was introduced to the effect that disqualification for receipt of benefit for participating in a labour dispute should not apply where the employer was in breach of *inter alia* a national agreement. This proviso was removed in 1927. During discussion of the legal effect of an agreement parliamentary advocates of the labour and management positions agreed that a breach of contract is remediable by legal action, but in the context it is clear that the only legal sanction they contemplated was in proceedings between employer and employee for breach of the individual contract of employment.

There is, perhaps, some evidence of the problems of updating.[20] In discussing in the Canadian context the intention to create legal relations, the author refers to the suggestion that collective agreements are intended to be enforceable through social sanctions but not through legal sanctions, and then states, "whether this argument is still tenable in England is doubtful". This hardly seems to take into account the *Ford Motor* case[21] which endorsed the position the author questions. Again, one would have expected references to the twenty-third, 1969 edition of *Anson* instead of the twenty-second, 1964, and to the seventh edition of *Cheshire and Fifoot,* 1969, instead of the sixth, 1964.[22]

The discussion of the legal rules relating to implied incorporation[23] could surely have been condensed? A mark of the thesis?

Discussion of the Terms and Conditions of Employment Act[24] is brief but adequate. This Act has something in common with European models and the Collective Agreement Decrees Act[25] in Quebec.

The only criticism of treatment of the Wages Council Acts is to wonder whether the reader will really appreciate their place in

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[19] 1924, 14 Geo. 5, c. 1; 1927, 17 & 18 Geo. 5, c. 30.
[20] P. 178.
[21] *Ford Motor Co.* v. *Amalgamated Union of Engineering and Foundry Workers*, [1969] 1 W.L.R. 339 (Q.B.D.), discussed at pp. 25-26.
[22] See p. 24, footnotes 88, 89.
[23] Pp. 33-37.
[24] *Supra*, footnote 3.
[25] R.S.Q., 1964, c. 143.

a work on the status of collective agreements even with constant reference to the copious footnotes. The system of industrial relations in England cannot be understood fully without some knowledge of these Acts. The Wages Council is in concept a substitute for collective bargaining. When adequate voluntary machinery has developed it has been the policy to dissolve a Wages Council, and where a Wages Council exists the parties cannot resort to the Terms and Conditions of Employment Act for the purpose of extending a collective agreement. Perhaps the processes of settling wages and hours through a Wages Council might be described as a form of collective bargaining. There have been occasions upon which the representative sides of a Council have in fact bargained collectively and simply used the Wages Council Order as a device for attaching a legal sanction to the agreement.

The Fair Wages Resolution[26] has its counterparts in both federal and provincial jurisdictions in Canada. They are much less well developed than the English model and may be of minimal significance. They seem to have escaped mention in later discussion of the Canadian position.

In setting forth the English and Canadian positions,[27] the author analyses the law under the headings of "Contractual Effect" and "Normative Effect". In dealing with American law he departs from this organisational theme. The reason is not entirely clear. After a brief survey of the American system[28] he ventures in Chapter 6 into the "Common Law Enforceability of Collective Agreements" both at the instance of the collective parties and of individual employees. He shows how the American courts have been much more successful than those in the other jurisdictions in obviating such problems as lack of capacity and contractual intent so as to provide a common law basis for the enforcement of collective agreements. By using custom or usage, and by pressing notions of agency and third party rights far beyond what would have been acceptable in England or Canada, they gave to the individual employee a right to enforce against his employer rights derived from the collective agreement.

In Chapters 7 and 8 he sets out in lucid and scholarly fashion the impact of collective bargaining legislation. He describes the impact of sub-section (a) of section 301 of the Taft Hartley Act, which allows actions in the federal courts to enforce collective agreements, and traces the growth of federal case law establishing the pre-eminence of arbitration as the means of enforcement, resolving conflicts of jurisdiction between federal and state authorities, the courts, arbitrators and the National Labour Rela-

[26] Pp. 52-54 and *supra,* footnote 5.
[27] Chs 2-4, and 9-11 respectively.
[28] Ch. 5.

tions Board. Occasionally we may in Canada deplore the lack of authority and clear direction from legislatures and the courts. We may also be fortunate in avoiding many of the jurisdictional tangles arising from the overlap of jurisdictions, and the vast quantity of litigation which it has taken to resolve them.

The rights of the individual employee to complain of a breach of a collective agreement's terms are examined in Chapter 8. After considering the Wagner Act[29] and sub-section (a) of section 301 of the Taft Hartley Act, Professor Adell draws the conclusion that although the basis of the individual's right to sue his employer is not clear, the predominant theory is that it does not derive from the individual contract of employment but originates in the collective agreement on a third party beneficiary basis. This may lead to a different view on the question of vested rights than that in Canada where the courts have preferred to rest individual rights on the contract of employment. The issue of exhaustion of remedies, which has not been explored fully in Canadian courts, may also be affected by the difference in theoretical basis for intervention. Chapter 8 also covers the individual's right to process his own grievance or to compel the union to process his grievance, and concludes with an analysis of the duty of fair representation which the Canadian reader will find a rewarding introduction to American materials although it is by no means exhaustive.

The next three chapters find the Canadian reader back on familiar ground as Professor Adell turns to the Canadian scene. The same material has been covered to some extent in other forms, but seldom in as satisfactory a fashion. He departs somewhat from his theme[30] to examine three specific problems — the arbitrator's power to award damages, the power or reinstatement on discharge, and the interpretation of agreements. This he does to illustrate the impact of arbitration on the status of collective agreements and the relationship between the courts and arbitral tribunals. He strongly criticises the "strong distrust" of arbitration displayed in recent court decisions, accusing the courts of failing to understand the proper role of the arbitrator. In covering the normative effect of the collective agreement[31] he also has occasion to take to task both arbitrators and courts for importing into collective agreements common law concepts developed to deal with master-servant relationships in a different era. A heading on procedural rights of affected employees in arbitration proceedings[32] reflects recent Canadian developments in this area. There is no counterpart of this heading in dealing with the United States position, although such

[29] National Labour Relations Act, 1935, 49 stat. 449.
[30] Pp. 195-202.
[31] Ch. 11.
[32] P. 224.

rights are also recognized there. The chapter concludes with an exposition of the Collective Agreement Decrees Act[33] in Quebec.

To some extent the book has been overtaken by subsequent developments. A Canadian court has given its blessing to the duty of fair representation in *Fisher* v. *Pemberton*.[34] The Industrial Relations Bill[35] in England promises significant changes, along the American pattern, in the status of collective agreements in that country.

Whatever criticisms one may have of the form or content, Professor Adell is to be congratulated upon covering so much material in such depth within such a small compass.

M. A. HICKLING*

* * *

The Brandon Packers Strike. By G. F. MACDOWELL. Toronto: McClelland and Stewart Limited. 1971. Pp. xiii, 305. ($12.50)

A strike in a local packinghouse employing slightly over 100 employees would not in the surface appear unique, or significant to the development of labour relations. Yet this seemingly "routine" work stoppage was to have a marked effect on the industrial climate of Manitoba, as well as being instrumental in prompting several amendments to the province's labour legislation. In a book which could equally have been entitled "Anatomy of a Strike", Professor MacDowell has written a detailed and well-documented study of an industrial conflict which was to affect Manitoba's labour laws for years to come.

As an analytical study of a labour dispute, this work is a valuable addition to our Canadian writings on labour relations. In helping the reader to understand the reasons for the Brandon Packers strike, Professor MacDowell has delved deeply into the history and economic situation of the company, as well as detailing the backgrounds of the principal union and management personnel involved in the strike. As the story of the strike unfolds, it becomes apparent that the vagaries of human conduct, are often more instrumental in occasioning industrial conflict than questions of wages or fringe benefits. The penetrating analysis of the personalities involved both in the strike and the government Commission[1] which followed reveal how human prejudice and obstin-

[33] *Supra*, footnote 25.
[34] (1969), 8 D.L.R. (3d) 521.
[35] Now the Industrial Relations Act, 1971, 1971, c. 72.
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[1] The Commission was appointed by the Province of Manitoba to inquire into the causes of the Brandon Packers dispute.

acy can be both the creators and propagators of industrial tensions. Is, for example, management justified in communicating directly with its employees where it alleges that the bargaining agent has not presented management's latest offer? Does such action pose a direct challenge to the honesty and integrity of the union officers who are charged with informing their colleagues of negotiation developments? Regardless of one's opinion, in the Brandon Packers dispute, such conduct on the part of the company was to create a chasm of distrust so wide that the strike which followed was imminent. Unfortunately, although over a decade has passed since the Brandon Packers strike (1960) mutual distrust still remains one of the main sources of industrial friction. Only by mutual respect and understanding for each other's desires and objectives can labour-management harmony be achieved.

Although Professor MacDowell has taken particular care in setting out both labour's and management's versions of the dispute, it is clear that the author's sympathies are on the side of labour. Supplementing his own analysis of the strike with evidence from the Judicial Inquiry Commission, the author has endeavoured to show that there existed both on the part of Brandon Packers' management and the Commission, a basic lack of understanding of organized labour, its methods and economic objectives. From the excerpts of Commission evidence selected by the author, it would appear that both the Chief Commissioner and the Commission Counsel (both lawyers) commenced the inquiry with a definite predisposition to management, a penchant which was to influence the entire course of the hearing and the Commission's ultimate report. That the government of Manitoba shared many of the Commission's views was expressed in subsequent amendments to the province's Labour Relations Act,[2] such as the establishment of government supervised strike votes.

In conclusion, I would recommend this work to anvone concerned with industrial relations and labour law. Although the book centres on the Manitoba labour scene, it raises issues and problems common to the industrial community throughout Canada. Finally, economists and businessmen (Professor MacDowell is himself head of the Department of Economics at Brandon University) will also find this work of interest for its detailed examination of the checkered history of Brandon Packers.

K. ALYLUIA*

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[2] R.S.M., 1970, c. L10.

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Automobile Insurance . . . For Whose Benefit? State of New York Insurance Department: A Report to Governor Nelson A. Rockefeller. 1970. Pp. 164, vi. (No price given)

This small volume is a report on the amendments and reforms necessary to improve and modernize the law of the State of New York. The Report deals in some detail with the law and practice of that state. Occasionally, this may cause annoyance to the reader whose interests are somewhat wider.[1] Nevertheless, the text is very readable. It is also well documented.

The inadequacies of the present system are set out in the usual manner. Then follows some examination of the principles involved in the choice of a better system. The interests to be promoted and reconciled are set out in point form.[2] The last of those points is to the effect that the system contemplated "should be operated by private enterprise".[3] This may be politically necessary in the State of New York but it may be too narrow an interest for some readers.[4] Selection of this premise will also necessarily dictate a rather restricted range of conclusions which could be reached by the author of this Report.

The dénouement is reached in a chapter entitled "A Proposal for a Better System".[5] Predictably, it is a compulsory loss insurance scheme that is recommended in return for abolition of the modern tort remedies. Two aspects of the proposed plan deserve particular note. The first is that there would be no dollar ceiling on the payments under the scheme. The second is that payments under the scheme would be made only so far as additional and overlapping insurance benefits were not paid.

Despite the limited objectives and scope of the *Report*, the authors are to be commended for their concise and lucid text. No questions remain unanswered about their proposed scheme since the *Report* is completed with a draft bill. While one may be able to criticize the plan itself it is doubtful if one may question its appropriateness for the State of New York.

JEREMY S. WILLIAMS*

* * *

[1] As where, at pp. 37 *et seq.*, the changes that have been wrought in the law of New York state are rehearsed somewhat tediously. This is aggravated by the fact that those changes are not markedly different from the resolution of problems that have confronted other jurisdictions.

[2] P. 62.

[3] *Ibid.*

[4] For example, Professor T. G. Ison, author of The Forensic Lottery (1967).

[5] P. 83.

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Courtroom Testimony, A Policeman's Guide. By KEVIN TIERNEY. New York: Funk & Wagnalls. 1971. Pp. ix, 244. ($7.95 U.S.)

With the ever increasing amount of conventional criminal cases and the unusual upswing of drug cases, it is certain there will be an increase in the amount of courtroom testimony. Although it is likely that many lay people will appear as witnesses, the bulk of evidence will be given by police officers or special investigators. For the inexperienced witness, and indeed for the experienced witness, there is always much to be learned in offering evidence which is to form the basis of a jury or judicial decision.

Although Mr. Tierney's book is entitled "A Policeman's Guide", it could just as accurately describe a guide for all witnesses. Mr. Tierney's book is directed specifically to the American court system. However, his experience as a common law trained lawyer enabled him to make comparisons between the American system and the English or Canadian systems where there are differences. Not only does this add to the value of the book but also it indicates how very little difference there is between the two systems. There are undoubtedly several technical differences but as a guide, which the book purports to be, it is equally as valuable for Canadian readers as for American readers.

The book is delightfully easy to read. Mr. Tierney has managed to take a very complicated and complex subject, arrange it under a variety of topics and discuss it in a manner which makes it not only valuable but pleasantly easy reading. The book will have wide appeal for it is deliberately addressed to the policeman and Mr. Tierney achieves his purpose in this regard well for he has succeeded admirably in bringing what is sometimes a rather complicated legal topic down to street level. This is not to say the book would not be a most important tool for a courtroom lawyer. Particularly for the inexperienced lawyer this book has a wealth of valuable information.

Mr. Tierney looks at the courts as they operate in practice with a jury. He describes the function of the court and the jury; he discusses the reasons for and the application of the rules of evidence. He describes the window-dressing, plea-bargaining, illegal conduct, and dishonesty which inevitably forms part of the whole system. It is very tempting for the reader to say, of course that happens in the United States, it could never happen here — but then one is forced reluctantly to remember it does.

It is well understood by lawyers and police that the prosecution must prove the case. Mr. Tierney elaborates the importance, from the police standpoint, of obtaining necessary proof and in this regard the necessity of keeping proper records and notes and of building from the start a case that can in the final analysis be

said to be proof beyond a reasonable doubt. In this regard, he also considers the necessity of a good appearance in the court by witnesses, and cautions his readers that at times what appears to be the truth is more valuable than the truth itself. Speaking of appearance, the book jacket is unfortunate in that it pictures a man's hip on which hangs a pistol and handcuffs with a copy of Mr. Tierney's book protruding from the pocket. The jacket is misleading for the book is certainly not concerned with force in the courtroom. On the contrary only four lines in the whole book refer to the wearing of weapons in the courtroom and strongly discourages any such display of arms in court.

The book contains short paragraphs on entrapment, the Civil Rights Act of 1871, extra judicial confessions, and the right to counsel which are not specifically applicable to any Canadian jurisdiction, however, they do provide most interesting comparisons. These paragraphs in no way detract from the value of the book to Canadians as indeed they highlight some of the problems that some day we are bound to face. In general, Mr. Tierney has provided a very useful tool to the practising lawyer and to the courtroom witness. It is not a large book, it is easily readable, it is inexpensive and has a very definite and useful place on the shelf of all law libraries, lawyers' offices and ought to be compulsory reading for all police officers. In particular, chapters 5 and 6 ought to be extracted and carried by police officers at all times and read over quickly before going into court as witnesses.

This book ought not to be judged by its cover until every word between the covers is thoroughly digested.

D. M. HURLEY*

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The Human Right To Individual Freedom, A Symposium On World Habeas Corpus. Edited by LUIS KUTNER. Coral Gables: University of Miami Press. 1970. Pp. 249. (No price given)

As Arthur J. Goldberg states in a forward to this book, "the idea of worldwide habeas corpus, internationally recognized and enforceable in an appropriate international court, can only be applauded by those who are dedicated to the rule of law and the attainment of lasting world peace".[1] However, do not look for its emergence in the very near future, at least not according to Gebhard Muller, the Chief Justice of the Constitutional Court of the Federal Republic of Germany, who writes:[2]

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[1] P. 7.

[2] Pp. 44-45. See also, at p. 165 *et seq.* and p. 167 *et seq.*

> The international movement for habeas corpus, like every movement for peace and justice, depends on whether the political realities will permit realization of the idealistic goals. Unfortunately, at this time the political realities are not favourable for many idealistic movements, among which is the world movement for habeas corpus, even though the constitutions of many countries of the free world contain the right of habeas corpus . . . . I also believe that a world court of habeas corpus could not, at present, operate too successfully.

Nonetheless, it would appear, and this is probably news to most readers, that the world habeas corpus movement, the beginning of which is traced back to 1931, is gathering momentum at a significant rate, and it has acquired along the way a host of impressive sponsors and supporters.[3]

Luis Kutner, the editor of the book, is the president of the Commission for International Due Process of Law and a former professor of law at Yale University. He is credited with being the "author of the concept" of an international or world writ of habeas corpus,[4] and he has written extensively on the subject.[5] Contained in this latest offering on the subject are the national views of several countries, and the thoughts and comments of various individuals, including William O. Douglas, William J. Brennan Jr., Myres S. McDougal, Harold D. Lasswell, and Quincy Wright, on such topics as: The Rule of Law in World Affairs, International Due Process and the Law, The United Nations and the Protection of Personal Liberty, World Habeas Corpus World Law and Sovereignty, and Steps in the Realization of World Habeas Corpus.

From a Canadian point of view, commendable as world habeas corpus may be, it would be more to the point for us to put our own house in order first. There are several strains of habeas corpus in existence throughout Canada and it seems to me that it would serve us all if there could be some meeting of minds to provide us with a reformed uniform law of habeas corpus for Canada.

CAMERON HARVEY*

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[3] See pp. 21-25 and 176-180.

[4] P. 177.

[5] See, *inter alia*, A Proposal for a United Nations Writ of Habeas Corpus and an International Court of Human Rights (1954), 28 Tul. L. Rev. 417; World Habeas Corpus for International Man: A Credo for International Due Process of Law (1959), 36 U. Det. L.J. 235: An International Writ of Habeas Corpus: Protection of Personal Liberty in a World of Diverse Systems of Public Order (1961), 22 U. Pitt. L. Rev. 469; World Habeas Corpus: A Legal Absolute for Survival (1962), 39 U. Det. L.J. 279; World Habeas Corpus (Oceana, New York, 1962).

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The British Tradition in Canadian Law. By BORA LASKIN. London: Stevens. 1969. Pp. 138, including Index. (No price given)

If you have not discovered, heard about or taken the time to read this particular series of Hamlyn Lectures, then "it's about time you did". As the title indicates, the lectures deal with the British tradition or influence in Canadian law, and thus, to some extent with Canadian legal history (indeed, for its historical content alone this book is a welcome addition to the existing source materials), and, as well, they are descriptive of the current situation in Canada in several fields such as legal research and the position of the Crown. The four lectures cover the following topics—Reception: The Courts and the Profession (Reception, Courts, Legal Profession); English Law in Canadian Courts: The Judicial Office in Canada (Independence of the Judiciary, Jury Trial, Continuing Impact of English Law, English Decisions and Stare Decisis); Balancing Considerations: Law Reports, Legal Education and Scholarship in Canada (including the influence of the United States); The British Tradition and Canadian Federalism (Judicial Power in Canada, the Crown in Canada, the Law in Federal Courts: Federal Law in the Provincial Courts). In short, this book will provide you with some very engrossing and rewarding reading. Without intending to detract at all from this enthusiastic endorsation and with the greatest respect for the author, I have a few comments and enlargements and I apologize for the "scattergun" approach which I have taken in making them.

The lectures were delivered in 1969 and, therefore, they are slightly dated. I trust that it is not inappropriate to point to a few of the instances throughout the lectures where this is the case. In connection with the reception of English law into New Brunswick,[1] *Scott* v. *Scott*[2] now indicates that the cut-off year is 1660. In 1970 and 1971 Manitoba enacted wide-reaching amendments to its Landlord and Tenant Act.[3] The New Brunswick Reports and the Nova Scotia Reports have both recommenced publication,[4] and, as well, the Newfoundland and Prince Edward Island Reports[5] have made an appearance.[6] Ontario and Alberta have been joined by at least the Federal Government, British Columbia, Manitoba and New Brunswick in establishing Law Reform Commissions.[7] Interestingly, the membership of the Manitoba Com-

[1] Pp. 5-6.
[2] (1970), 15 D.L.R. (3d) 374 (N.B.C.A.).
[3] P. 54.
[4] Cited (1969), 1 N.B.R. (2d) and (1970), 1 N.S.R. (2d).
[5] Cited (1971), 1 N. & P.E.I.R.
[6] Pp. 70-71.
[7] Pp. 96-97. See also, R. F. Gosse, Canadian Law Reform Agencies (1970), 1 Can. Bar J. 1.

mission is comprised of a mixture of lawyers and laymen; to me this raises the question as to whether the proper place for the layman is on the law reform commission or in the Legislature?[8] Although articling continues to be a common element for Bar qualification in Canada, at least one law society, namely that of Manitoba, is considering dropping articling in favour of a practice course, for no other reason than that it may become impossible for all of the students wishing to enter the Manitoba Bar Admission Course to find articles.[9]

Notwithstanding Mr. Justice Laskin's statement in his preface,[10] I am going to suggest a few additional references. To footnote 6, I would add Anger and Honsberger, *Canadian Law of Real Property*.[11] To footnote 14, I would add F. T. Piggott, *The Imperial Statutes Applicable to the Colonies*.[12] To footnote 36, I would add a reference to a fairly recent article entitled *Women in Law in Canada*.[13] And, it might be of interest to readers to have a few more references concerning the checkered history of the Queen's Counsel distinction in Canada.[14]

By way of enlargements upon the substance of the lectures I offer the following: in connection with the date for the reception of English Law in Newfoundland, I think that *Kielly* v. *Carson*[15] suggests 1832. Manitoba should be added to footnote 41. I believe it could be said of the practice in Manitoba that factums at the appellate level are more in the nature of written arguments rather than simply indicators of "the direction of the oral advocacy".[16] In connection with the first part of lecture 2, readers might be interested in a few additional references concerning early judges in Western Canada.[17] Concerning the statutory stipulation that federally appointed judges are to devote themselves entirely to their judicial duties, one could query the force of this stipulation in the light of the practice of appointing such judges to many

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[8] I do not question, however, the wisdom that advocates that law reform commissions ought to assign research projects to appropriate experts in other disciplines than law.

[9] P. 88.

[10] "I have tapped many sources in preparing these lectures, but have not identified all of them lest I overrun the text with an extravagance of footnotes."

[11] Canada Law Book, Toronto (1959), pp. 1-13.

[12] Clowes, London (1903).

[13] (1970), 4 Man. L.J. 9.

[14] See (1898), 14 L.Q.R. 195; (1950), 36 L.Q.R. 212; (1951), 23 Man. B.N. 15, 61; (1958), 30 Man. B.N. 25; (1963), 6 Can. Bar J. 261; (1967), 25 Advocate 189; (1971), 29 Advocate 58.

[15] (1842), 4 Moo. P.C. 63, 13 E.R. 225, *re* p. 6 of Laskin.

[16] P. 33.

[17] See, *inter alia*, Roy St. George Stubbs, Four Recorders of Rupertsland (Peguis, Winnipeg, 1967); Hon. Edmund Burke Wood (1962), 34 Man. B.N. 109; and Sir Mathew Ballie Begbie (1968-69), Series 3, No. 25 Historical & Scientific Society of Manitoba Transactions 49.

government investigative commissions.[18] The reference to the case involving the validity of a marriage of slaves[19] brings to mind Judge Sissons and the problems with which he had to deal in the Northwest Territories with respect to Eskimo marriages and adoptions.[20] Two other early Canadian manifestations of judicial independence[21] occurred in the Recorders' Court of Rupertsland: in *Regina* v. *Patneaud and LaDoux* (1859) one of the accused was allowed to testify, and in *Morgan* v. *LaFoix* (1860) the current law with respect to contributory negligence was anticipated by more than seventy-five years.[22] Speaking of limited legal reference resources in the Canadian colonies,[23] an 1822 inventory of such books available in the Red River Settlement lists three volumes of Blackstone's *Commentaries* and Tomlin's *Law Dictionary*.[24] Perhaps it could be said of the architects of the current format of legal education in Canada that they were seeking to establish an amalgam of the best features of the English and American systems.[25] Regarding admission requirements in Canada,[26] it could be mentioned in passing that many of the law schools have adopted, as a mandatory adjunct to making an application for admission, the Law School Admission Test, and in Manitoba there is, in addition to the ordinary avenue of entry (that is, satisfactory completion of at least two years of university course work) also a "mature student" avenue of entry for Manitoba residents who are at least twenty-six years of age and have a satisfactory equivalent to the ordinary entrance requirements (incidentally, the University of Manitoba's involvement in legal education dates back to 1884 when it established a three year course of studies leading to an LL.B. degree).[27] Parenthetically to the mention of the influence on Canadian law teaching of the American graduate programmes,[28] a survey of the current *Directory of the Association of Canadian Law Teachers* will yield the information, for what it is worth, that

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[18] P. 42.
[19] P. 51.
[20] See, Judge of the Far North (McClelland & Stewart, Toronto, 1968); (1966-67), 5 Alta. L. Rev. 254; (1967), 5 Osgoode Hall L.J. 159; and (1968), 33 Sask. L.R. 19.
[21] Pp. 51-52.
[22] See Four Recorders, *supra,* footnote 17, at pp. 124-125 and 128-129, respectively. The course followed in these cases might be attributed to the fact that the Recorder who handled them, John Bunn, was not legally trained.
[23] P. 68.
[24] Four Recorders, *supra,* footnote 17, at p. 40. It should be noted that in 1822 there was not a legally trained person resident in the Settlement or the whole of Rupertsland.
[25] Pp. 75-76.
[26] Pp. 79-80.
[27] Robson Hall, at p. 4, a pamphlet published in conjunction with the opening of the current Faculty of Law premises.
[28] P. 88.

apparently of the 403 full-time law teachers employed in Canada in 1970-71 approximately thirty-five received their basic training in England, twenty-nine in the United States and fourteen in Australia and New Zealand. And finally, I would add to the list of the early, significant Canadian law books,[29] E. D. Armour, *Essays on the Devolution of Land* (1903), Benjamin Russell, *The Bills of Exchange Act* (1909), and F. W. Wegenast, *The Law of Canadian Companies* (1931); some mention should be made in passing of those Canadian scholars, who pioneered in the field of casebooks on subjects too numerous to mention, such as H. A. Robson and J. B. Hugg, H. E. Read, C. A. Wright and Bora Laskin.

There was one omission which struck me with respect to British influence, namely the roles played by the British government and the Privy Council in assuring the impotence of our Supreme Court of Canada in its fledgling years, which had particular significance in connection with the interpretation of the British North America Act regarding the powers of the federal and provincial governments.

I cannot conclude this review without remarking upon the quality of the research:[30]

> The mark of research is on every page. When did Mr. Justice Laskin find the time to prepare [these lectures]. . . . That he did so without in any way limiting or impairing the quality of his judicial work is attested to by the steady stream of luminous judgments that flowed from his pen. Somehow, in the interstices of spare time available to him, he managed to produce this work as well. The husbanding of one's energies and talents for the effective performance of many tasks including creative research, must remain the author's secret.

To reiterate, it has been my pleasure to read and to review these lectures.

CAMERON HARVEY*

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Jerome Frank: Jurist and Philosopher. By J. MITCHELL ROSENBERG. New York: Philosophical Library. 1970. Pp. xviii, 274. ($8.75)

In the introductory chapter of his book on the great American legal realist, Dr. Rosenberg emphasizes that Judge Frank ". . . sought to rebut the commonly held notion that the most

[29] P. 92.

[30] Samuel Freedman, Chief Justice of Manitoba (1970), 20 U.T.L.J. 486.

* Cameron Harvey, of the Faculty of Law, The University of Manitoba, Winnipeg.

difficult function in the administration of justice is the determination of which rules to apply to the facts of a case".[1] The name of the late Jerome Frank has become inseparably associated with "fact skepticism" and the current of legal realism of which he was a foremost early practitioner. Beginning in 1930 with an uncritical acceptance of Justice Holmes's "prediction theory" of law in the final chapter of his famous *Law and the Modern Mind*,[2] Frank developed and finally virtually abandoned the great jurist's insight that the task of jurisprudence was essentially one of prophesy. Law was not, according to Holmes, primarily an abstract, ideal study, but was an attempt, given an intricate configuration of rules and concrete circumstances, to predict what decision a court would ultimately arrive at. In this respect, Holmes had puckishly admonished counsel that their function was to advise thoroughly bad men how to prosecute their schemes while evading the outreaching tentacles of the law.

As Dr. Rosenberg notes, Frank became increasingly skeptical about the practicability of Holmes's advice: "One cannot predict whether a judge will follow an old rule, consider the case an exception to the old rule, or formulate a new rule."[3] According to Frank, law was definable more in terms of individual decisions than abstract principles. Given the actual dimensions of the judicial process, including the diverse permutations of possible evidence, the expansibility or compressibility of legal norms, the prejudices of juries and the preconceptions of judges, he concluded that the legal quest for certainty, stability and order was an unreal one. Accordingly, it would be necessary to reformulate or abandon Holmes's prescription.

When one considers the vagaries of the evidence presented to trial courts, the conflicting testimony and varying credibility of adverse witnesses, the judge and jury are confronted with the task of choosing whom to believe and how to select and interpret from the potentially vast array of evidence those combinations of facts which are most credible and crucial to the determination of different issues. While conceding the importance of the ideal or normative element in law, accordingly, Frank greatly emphasized the significance of collateral psychological factors in the legal process such as the impressions made by different witnesses on the trial court and the consequences such factors had on the reception and evaluation of evidence and the application of law. A trial court, indeed, exercises "fact discretion" and, where the facts present any degree of complexity, it is not possible on the basis of any prior theoretical formulation to predict accurately how the

[1] P. 25.
[2] New York, Brentano's (1930).
[3] P. 18.

court would decide any concrete issue. On the appellate level, on the other hand, in most cases the material facts have been preselected and analyzed by courts of first instance and the predictive task is somewhat easier. Appellate courts will usually defer to inferior tribunals on matters of fact. It is in the individuation of general principles at the trial level, given the multiplicity and unmanageableness of facts in different contexts, that subjective elements not susceptible to precise analysis make the predictive chore of counsel exceedingly difficult or impossible. While rejecting an extreme nominalism about rules Frank, as Dr. Rosenberg notes,[4] stressed that a definition of law solely in terms of rules obfuscated clear thinking about law.

The writer mentions that in his jurisprudential works, because of his views on the legal process, Frank never ceased to advocate the abolition of the jury in civil cases but that, curiously, in confirming the death sentence on the Rosenbergs,[5] (who were convicted of transmitting nuclear secrets to the Soviet Union between 1944 and 1950) he failed to express his abhorrence of capital punishment; it may have been, as the author states, that Frank's views on the death sentence were not fully crystallized until the publication of his last book *Not Guilty*,[6] shortly before his death in 1957.

Frank advocated a programme of reform as a corrective for the pernicious tendencies which he saw arising out of the inability of human beings to deal accurately with facts in the legal context. Judges should study psychoanalysis and practice introspection, for instance, in order to offset any prejudicial family or personal associations, political biases, or intellectual and temperamental traits which might deflect them from a "just" decision.[7] In response to Dean Roscoe Pound's criticism that the legal realists emphasized the factual or "empirical" side of jurisprudence at the expense of the axiological side, Frank did develop in his later writings his views on justice and natural law, finding himself ranged with Thomas Aquinas on the principles which should animate every decent man in a civilized society. He considered, however, that in the contemporary context the term "justice" was more appropriate than "natural law" as a class term for these principles.[8]

In subsequent chapters on "Stare Decisis", "Civil Liberties", and "Freedom of Speech and Press", Dr. Rosenberg, with commendable economy and incisiveness, examines how Frank worked

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[4] P. 21.
[5] *U.S.* v. *Rosenberg* (1952), 195 F. 2d 583.
[6] With Barbara Frank, Garden City, Doubleday (1957).
[7] P. 34.
[8] Pp. 31, 47.

out his jurisprudential ideas in his judgments on the Second Circuit Court of Appeals and in his numerous writings.

Against the views of Karl Llewellyn and Edward McWhinney that there were two irreconcilable tendencies in Frank, the realist who virtually abandoned *stare decisis* because of his conception of the legal process, and the administrative lawyer and judge who invoked and applied precedent, Dr. Rosenberg argues that Frank never advocated the total abandonment of *stare decisis*. He did, however, emphasize that the spectrum of cases in which the mechanical application of rules was possible would be extremely limited, and that rules should not be converted into dogmas; they occupied a decidely subordinate position in the judicial process.[9]

With respect to trial by jury, Frank considered that certain procedural reforms might be examined with a view to promoting more just decisions. He felt worthy of serious consideration a suggestion that stenographic records be made of jury deliberations to determine whether any impropriety had entered into the verdict. Prospective jurors might also be asked to pass written and oral tests of jury aptitude as a prerequisite for their task, as was the practice in one California court. Perhaps instruction might be instituted in the public schools or in adult education courses on the jury function, especially as it related to fact finding. Dr. Rosenberg was understandably perplexed about how such courses could effectively remedy Frank's basic difficulties about fact-finding, in the absence of any guidance in this regard from Frank himself.[10]

In the area of civil liberties, while conceding first amendment freedoms "preferred status", Frank parted company with absolutists like Justices Black or Douglas. He contended, however, that free speech was a "near absolute" subject only to certain exceptions of limited application.[11]

As Dr. Rosenberg stresses in his final chapter, in recent decades there has been a trend in American jurisprudence back to normative standards and rules, re-emphasizing the oughtness of law in contrast to Frank's factual orientation. The work of later jurisprudents of all schools has, nevertheless, benefitted from the useful catharsis of Frank's scrutiny, representing a synthesis of Hebraism and Hellenism, ". . . of the highest intellectual and moral impulses of man".[12]

The author has a remarkable gift for compression and has ably co-related and interpreted Frank's numerous academic and judicial writings in a way that elucidates their significance against

[9] Pp. 61-62.
[10] P. 117.
[11] P. 136 *et seq.*
[12] P. 162.

the background of recent American jurisprudence. The book, which is an outgrowth of a doctoral dissertation at the New School for Social Research, will be a useful addition to library shelves on contemporary American legal thought. Supplementing the 162 pages of text is a complete bibliography of Frank's judicial opinions, books and articles, as well as articles and miscellaneous materials by others about Frank himself.

On the negative side, there are a number of disconcerting typographical errors and, in a work which is so preoccupied with the role of precedent in judicial decisions, there is a serious blemish in Dr. Rosenberg's statement that ". . . the House of Lords and the Court of Appeal do not overrule their own prior decisions . . .".[13] Considering that Dr. Rosenberg is discussing the operative rules in effect in different forums and the fact that his book was published in 1970, he should surely have mentioned here Lord Gardiner's statement in the House of Lords in July, 1966, that their Lordships proposed in future ". . . to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so".[14]

W. H. McCONNELL*

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The Transfer of Property Act. Ninth Edition. By S. M. LAHIRI. Calcutta: Eastern Law House. 1970. Pp.xx, 776. (Rs. 25)

This is the ninth edition of a work which first appeared in 1930, and is aimed at providing an exhaustive commentary on The Transfer of Property Act, 1882 as amended by The Transfer of Property (Amendment) Act, 1929. It is suitable for law students, and is at the same time, a useful book for the profession. The eighth edition was published in 1965. Since then many important decisions have been rendered by the Supreme Court and the High Courts of India, and these have been incorporated in appropriate places. In this new edition there has been considerable re-writing in some chapters; the scope of the work has been enlarged; many important topics have been dealt with in greater detail and as a result there has been a considerable increase in the size of the book.

The Transfer of Property Act lays down the general principle with regard to transfer of immovable property. It deals with sales, mortgages and leases except leases for agricultural purposes. For

[13] p. 50.

[14] See Note, [1966] 3 All E.R. 77.

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each section of the Act, the author has given explanatory notes, in a clear and concise form. Students of comparative law will find this book useful. A number of English decisions are included to elucidate the law. At the same time, the differences between the English law and the Indian law, where such differences do exist, have been explained. For example, the doctrine in *Walsh* v. *Lonsdale*[1] is not followed in India. It is interesting to note that under English law, the transferee electing against the instrument does not incur a forfeiture of the benefit conferred on him thereby, but has only to make compensation out of it to the person disappointed by the election and the surplus goes to the refractory donee. But in India the transferee electing against the instrument forfeits the gifts which revert to the transferor subject to compensation to the disappointed transferee in certain cases.

It is also interesting to note that whether the doctrine of frustration can be applied to all to put an end to a lease has not yet been finally decided in England.[2] In India also the position is somewhat obscure. Indian courts have not applied the doctrine of frustration to a lease. The position is somewhat different in cases covered by section 108(e) of The Transfer of Property Act in India. The lessee, provided he is not in default, has the option of putting an end to the lease.

A minor point of criticism may be made: the introduction which deals with the history of the law with regard to transfer of immovable property in India and the ultimate enactment of The Transfer of Property Act, 1882, The Transfer of Property (Amendment) Act, 1929, and its many recent statutory changes is very short. In order to enhance the value of the book to law students, it is suggested that this chapter should be expanded. It may also be pointed out that the principles of English law and equity which were applied in India before the introduction of the Act of 1882 were not always applicable to the social conditions prevalent in India. Some of the provisions of the Act of 1882, namely, discharge of encumbrances on sale, consolidation of mortgage, power of sale of the mortgaged property without the intervention of the court are borrowed from the English Law of Conveyancing and Property Act, 1881.[3] Such omission, however, does not in any way detract from the undoubtedly high quality of the book.

Several appendices dealing with analogous Acts such as Civil Procedure Code (Mortgage Suits), The Indian Registration Act,

[1] (1882), 21 Ch. 9.

[2] See *Cricklewood Property & Investment Trust Ltd.* v. *L. I. Trust Ltd.*, [1945] A.C. 221, [1945] 1 All E.R. 252 (H.L.); *Denman* v. *Brise*, [1949] 1 K.B. 22, [1948] 2 All E.R. 141 (C.A.); Halsbury's Laws of England (3rd Ed., 1948), Vol. 23, p. 553.

[3] 44 and 45 Vict., c. 41.

XVI of 1908 as amended, The Hindu Disposition of Property Act, 1916, The Hindu Transfers & Bequests (City of Madras) Act, 1921, The Government Grants Act, 1895, The Dispositions of Property (Bombay) Validation Act, 1947, The Transfer of Property and Indian Registration (Bombay Amendment) Act, 1935, The Payment of Taxes (Transfer of Property) Act, 1949, have been added, which make the book more useful.

With a subject of this kind certainty in the law is one of the important considerations. The writer's main duty is to describe the law as objectively and accurately as possible. In this the author, S. M. Lahiri, is successful. This work will undoubtedly be of great value to the practioners in India as a primary work of reference and to comparative lawyers and will remain so for many years.

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