
This monograph reproduces the inaugural lecture Professor Atiyah delivered at the Australian National University on July 29th, 1970. In it, as the fly-leaf explains, Atiyah attempts "to restate the law relating to consideration in contracts in the light of the actual decisions of the Courts", for his study has convinced him that there has been a "wide gulf between the conventional accounts of the doctrine of consideration and the law actually enforced in the courts". His thesis in the lecture is that although the conventional accounts of consideration make it seem that the doctrine is rigid and artificial, in fact it is not. When the courts talk about consideration they are, he argues, simply searching for what seem to them to be good and sufficient reasons for enforcing promises.

Thus like Professor Corbin, Atiyah is convinced that the doctrine of consideration "no longer accords with the law actually enforced in the Courts". This conviction of his is, of course, fairly recent on his part as anyone knows who has read the section on consideration in his Introduction to the Law of Contracts, for his account of the doctrine there is by his own admission "completely orthodox". The forthcoming edition of the Introduction Atiyah therefore promises will contain "major changes".

The method Professor Atiyah uses in his monograph to move toward what he takes to be an accurate, realistic statement of the doctrine of consideration is an essentially dialectical one. That is, he begins the work by setting out the "conventional" or "orthodox" statement of the doctrine and then, through showing specifically and concretely how that statement falls short of describing what the courts have actually said on the matter, works toward establishing his thesis that the more elastic, fluid notion of consideration

---

1 Fly-leaf, para. one.
2 Ibid.
4 P. 5.
5 (Oxford, Clarendon, 1966, 1st pub. 1961), Ch. 6, p. 57 et seq.
6 P. 5, footnote 2.
as a "good and sufficient reason" for enforcing contracts is the more accurate way of looking at the doctrine.

The orthodox version of consideration is comprised of at least the following rules: 1. A promise not under seal is not enforceable unless the promisor obtains some benefit or the promisee incurs some detriment in return for the promise. (Some writers—for instance, Treitel—hold as a notion subsidiary to this rule the view that the consideration must be of some economic value.) 2. In a bilateral contract the consideration is a counter-promise whereas in a unilateral one it is the performance of a specified act. 3. The contract, to be enforced, must be a bargain; thus the consideration must be the "price" of the promise. 4. Past consideration is not sufficient to enforce a contract. 5. Consideration must move from the promisee. 6. The law does not enforce gratuitous promises—a rule that follows from the first three. 7. Finally, there is a "limited exception" to the above rules recognized by High Trees. The limit to the principle in that case is found in this, that it only allows certain promises lacking consideration to function as defenses to actions.

These seven rules, say Atiyah (who suggests that there may be additional ones), have come to be not only referred to but thought of as the "Doctrine of Consideration", a fundamental legal concept that has for some not altogether clear historical reason been admitted into the common law and whose only rationally commendable quality consists in its ability to prevent gratuitous promises from being necessarily enforceable. Thus, Professor Atiyah notes, lawyers "do not inquire what are the considerations which lead a court to enforce a promise, but whether there is consideration". Yet this entire conventional account of the law bearing upon consideration "is unsatisfactory", and the major part of Atiyah's monograph is given over to showing that not one of the seven rules set out above accurately reflects the law.

The assumption that Atiyah uses as a basis for comparing the living law with the hardened rules that comprise the conventional doctrine is this: "... the Courts have never set out to create a doctrine of consideration. They have been concerned with the much more practical problem of deciding in the course of litigation whether a particular promise in a particular case should be enforced". After all, no legal system can enforce every promise, and so, says Atiyah, it "seems highly probable that when the Courts first used the word 'consideration' they meant no more than that there was a 'reason' for the enforcement of a promise. If the consideration

---

7 These rules are set out by Atiyah, p. 6.
10 P. 7.
11 Ibid.
was ‘good’, this meant that the Court found sufficient reason for
enforcing the promise”. This insight prompts Atiyah to reject
the orthodox version of consideration in favour of his more elastic
statement that it is a “set of guides for deciding whether there is
good reason for the enforcement of a promise...”.

The fundamental difference between the orthodox “Doctrine
of Consideration” and Atiyah’s way of looking at the matter comes
down to this: for him “consideration” is a word that indicates
whether there are “good reasons for enforcing a promise”; for
lawyers of the orthodox persuasion it is a “technical requirement
of the law which has little or nothing to do with the justice or
desirability of enforcing a promise”. Thus he remarks—in a state-
ment that should wake somebody up to the irrationality that has
come to pervade this area within the common law of contract—
modern lawyers “see nothing incongruous in asserting that a prom-
ise made for good consideration should nevertheless not be en-
forced”. And conversely, it has become heretical to admit that a
promise without consideration might be enforced. High Trees was
typically thought to be merely an instance of Lord Denning’s
“advanced and ‘unsound’ views”.

To sum up, what has happened to the common law of contracts
says Professor Atiyah is that over the past several centuries there
has welled up a “persistent and apparently compulsive desire [on
the part of] lawyers to concentrate on the typical contractual prom-
ise and to draw conclusions of universal validity from that typical
case”. In other words, because most contracts are as a matter
of fact bargains, lawyers—both academic and practising—have
“steadfastly refused to recognize the evidence under their very
eyes, that Courts often enforce promises which are not bargains,
and that they do so for reasons of justice and good policy”.

A restatement of consideration in contracts is thus in order.
It must be a fundamental one, however, going beyond simply
recognizing that there are exceptions to the presently established
rules, that forces lawyers to begin regarding consideration in
terms of “reasons for enforcing a promise”, a restatement requiring
them to recognize “that the presence of factors like benefit, detri-
ment, and bargain is taken into account not because they fit some
preconceived...” definition, but because they are often very
material factors in determining whether it is just or desirable to
enforce a promise; and this necessarily involves [the] recognition that these are not the only factors to which attention must be, and is in practice paid by the Courts”. Atiyah is, in short, calling for a Copernican Revolution in contract law, arguing in his way as Copernicus did in his that things are being looked at backwards and that as long as lawyers—especially academic ones—believe that the working law is shaped according to their theories rather than allowing their theories to reflect the law (thus thinking their theories rather than the law itself to lie at the heart of the universe of contracts) the rationality and coherence that potentially belong to this common law field will likely remain unrealized.

The bulk of Professor Atiyah's monograph is given over to a detailed critical analysis of the rules he mentions as constituting the core of the consideration doctrine. He begins with the conventional statement on the need for benefit and detriment, goes on to examine the orthodox view of unilateral contracts and of bargains, to treatments of the propositions that “past consideration is no consideration” and that consideration must move from the promisee—showing that in fact this “supposed rule” is not in practice observed by the courts, and ending finally with a rigorous and detailed analysis of the notion that the law does not enforce gratuitous promises.

Perhaps the most important conclusion yielded by Atiyah's analyses of the “core” rules is that the “bargain element” of contracts is not necessary for enforceability. In the case of executory bilateral contracts, for example, Atiyah argues that “enforceability comes first, and benefit and detriment afterwards; it is purely circular to assert that the presence of benefit and detriment can be a ground for the enforcement of such contracts”. (And incidentally, through his analysis of Chappell and Co. Ltd. v. Nestle Co. Ltd. Atiyah claims, convincingly I think, that contrary to the conventional view the courts will enforce a promise where the promisor's only “benefit” is his motive.)

Surely to be the most controversial claim Atiyah makes, however, is that the rule that “past consideration is no consideration” admits of exceptions. Indicative of the refreshingly imaginative argumentation he utilizes here can be seen in the fact that he takes Bell v. Lever Bros., normally restricted to the area of “objective

18 P. 11.
19 P. 6.
21 Pp. 21-27.
22 Pp. 34-38.
23 Pp. 45-60.
24 P. 15; italics mine.
25 P. 15, italics mine.
26 Pp. 16-17.
27 Pp. 21-27.
28 Pp. 34-38.
29 Pp. 45-60.
29 P. 15, italics mine.
30 Pp. 36-38.
mistake”, and presses it into service to show that in fact promises to reward past performances are enforceable. Further and parallel evidence of Atiyah’s ability to look at things in unorthodox ways is his helpful suggestion in connection with the rule that consideration must move from the promisee that Dunlop and Selfridge and Tweedle v. Atkinson have more to do with consideration than privity. It is here that he argues the point that by itself is worth the price of the book: that in spite of the support given by such “powerful converts” as Cheshire and Fifoot to the assertion that there is no real distinction between the rule that consideration must move from the promisee and the rule on privity, a distinction is in fact there. He points out here that a person “who supplies no consideration for a promise has a better claim for enforcing the promise if he was at least a promisee”, the logical implication being that the questions about privity and consideration cannot be reduced to one another. (And although Atiyah does not mention the point, it also implies that the foundation of contractual obligation is a promise, not a bargain—which further implies, as Lord Wright tried to make clear some years ago—that consideration is not of the “essence” of contractual obligation but only evidence of its existence. Because most first year law students are taught the opposite, Atiyah’s monograph could give them at least a more balanced view.)

The basic insight Professor Atiyah’s book leads its reader to is that consideration is not a doctrine but a dogma. There was a time, he notes (in referring to the concept of “reliance”) when the courts were prepared to enforce a promise when they thought the justice of the case required it. But the new orthodoxy, he says, has “grown so strong and vigorous that it may be too late for the Courts to recognize what they have actually done; and I am not vain enough to suppose that this lecture can repair the damage”.

Perhaps not. But if a monograph such as Atiyah’s had been written in literature or philosophy or science those disciplines would have acknowledged its publication date as the start of a new and important line of theoretical development. And if practicing lawyers will take the time and academic lawyers the trouble to shake open their minds to Atiyah’s claims and proposals the common law of contract could itself well be revolutionized.

JOHN UNDERWOOD LEWIS*

---

33 (1861), 1 B. & S. 393.
34 P. 40, footnote 75.
35 Atiyah elaborates this point, see pp. 40-45.
36 Ibid., pp. 40-41.
37 Lord Wright, Ought the Doctrine of Consideration Be Abolished From the Common Law? (1936), 49 Harv. L. Rev. 1225, at p. 1252.
38 P. 58.
39 Ibid.

* John Underwood Lewis, of the Department of Philosophy, University of Windsor, Windsor, Ontario.

Judges and lawyers will find Principles of Sentencing both interesting and useful. Published as the latest in a series of Cambridge Studies in Criminology, the book takes a detailed look at sentencing policies and criteria that have been developed by the Court of Criminal Appeal and its successor, the Court of Appeal Criminal Division, in Britain.

Mr. Thomas is not concerned with the problems of law reform, with the ought rather than the is. Rather, he sets out to describe and analyze the principles and factors the British court actually takes into account in arriving at a proper sentence.

The result is a practical description and analysis with illustrations from numerous cases showing the range of prison terms that can be expected in specific offences, or with respect to special groups of offenders, for example, the young offender, the mentally disordered, or the persistent offender. Mr. Thomas points out that in England the court may adopt either a policy of following the "tariff" or of individualizing the sentence. The former approach accepts punishment and limited retribution as the primary principle in a case, while the latter involves acceptance of incapacitation or rehabilitation.

Tariff sentences, that is sentences of imprisonment, are almost always resorted to in cases of serious woundings, violent robbery and rape, and are usually justified as a general deterrent. In other cases the policy of the court is not so firm; depending upon the seriousness of the offence or the age of the offender, for example, the court may adopt an individualized measure. The trend toward a greater use of individualized sentences such as probation is apparent in Britain, especially in offences like theft, or break and enter, where probation, fines, suspended sentence or other non-custodial sentences are now regarded as quite proper.

Because statutory terms of imprisonment are now considered obsolete, the courts have had to work out their own appropriate range of limits above or below which a proper sentence in a particular case ought not to fall. The care with which the Court of Criminal Appeal has examined cases is illustrated in the thirty-two pages devoted to mitigating factors.

Approximately two hundred pages, more than half the book, gives a detailed account of cases illustrating the weight accorded to different factors in determining "just deserts" in varying circumstances. A Canadian reader cannot help but be impressed by the volume of cases that, in Britain, are appealed on sentence. Equally impressive are the quite apparent energy and expense involved in adjusting a sentence up or down a year or two to bring it into line with the prevailing tariff set by the court.
One of the dangers of a well-written book of this nature is that it may lend an undeserved legitimacy to appellate review of sentences. In jurisdictions such as Canada, it is doubtful if the success of the English Court of Criminal Appeal can be duplicated. In an article written elsewhere,¹ Mr. Thomas has suggested that the role of the court in developing principles and reviewing sentences to ensure uniformity of practices at the trial level works in Britain because of the relatively large number of cases appealed, thus permitting the development of a jurisprudence within a relatively short period of time. In addition, the judiciary in Britain being limited in number, and having a close contact with the bar, a sense of sentencing purposes has developed. One may anticipate that in Canada, however, with relatively few cases appealed on sentence, and the diversity provided by a large number of appeal-court judges spread over ten independent jurisdictions, the development of uniform sentencing principles is not likely to occur.

Nor is it likely that the jurisprudence of the Court of Criminal Appeal and its successor can be adopted into Canada. The upper and lower limits of any sentencing tariff are determined very much by sentiment; they are a factor of local or temporary conditions, and are the outcome of conflicting social interests springing from the home community.

Canadians will find helpful the detailed discussion illustrating the weight to be accorded criteria like premeditation, age, or record in particular cases. It may be misleading, however, to think that the upper or lower levels of the tariff in any given offence accord, or should accord, with similar tariffs in any Canadian province. It is difficult to know what are the prevailing tariffs in Canada, simply because here few cases are appealed on sentence and of those few even fewer are reported. Even so, it is surprising to find that in England the tariff for serious woundings runs from three years to fourteen years with the majority of reported cases being in the three to seven year range. Rape, on the other hand, appears to have a rather low tariff, ranging from a low of two years to an upper limit of ten years in gang rapes. Indecent assaults on males, however, carry a tariff of five to seven years.

The chapter dealing with sentences for the mentally disordered offender will be particularly useful to criminology students who wish to compare alternative sentencing models for this special class of offender. In addition the final chapter on sentencing procedure indicates that prevailing practice in the use of pre-sentence reports in Britain and the assistance of legal aid counsel at sentencing is in some respects significantly ahead of similar practices in parts of Canada.

Certainly *Principles of Sentencing*, appearing as it does at the same time as the publication in Canada of John Hogarth's revealing and important *Sentencing as a Human Process*, is a timely reminder for Canadians to look anew at this important aspect of the administration of justice, and consider the need for reform.

Keith Jobson*

---


Anyone in Canada who has had occasion to hunt for authoritative works on deterrence will have come quickly to the realization that Canadian effort in this area is practically non-existent and will therefore welcome this booklet which represents a clear, concise and thorough enough assessment of the concept of deterrence. Mr. Zimring is from the University of Chicago Law School, and it seems that we may look forward to a more comprehensive treatment of the subject from that same source in the very near future.

Those who have charge of criminal law enforcement in Canada have made giant strides in recent years in their appreciation of the true nature of criminal or deviant behaviour. It is safe to assert that the vast majority of them have discounted the century old view that the relations between man and his social environment can be reduced to a conflict between man on the one hand who seeks to satisfy his biological needs and impulses and social order essentially designed to curb these impulses and to compel him to draw back on the satisfaction of his instincts for the sake of the common good.

Many noted social scientists such as Merton, Sutherland, Becker, have made us aware of the complexity of human behaviour and of how the environment, the social institutions and personality characteristics, provide far more fertile ground for determining the causes of criminal behaviour and criminality rates than did the age old concepts of "freedom of will" or "shape of the head" or other similarly discarded explanations of criminal behaviour.

The sophistication however which has finally taken firm hold and generally pervades all discussions and decisions pertaining to criminal behaviour, treatment of offenders and prevention of crime generally, does not seem to extend to the vital process of deterrence in sentencing. Deterrence by and large still appears as a simplistic solution to crime simplistically conceived.

---

*(1971).

* Keith Jobson, of the Faculty of Law, Dalhousie University, Halifax, N.S.
The broad theory that threat of punishment inevitably acts as a deterrent to crime reigns unchallenged in our midst. *R. v. Turner* mirrors to some extent the official view:

Our legislatures, when defining penal sanctions, think and act predominantly in terms of deterring prospective offenders, and properly so. Our criminal law has deterrence as its primary and essential postulate.

Statements of this nature abound in our literature and in some of our judgments. The following for example appeared in a last year's issue of one of our criminal law reviews:

The police are as well aware as any other member of our society that the citizenry obey the nation's laws selectively. They obey those whose violation will visit upon them severe sanctions. Given the opportunity however, where selective law enforcement exists, be it illusory or real, coincidentally with selective law obedience, it is probable a given individual will violate the law. . . .

The trouble with statements such as these is that they do not tell the whole story. Without questioning the general theory of deterrence (although many do, it is not the purpose of this review) it is right I think to complain that too few people ever question the many significant differences which will affect the manner in which and the extent to which deterrence will work in given situations.

Our law enforcement mechanism owes it to society, law-abiding and law-breaking citizens alike, to define deterrence when making use of it in the exercise of its crime prevention function and to take account of the extensive research work carried out in this field, at Chicago notably, and California and Norway. If we are to deprive individuals of their liberty in the name of deterrence, we should at least give them the benefit of all the information which has now been gathered.

The author for example draws the well-known distinction among special deterrence (threat of further punishment of one who has already been punished for a crime), general deterrence (aimed at the population at large) and marginal deterrence. It follows that different considerations should be made to apply to each. Also there are the ethical issues which must be surveyed: the propriety of imposing upon an offender a hypothetical three additional years for robbery, so that others will be deterred. And the differences among men must somehow be recognized: because of differences in personality types, "A" for example may be relatively immune from the threat of sanctions because he is present as opposed to future oriented, he is an optimist regarding his chances of being caught, he is a man of impulse and so on, just

---

2 (1971), 13 Crim. L. Q. 313,
to name a few, whereas “B” will be effectively deterred because the traits which he possesses are precisely the opposite to those of “A”.

It is also suggested by the author that status affects responsiveness to threats. This is referred to as the “investment theory”. How much does one have to lose? The poor may be more tempted to commit “instrumental crime” because they have less to lose and also because they have less of what they want and hence they are less responsive to threat. It may also be said that instrumental crime (stealing money to buy drugs) is more easily deterred than expressive crime (consuming drugs) because other means or instruments which are non-criminal may be available. The emotional climate surrounding the offence will have a bearing on the importance of threats in the decisional process of whether to commit or not to commit a particular crime. It has also been observed that different kinds of people are drawn to different types of criminal activity and one kind is amenable to a lesser or higher extent than another to the threat of sanctions. A likely bank robber for instance will differ significantly from the potential embezzler. Communication is another element of interest. In order that it be deterred, a threatened audience obviously must know of the threat.

What I have attempted to do through randomly selected examples is to show the quality and the character of the book. It is more an introduction than a treatise, more a survey of issues about deterrence, than a definitive work on all or any of its many and complex aspects. But enough is known about deterrence to allow doubts to be raised about the effectiveness of a wholesale application of the “deterrent factor” in sentencing. Official attitudes, as the author says, were born of the absence of a suitable alternative to deterrence in crime fighting and were also born of the lack of sophistication in reading the results of surveys undertaken following intensification of law and order measures in a given area, designed to arrest a crime wave. Many of these surveys have confirmed some authorities in what has been termed “tiger prevention” programmes. The name derives from a well-known tale. The story goes that a man was seen on a main street snapping his fingers. A conversation followed:

“What are you doing?” A. “Keeping tigers away.”

“Why, that’s crazy, there isn’t a wild tiger within 5000 miles.” A. “Well, then I must have a pretty effective technique.”

But deterrence is too strongly imbedded in the conventional wisdom to permit of a successful attack against it leading to its disappearance without it being shown conclusively that the assumption which underlies our criminal law and its enforcement that stiffer penalties will reduce the rate of particular types of crime at least, is clearly wrong. It is very doubtful that the full case
against deterrence can ever be made, any more than the full case for its complete acceptance. Polarization of positions is what must be avoided, if we are to mark any achievement in this area.

And Mr. Zimring to be sure does not deny all value to deterrence. On the contrary he deplores the view much too commonly held, especially at the custodial level of the law enforcement process, that deterrence is a failure since a high proportion of criminals resume their deviant behaviour following incarceration and also (perhaps more significantly) since, as in the case of drugs, the rate of commission of a particular offence keeps increasing notwithstanding the imposition of stiff penalties. But, as it is said, it does not follow that all potential drug addicts are unaffected. Put in a different way, the law's successes, if there are any, will be found in the non-drug-using segment of the population, not among the recidivists.

On the other hand it is clear that simple deterrence is not the only explanation of the widespread pattern of conformity to criminal laws. It may not even be a primary explanation. The socialization process may well keep most people law-abiding, not the police. Such a view is certainly consonant with modern principles of criminology.

Mr. Zimring and others like him are making us aware to an ever increasing degree of the inadvisability of making indiscriminate use of a device (deterrence) which may have little to do with the effects which are intended thereby wasting time, energy and money and perhaps in time marring the image that people have of our system of justice.

The time may now have arrived for a more discriminating use of the factor "deterrence". If deterrence and rehabilitation cannot lie in the same bed as suggested in R. v. Turner, then it may be that our conception of deterrence requires to be reviewed. Perhaps we need to construct a new typology of crime that will reflect the responsiveness or sensitivity of the actor to punishment threat.

In the final analysis, this short work is well worth reading and in my view should be widely disseminated.

ELMER E. SMITH*  

* * *

Studies in Canadian Business Law. Edited by G. H. L. FRIDMAN.  
Toronto: Butterworths. 1971. Pp. vi, 580. ($35.00)

Albeit its editor is a transplanted Englishman, and several of the contributors are across the water, this is a Canadian contribution to the literature on commercial law, and by and large, a good one. Its

* His Honour Judge Elmer E. Smith, Timmins, Ontario.
aim is to set out a Canadian outlook on some aspects of business law, in the same fashion as has been done in the fields of tort and company law.

As with any joint production, there are high and low spots. Perhaps the reader will be best served by some indication of the strengths and weaknesses of this book. To my mind, the finest piece is Professor Laux's "Deceptive Advertising, The Law and the Canadian Consumer". Covering common law and legislative remedies, needed reforms, and types of abuses, this chapter reads exceptionally well and the arguments are both persuasive and finely reasoned. Close on its heels come Professor Foster's "The Real Estate Broker and His Commission", Professor Percy's piece on "The Application of the Doctrine of Frustration in Canada", Professor Bretten's "Commercial Arbitration: Judicial Review of Proceedings and Awards", Professor Cuming on "Consumer Credit Law", Professor Leigh's "Breach of Warranty of Authority", and the editor's contribution on "Protection of Business Relations by the Law of Torts". These are comprehensive chapters, covering their topics fully and well.

Two chapters in particular are notable for their contributions to fields that are somewhat new and whose legal development is inadequate—commercial leasing and the tort liability of administrative bodies. The main comment to be made on Professor Jones' "Leasing—A New Business Tool" is good material but let us have more. The paucity of footnotes attests not to lack of research by the author but to little other work in the area. As Professor Jones points out, leasing of capital goods is becoming increasingly a means of establishment financing. This trend brings with it a growing need for legal adaptation and development—and there has been an inadequate response and this chapter is as fine a beginning as could be. But more is needed. And the same can be said of Professor Molot's piece on "Administrative Bodies, Economic Loss and Tortious Liability". The gross proliferation of these agencies, and the often inadequate staffing of the positions on them, cry out for some protection for the individual who bears the burden of an unlawful decision. As Professor Molot points out, the remedy of certiorari is of little practical help and the legislature, courts and writers have been too slow to respond to the problems.

Professor Baer's chapter on "Recent Personal Property Security Legislation: Cosmetic Change?", while very well written and comprehensive, is marked by too many personal judgments that are not well documented. "There should be no security interests in

1 P. 150. 2 P. 293. 3 P. 49. 4 P. 392. 5 P. 87. 6 P. 342. 7 P. 469. 8 P. 273. 9 P. 425. 10 P. 225.
consumer goods".1 This is strong language and needs a little more argument than Professor Baer gives it or refers to.

Two chapters, in my opinion, are not up to the calibre of the rest of the book. Perhaps too much has already been written (though not enough action taken) in the area of exemption clauses, limitations of liability, contrats d'adhésion (call it what you will) and an effort was made to add something new; for whatever the reason, Mr. Côté's "Exculpatory Clauses"12 is too brief, with too little good argument on the policy questions and next to no reference to recent Canadian cases.13 Professor Williams' "Misrepresentation in Commercial Transactions"14 is terribly hard to follow and things are passed off rather glibly. For example, reference to the Combines Investigation Act with no citation of jurisdiction (though he can probably assume we know) and date (the section he refers to is a recent amendment);15 or, with reference to the legal effect of an advertising "puff":16

Thus, the law of contracts depends on whether an ordinary reasonable man would think the statements were predominantly statements of fact or opinion. It may be thought that with the increased resort to equitable estoppel and to the tort of negligent misrepresentation there would be an increased dependence on the criterion of how far an ordinary reasonable man would rely on the statements.

I am afraid I am still lost.

Taking the book as a whole, there is one pervading after-taste. That is, the increasing development of tort law in the commercial area. It always seemed that the business world rested on the firm foundation of the law of contracts and its offshoots, such as sale of goods, credit law, and so on. But here we have a new book on business law, a Canadian book published in 1971, and the law of tort plays a very major part in it. Negligence, misrepresentation, interference with business relations—these have a very vital but not-yet-fully-explored part to play in the commercial field. The commercial man, a tort lawyer? One used to think the latter only chased ambulances.

J. W. SAMUELS*


11 P. 240. Italics are the author's.
12 P. 1.
13 They are mentioned in footnotes with no comment.
14 P. 25.
15 P. 26.
16 P. 28.
* J. W. Samuels, of the Faculty of Law, University of Western Ontario, London, Ontario.
The publication of the Official Draft of the Restatement of the Law Second on conflict of laws, approved by the American Law Institute at the Annual Meeting of 1969, constitutes an event of major significance because of the frequency with which American courts rely on the work of the Institute and the interest it invariably arouses abroad. The Restatement Second supersedes entirely the original Restatement of this subject published in 1934.

As the Director of the Institute states in the Preface: ¹ “In basic analysis and technique, in the position taken on a host of issues, in the elaboration of the commentary and addition of Reporter’s Notes, what is presented here is a fresh treatment of the subject.”

The Restatement Second rejects the rigid rules that were the characteristic of the first Restatement as the Institute now recognizes that “black-letter formulations often must consist of open-ended standards, gaining further content from reasoned elaboration in the comments and specific instances of application given there or in the notes of the Reporter”.²

The new edition of Cheshire’s Private International Law now jointly authored by Professors G. C. Cheshire and P. M. North continues a time-honoured tradition of excellence. It contains a number of changes and additions most of which were prompted by the legislature and the judiciary.

Professor J. H. C. Morris’ Conflict of Laws is not a shortened version of Dicey and Morris on the Conflict of Laws³ prepared for the use of students. Although in the main it follows the arrangement of Dicey and Morris there are many variations including new chapters and also many original ideas which are the product of Dr. Morris’ long and deep study of his subject.

The chapter on torts in the three works under review and Dr. Morris’ new chapter on theories and methods are very good illustrations of their high quality and usefulness to practitioners, teachers and students because,

¹ Vol. 1, p. vii.
² Ibid.
guage) the discussion of why courts apply foreign law, and on what basis do they choose it, and also because,

... in the twentieth century the law of torts has responded to the pressures of the technological revolution as applied to the manufacture and distribution of products and to the means of transport and communications.

In Chaplin v. Boys a majority of the House of Lords rejected the concept of the proper law of the tort and left Phillips v. Eyre as the basis of English law:

As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. Secondly, the act must not have been justifiable by the law of the place where it was done.

Professor North is of the opinion that the first part of the rule which was originally enunciated in the Halley case places too much emphasis upon the accident of the forum and rightly suggests that it should be interpreted to mean that the lex fori will recognize a type of liability roughly similar to that for which the plaintiff seeks a remedy. Unfortunately this point of view has not been accepted by the House of Lords. A plaintiff who sues on a foreign tort in England must show that the wrong of the defendant would have been actionable had it been committed in England.

With respect to the second part of the rule in Phillips v. Eyre, the majority of the House of Lords clearly rejected the interpretation given to the word "justifiable" by the Court of Appeal in Machado v. Fontes. Non-justifiability by the lex loci delicti commissi has now been replaced by actionability by the lex loci delicti commissi.

However, as Dr. Morris points out actionability by the lex loci delicti must mean civil liability.

There is no requirement that the conduct must be tortious by the lex loci delicti; it is sufficient if by that law the defendant's liability to pay damages is contractual, quasi-contractual, quasi-delictual, proprietary or sui generis.

---

4 Morris, p. 256.
5 Ibid.
7 (1870), L.R. 6 Q.B. 1, at pp. 28-29.
8 (1868), L.R. 2 P.C. 193.
9 Cheshire, p. 265.
10 [1897] 2 Q.B. 231.
11 See for instance Lord Wilberforce, supra, note 6, at pp. 329-330, 339-341 (W.L.R.), Lord Guest, ibid., at p. 334 (W.L.R.).
12 Morris, p. 271.
It seems natural to assume that the wrong of the defendant entailed civil liability by the law of the place where it was committed. The word "justifiable" or "non-justifiable" was too ambiguous to have a place in a broad rule of conflict of laws. "Actionable" is a technical term which cannot be interpreted in such a way that a remedy would be granted by the forum where none existed in the place of wrong. Thus, today, to justify an action in England for a tort committed abroad the conduct must be civilly actionable by English law and by the law of the country in which the conduct occurred. It is surprising that it took so long for the English courts to reject such an indefensible rule which, in its application, leads to results often so contrary to the principles of fair play. Why should a plaintiff obtain a remedy denied to him in the country where he suffered injury?

After reviewing the various theories that have been advanced to explain Phillips v. Eyre, Professor North comes to the conclusion that this case provides a rule for choice of law and not one of jurisdiction. This view does not mean that actionability by both the lex loci delicti and the lex fori resolves the issue of the substantive law. Although Chaplin v. Boys does not provide a clear answer, the author is forced to recognize that the lex fori is the dominant substantive law, thus unduly favouring the defendant.

In the end, one must agree with Professor North that Chaplin v. Boys does not constitute a landmark in the field of conflict of laws:

Judicial law-making of this kind is of little service to the conflict of laws and it is not surprising that the Lord Chancellor has established a committee to examine the rules governing choice of law in proceedings based upon foreign torts.

Let us hope that, in Canada, the higher courts will at long last reconsider Machado v. Fontes or if not that the Conference of Commissioners on Uniformity of Legislations will finally complete their work on the Draft Foreign Torts Act.

While no definite position is taken in Cheshire's book as to which theory of the governing law should be taken by the courts,

---


14 Cheshire, p. 275.

Dr. Morris in his *Conflict of Laws* is still a supporter of the proper law of the tort which he enunciated more than twenty years ago: 16

... while in many, perhaps most, situations there would be no need to look beyond the place of wrong, we ought to have a conflict rule broad enough and flexible enough to take care of the exceptional situations as well as the more normal ones: otherwise the results will begin to offend our common sense. 17

... it seems unlikely that a single mechanical formula will produce satisfactory results when applied to all kinds of torts and to all kinds of issues. 18

Dr. Morris strongly criticizes the first part of the rule in *Phillips v. Eyre* and is distressed by the fact that the House of Lords in *Chaplin v. Boys* went out of their way unanimously to approve it. As he points out:

... if certainty and the promotion of English ideas of justice are to be the only goals, why not scrap the second rule in *Phillips v. Eyre* and dispense with any reference to foreign law whatsoever? 19

Dr. Morris offers two answers to the question of what is the *ratio decidendi* for *Chaplin v. Boys*. The first is that there is none and the second that we can pick and choose which *ratio* we prefer. Of course he prefers the proper law of the tort “not only because he invented it, but also because... the other possible rations seem retrograde and likely to produce unacceptable results”. 20

He does not agree with Professor North that *Chaplin v. Boys* sounds the death-knell of the proper law of the tort. Analysing the views of Lords Hodson, Wilberforce and Pearson, he comes to the conclusion that quite on the contrary, the first step has been taken in the direction of injecting some flexibility into the rules in *Phillips v. Eyre*. He views the proper law of the tort theory as an exception to the double actionability rule. Thus, as a result of *Chaplin v. Boys*, in England:

... a particular issue may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties. For Lord Hodson stressed that the rule in *Phillips v. Eyre* must be given a flexible interpretation because Willes J. himself said that the rule was only applicable “as a general rule”. 21

Professor North does not mention this exception although it should be accepted by the English courts.

---

16 The Proper Law of a Tort (1951), 64 Harv. L. Rev. 881.
17 Morris, p. 259.
18 Ibid., p. 260.
19 Ibid., p. 264.
20 Ibid., p. 269.
21 Ibid., p. 271.
Dr. Morris' approach has found its way in the *Restatement Second* on conflict of laws. In the light of the difficulties and complexities of the subject of foreign torts, the American Law Institute did not wish to formulate a precise rule or series of rules. It has simply stated as a general principle that the court will apply the local law of the state of most significant relationships. In each case the court must accommodate a certain number of underlying factors.

The rights and liabilities of the parties in tort are to be governed by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties. Separate rules are stated for different torts and for different issues in tort. "In other words, the identity of the state of most significant relationship is said to depend upon the nature of the tort and upon the particular issue." Furthermore, in reaching its decision the court must give greater weight to certain choice of law policies than to the demands of vested rights. According to section 145:

The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

The analysis of choice of law rules in the field of torts found in the *Restatement Second* is of great interest to Canadians at a time when the courts seem hesitant about abandoning the traditional approach as exemplified in *Machado v. Fontes* and *McClean v. Pettigrew*. Unlike the American courts which have considered the matter, Canadian courts do not seem to prefer a more flexible approach in which the various policy factors are considered, on the ground that its adoption would produce uncertainty in the law.

As Dr. Morris points out:

It is a pity that counsel in *Chaplin v. Boys* were unable to cite any

---

23 See *supra*, footnote 13.
24 P. 283.
American cases more recent than *Dym v. Gordon* ((1965), 16 N.Y. 2d 120, 209 N.E. 2d 792). If they had done so, it seems unlikely that the House of Lords would have stigmatised the new flexible approach as productive of uncertainty. Nor would Lord Wilberforce have said that "if one lesson emerges from the United States decisions it is that case to case decisions do not add up to a system of Justice" ([1969] 3 W.L.R. 322, at p. 343). For if that is true, then we might as well scrap not only the conflict of laws but also the common law itself.

Professor Morris' chapter on "Theories and Methods" is interesting because it contains an appraisal of the spate of writing in the United States on theories and methods in the conflict of laws. In a few pages brilliantly written, he has accomplished the seemingly impossible task of bringing order out of chaos, and for this we must be grateful to him.

The theories (not all of which are of American origin) seek to explain how it is that foreign law is applied in the forum despite the division of the world into independent sovereign States. The methods offer new techniques for solving choice of law problems.25

The theories discussed are the comity theory, the vested rights theory and the local law theory. With these, most of us are already familiar. It is with respect to methods that Dr. Morris' analysis is enlightening and refreshing as many students of conflict of laws often have difficulty distinguishing one method from the other. He discusses first the method which prefers rule-selecting rules to jurisdiction-selecting rules (Cavers); secondly, governmental interest analysis (Currie); thirdly, the interpretation of forum policy (Ehrenzweig); fourthly, principles of preference (Cavers); and lastly the use of choice-influencing factors as exemplified by the *Restatement Second*.

With respect to theories, it should be noted that the *Restatement Second* has abandoned the vested rights theory and all its consequences. In the first *Restatement*, choice of law rules in torts and contracts derived from vested rights analysis and were immutable and therefore led to a mechanical application of the local law of the place where the injury occurred in the field of torts and the law of the place in which the contract became binding or, when performance was in issue, where the contract was to be performed,26 in the field of contracts. On the other hand, the *Restatement Second*, as noted above, adopts the flexible rule that rights and liabilities with respect to a particular issue are determined by the local law of the state which, as to that issue, has "the most significant relationship to the occurrence and the parties". In ascertaining the law applicable to the issue at hand the courts

25 P. 517.
should be guided by a number of enumerated but not exclusive factors or policies.\textsuperscript{27} These policies are not listed in the order of their relative importance. As often some of the factors point in different directions in all but the simplest case, any choice of law rule represents an accommodation of conflicting values. Thus section 6 states:

Choice-of-Law Principles  
(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.  
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include  
(a) the needs of the interstate and international systems,  
(b) the relevant policies of the forum,  
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,  
(d) the protection of justified expectations,  
(e) the basic policies underlying the particular field of law,  
(f) certainty, predictability and uniformity of result, and  
(g) ease in the determination and application of the law to be applied.

"... this mode of treatment leaves the answer to specific problems very much at large. There is, therefore, wherever possible, a secondary statement on blackletter setting forth the choice of law the courts will 'usually' make in given situations. These formulations are cast as empirical appraisals rather than supported rules to indicate how far the statements may be subject to revaluation in a concrete instance in light of the more general and open-ended norm".\textsuperscript{28}

Conflicts problems are resolved in a flexible manner, case by case, issue by issue.\textsuperscript{29} In other words, the Restatement Second retreats from dogma in the sense that many basic norms consist of standards that are open-ended. This does not mean the Restatement Second rejects formulated conflict of laws rules. For instance in parts of property the rules are sufficiently precise to permit them to be applied in the decision without reference to the factors which underlie them. However as the Reporter points out:\textsuperscript{30}

Statement of precise rules in many areas of choice of law is made even more difficult by the great variety of situations and of issues, by the fact that many of these situations and issues have not been thoroughly explored by the courts, by the generality of statements frequently used by the courts in their opinions, and by the new grounds of decision stated in many of the more recent opinions.

\textsuperscript{27} Restatement Second, s. 6.  
\textsuperscript{28} Restatement Second, Vol. 1, Preface, p. viii.  
\textsuperscript{29} Morris, p. 546.  
In spite of the virulent attacks made upon the very idea of re-stating the rules or standards to be applied by the courts in conflict of laws cases,31 Professor Reese, the Reporter, and his colleagues have performed their task with great success and have come up with a very rational and workable system which will without doubt have a great constructive influence on the solutions to be adopted by the courts in the United States and elsewhere when confronted with difficult conflict problems.

Dr. Morris takes a realistic although somewhat conservative view when he points out that:32

It does not seem necessary to abandon the whole existing system of the conflict of laws with its apparatus of concepts and rules, as long as it yields acceptable results. It economises thought to be able to apply a conflict rule instead of having to think out each problem afresh each time it arises.

I fully agree with Dr. Morris that the new American methods, except for the choice influencing factors of the Restatement Second, are not suitable for adoption by English or Canadian courts in international cases.

We would do better to build on what is good in the traditional system, as the Restatement Second seeks to do, rather than to abolish that system altogether and start again. On the other hand, these methods have three lessons which we should do well to take to heart. The first is that choice of law rules should be flexible and should be flexibly applied. The second is that they should never be applied without some regard to the content of the foreign law referred to. The third is that we should be on the alert to identify and avoid false conflicts, and not be afraid to decide such cases in accordance with the law that is common to both countries, rather than in accordance with traditional conflict rules.33

The three books reviewed here are well printed and easy to read. They also contain excellent indexes, tables of cases, statutes, rules of the Supreme Court and books referred to. In the Restatement of the Law Second on the conflict of laws, in addition to the valuable Comments explaining each rule and which carry the approval of the Institute, the Reporter's Notes are of great im-

31 See for instance Ehrenzweig, American Conflicts Law in its Historical Perspective; Should the Restatement be "Continued" (1954), 103 U. of Pa. L. Rev. 133; The Second Conflicts Restatement: A Last Appeal for its Withdrawal (1965), 113 U. of Pa. L. Rev. 1230. Professor Ehrenzweig raises four questions: Should the draft not be expressly limited to interstate conflicts? Should it not be revised with a view to achieving greater theoretical consistency? Should it not be revised to respond to current doctrine? Should it not be limited to those narrow propositions which are settled in light of judicial practice (rather than mere language)? In my opinion the Restatement Second, Conflict of Laws answers positively at least some of these questions.

32 P. 530.

33 Ibid., p. 547.
portance as they give the reader an up-to-date account of American case law on the topic under discussion. Volume 3 also contains parallel tables between the Restatement of the Law Second and the first Restatement as well as court citations to the first and second Restatement and a table of cases cited in the Reporter's Notes.

To anyone teaching or studying conflict of laws, each of these books should be very important as a guide and as a source reference. The fact that they are not concerned with Canadian conflict rules does not detract from their value due to the common legal tradition which Canada shares with England and the United States. They should certainly find a place in the library of anyone interested in conflict of laws, a discipline of increasing practical importance in the world and especially in federal states such as Canada.

J.-G. Castel*


The mass of documentary and statutory material in international law has become so overwhelming that the only way to maintain manageability for the student is through various collections of these documents in their different subject areas. A welcome addition to such collections is Dr. Ian Brownlie's Basic Documents on Human Rights. In this work which in its field is far more substantial and comprehensive than his Basic Documents in International Law, Dr. Brownlie seeks "to provide a useful collection of sources on human rights" which will be "of help to a variety of readers and not merely to those with specialist interests in political science, international relations, or law". This is done in a work of ten parts under the following headings; national constitutions, standard setting by the United Nations, instruments sponsored by the United Nations, the contributions of the International Labour Organization, UNESCO and European institutions, developments in Latin America, Africa and Asia, the concept of equality and the effect of trade and development on human rights. The collection is also cross-referenced by a relatively comprehensive index.

Each part commences with an introductory note, which varies in length, explaining the editor's purpose in including the particular material, and individual conventions and other documents receive a brief introduction. A criticism might be levelled at the

---

* J.-G. Castel, of Osgoode Hall Law School, York University, Toronto, Ontario.

1 Preface, p. v.
unevenness of these commentaries. In the case of treaties a reference is generally made to the number of signatories or, where ratification has begun, the number of parties, and to whether the instrument is in force. Sometimes a reference is given to further reading and at other times the editor explains some of the background to the material he is including and refers to further works or articles on the subject. The brevity of these comments has led to a tendency to generalize and oversimplify and in some cases statements require qualification or at least further explanation. Typical of these is the comment² that “the implementation of the Alliance for Progress has not been successful” and,³ “The [International Labour] Organization started its life in 1919, and it has the distinction of being in advance of other international institutions in that its major concern is social justice”.

However, this minor criticism, if it can be called that, is clearly offset by Dr. Brownlie’s refreshing and sympathetic approach to the human rights aspirations of developing and particularly non-Western countries as embodied in their national constitutions, their conventions and their common declarations. The reader is often referred to the political difficulties of implementation and application rather than left with a cynical remark referring to the gap between word and deed. Thus the comment is made with respect to the constitution of the United Arab Republic that “foreign commentators all too commonly judge the quality of government in the Middle East and North Africa on the basis of the attitude of the State concerned toward Western commercial and political interests”;⁴ and Dr. Brownlie reminds us of the possibility of being blinded and even manipulated by too slavish an adherence to human rights absolutes. He points out, for example, that there is “abundant evidence that the concept of human rights in Latin America has been employed as a weapon against revolutionary regimes, particularly Cuba”.⁵

A selection of material of the nature of Basic Documents on Human Rights, cannot pretend to exhaustiveness and any reviewer can note his differences, usually subjective, with the editor over the decision to include or to leave out certain documents. Why, for example, were human rights instruments from Europe limited to the work of the Council of Europe? One comment, however, seems deserved. This relates to the organization of the materials and the more general problem of using the materials in teaching courses on human rights. Dr. Brownlie gives little clue in his Preface to his reasons for presenting the materials in the manner he has elected to do. His approach in the main is unexcep-

² P. 398.
³ P. 257.
⁴ P. 50.
⁵ P. 387.
tionable, being based on a rather traditional classification: states, the United Nations, the Specialized Agencies, and regional institutions. The last two parts of his collection, however, are functional classifications—the concept of equality and trade and development—and are in striking contrast to the earlier categories.

This change in method indicates inherent possibilities for using the materials for teaching purposes. Not only is the collection useful as a basic reference work for students, to avoid their having to search for documents contained in a variety of sources, but the materials also contain the basis of a structure for the teaching of courses on human rights. The extracts included by Dr. Brownlie in the final two parts of Basic Documents on Human Rights, such as the dissenting opinion of Judge Tanaka in the South West Africa Cases (Second Phase) and the report of Raul Prebisch, then U.N.C.T.A.D. Secretary-General, on development through trade policy indicate a way in which the study of human rights can be approached. Without detracting from the valuable task performed by Dr. Brownlie in this collection of human rights documents, at least, was disappointed that an approach towards human rights hinted at by the editor was not pursued further or in fact made the principal focus of the organization of the work.

D. M. McRae*


Professor Gibson and his wife have collaborated effectively in producing a legal history of Manitoba. He is a law professor and she is a teacher with an interest in history. It must be hard for two people to write a book, but in this case the result is a success. Someone has done a great amount of research, shown good judgment and imagination in selecting the material, made appraisals of important events, and put the whole account in a form that is lucid and interesting and a style that is almost breezy.

It is always hard to organize in a systematic and effective way any material that covers a long period. The Gibsons have succeeded by using the chronological method in covering Manitoba's three hundred years of legal history. The first chapter covers two hundred years (1670-1870), when Rupert's Land was under the Hudson's Bay Company's rule, and the remaining six chapters

---

* D. M. McRae, of the Faculty of Law, University of Western Ontario, London, Ontario.
embrace the century since Manitoba became a province. It cannot have been easy to subdivide the last hundred years into different eras, but the authors make the divisions appear natural.

As to the Hudson’s Bay period, the authors acknowledge their indebtedness to the book *Four Recorders of Rupert’s Land* by His Honour Judge Roy Stubbs of Winnipeg. The latter is an excellent account of the administration of justice by the Hudson’s Bay Company in Rupert’s Land. An Imperial Statute in 1803 gave jurisdiction in criminal cases first to Lower Canada and in 1821, after the troubles in the Selkirk settlement, to Upper Canada as well. Nevertheless the Company had in the Fort Garry (Winnipeg) area, courts, juries, sheriffs and police.

The time of the change of rule in 1870 was a troubled one, and Chapter II describes the period 1870-1874 as “New Beginnings”, with the establishment of a provincial Legislature and the Court of Queen’s Bench. The next chapter covers the eight years in which the Chief Justice was E. B. Wood, a strong and able but wrong-headed and intemperate man. The authors say he was “ascendant” for three years and then “under siege” for five. Then came fifteen years described as “Coming of Age” followed by the period entitled “Prosperity and Politics 1896-1918”. Chapter VI is called “Years of Stress”, from the Winnipeg general strike through World War II. The last quarter-century is described as “The Williams Years” in acknowledgment of the dominant role of the late Chief Justice E. K. Williams, not only as Chief Justice of the Court of Queen’s Bench but also because of his influence in law reform, in the profession and in legal education.

In carrying through the story of Manitoba’s legal history the authors include the development of the courts, the police, the profession and legal education. The emphasis, however, is on human beings. Manitoba has had many colourful characters. Sometimes we tend to laud our forebears and overlook their faults. The Gibsons have not put the skeletons in the cupboard. Moreover they have made their characters live. Among the many biographical sketches, some that particularly appeal to me, are those of Adam Thom, Chief Justice Wood, Archer Martin, J. S. Ewart, the Hagels (father and son), Sir James Aikins, Judge Lewis Stubbs and Chief Justice Williams. On the other hand some who emerge as builders but who were not so conspicuous were people like Sir John A. Macdonald’s son Hugh John, Colin Inkster the High Sheriff, several of the court officials, some of the deputy attorneys general and the deans of the law school.

Manitoba has had some “scandals” including the fraud of the contractor who built the Parliament Buildings and Law Courts, and the embezzlement by a respected solicitor of University and

1 (1967).
Church funds. There has been a quota of causes célèbres and of controversies over the appointment of Queen's Counsel and legal education. In connection with judicial appointments and the performance of judges, one sometimes hears comments but does not often see in print an account of the happenings behind the scenes on appointments and of cases of senility. The Gibsons have not side-stepped these topics. The complaint that political factors govern appointments is almost as old as our courts; yet one is still taken aback to read of the vigorous efforts of Mr. Maybank, later Mr. Justice Maybank, to keep Conservatives off the bench.²

The authors have been fair and restrained in their account of controversial matters. They do not identify themselves with the "establishment": they lean in favour of the disadvantaged and would like to see social and legal reform move faster. Their position is well reasoned and temperate. The second last paragraph says:³

Many perplexing problems continue to confront those who administer justice, of course. New penal techniques that are both effective and humane must be devised. Political partisanship must be eliminated from judicial appointments. Law reform on a massive scale is needed, and radical improvements in legal aid are essential. Perhaps the most disturbing problem is the so-called "crisis in law and order", involving as it does the equally frightening stances of those who refuse to recognize the authority of legal institutions, and those who, in response, advocate more brutal methods of law enforcement. Now that the ineffectiveness of many traditional legal sanctions has been demonstrated, new ways must be found to persuade people to observe the law.

Yet the authors conclude, in the words of their title, that on the whole the record is one of "substantial justice".

I have a comment, by way of mild criticism, on three passages in the book. First, in connection with the Hudson's Bay Company's Charter⁴ appears the statement: "It was one of the few times in history when the administration of justice for a huge territory, together with all other functions of government, was placed in the hands of a 'commercial corporation'." The statement is doubtless correct so far as the "huge territory" is concerned, though the Crown had no idea at the time as to the extent of the Hudson's Bay's drainage area. My criticism is that one might infer that Royal Charters giving grants of land in territories outside England and conferring powers of government were rare. Until Parliament established a colony by the Quebec Act of 1774, there were two main kinds of colonies, each the creature of the Crown. The first was the royal colony, like Nova Scotia, with a constitution consisting of a commission and instructions to the

³ P. 317.
⁴ P. 2.
governor. The second was the proprietary colony created by a charter basically like that of the Hudson's Bay Company. These were commonplace in the sixteenth and seventeenth centuries. Sometimes the proprietor was an individual like the Duke of York in the case of New York and sometimes a body corporate like the Hudson's Bay Company or the East India Company, the latter acquiring in time large areas. A number of colonies in what is now the United States were originally proprietary. Their charters can be found in Thorpe's work on the constitutions of the American colonies.\footnote{The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the State, Territories and Colonies Now or Heretofore Forming the United States of America (1909).}

The grant of land "as of our Mannor of East Greenwich in our County of Kent in free and common Soccage" which is the form of grant in the Hudson's Bay Company Charter was commonplace,\footnote{See Hurstfield, The Greenwich Tenures of the Reign of Edward VI (1949). 65 L.Q.Rev. 72.} though the reddendum of "two Elks and two Black Beavers" whenever the monarch should enter the lands is doubtless unique.

My second comment has to do with the account of the removal of His Honour Judge Lewis Stubbs from the bench in 1933 for "vitriolic attacks" on members of the King's Bench and Court of Appeal. The account of the facts is fair, and one can agree that "an occasional judicial heretic is beneficial". However, the authors' conclusion is:\footnote{P. 265.}

There seems little reason to remove such a judge from the bench, if he is otherwise competent, unless his utterances raise a substantial risk that a significant segment of the population will refuse to accept judicial authority. Large though Judge Stubb's following was, it is doubtful that his opinions could have had such an effect.

This is perhaps a fair test to apply in a charge of seditious libel; it is a clear and present danger test, and in line with the judgment in \textit{Boucher v. The King}.\footnote{[1931] S.C.R. 265.} However, I suggest it is not appropriate where the issue is one of fitness to hold judicial office.

A third comment is in relation to the establishment of a legal aid plan (civil) in 1938. The text states:\footnote{P. 270.}

The innovation that meant most to the man on the street was the establishment of a scheme of free legal aid. Here Manitoba again led the rest of the country. A Legal Aid Committee of the Law Society, under the general chairmanship of F. M. Burbidge, and staffed chiefly by members of the junior bar, began to function in April 1938.

\textit{In Alberta the Rules of Court were amended by Order in Council}
dated May 25th, 1932, by way of adding Needy Litigant Rules.\textsuperscript{10} I have personal knowledge that the plan was active in the year 1934. For years thereafter the Committee in Edmonton met every Friday noon in District Court Chambers, and the benches outside were lined with applicants. Many certificates were granted, and the consensus is that the scheme was for long a success, though in recent years it has been replaced by a new legal aid scheme.

The research that went into this book is obviously immense. It is fortunate that there are now in existence archives and the papers of some public men, and that Manitoba's Law Society kept a scrapbook and that there was a \textit{Western Law Times} and later the \textit{Manitoba Bar News}. These are all frequently quoted in the footnotes along with other original or contemporary sources. A minor criticism of the footnotes is one of omission. For a substantial number of decided cases the citation in the law reports is not given. This is true of the application of Louis Riel for leave to appeal to the Privy Council,\textsuperscript{11} of the Court of Appeal's decision upholding a conviction for seditious conspiracy against one Russell in connection with the general strike,\textsuperscript{12} of the Supreme Court judgment upholding the conviction of Thomas Kelly for theft, and so on, in connection with the construction of the Parliament Buildings and Law Courts;\textsuperscript{13} and of the well-known murder cases of Deacon\textsuperscript{14} and Vescio.\textsuperscript{15}

The appearance of the book is attractive. In each chapter there are subheadings such as Police, Personalities, Lawyers' Associations, New Judges and Legal Education which add to the readability. In addition there are many illustrations, most of them being portraits of prominent legal figures.

Lawyers and others throughout Canada, and not merely the prairies, should welcome this book. Each province in Canada is young in relation to Great Britain, and each has taken England's legal institutions and her law (except for Quebec's Civil Law). Canada's legal history is the story of the implanting of old institutions in new and different soil. Judges, lawyers, legal educators and society have shaped them into their present mold.

There must be general regret that we have not had more writing in Canadian legal history. There have, of course, been biographies of many lawyers who were public figures and a number of sketches of judges and practitioners. The authors acknowledge the inspiration of His Honour Judge Roy Stubbs by saying "Western Canadian legal history owes more to Judge Stubbs than to

\begin{itemize}
  \item \textsuperscript{10} Alberta Gazette 1932, p. 324.
  \item \textsuperscript{11} (1885), 10 A.C. 675.
  \item \textsuperscript{12} [1920] 1 W.W.R. 624.
  \item \textsuperscript{13} (1916), 54 S.C.R. 220.
  \item \textsuperscript{14} [1947] S.C.R. 531.
  \item \textsuperscript{15} [1949] S.C.R. 139.
\end{itemize}
any other man". In Saskatchewan the late Professor Colwyn Williams wrote a number of very useful articles in the Saskatchewan Law Review on the legal history of Rupert's Land in the Hudson's Bay period and for the period from 1870 until Saskatchewan and Alberta became provinces in 1905. The fact is that a great deal more needs to be written. This is certainly true of Western Canada and probably of the older provinces as well.

The story of Manitoba as the Gibsons tell it is a very human one, and one which on balance shows the sturdiness of our institutions and on the whole the ability, character and sense of responsibility of those who have shaped our institutions. No two provinces have an identical history, but there is enough in common among them all to justify studies like the Gibsons' in other provinces, and one can only hope their good example will be followed.

W. F. Bowker*

---


Le sous-titre apparaissant sur la couverture extérieure du livre se lit The Case for National Court Reform and Reorganization. Il s'agit, en fait, d'une critique, modérée dans l'ensemble, du système juridique des États-Unis. L'auteure est un avocat de Miami. Son ouvrage n'est cependant pas destiné exclusivement aux juristes: au contraire, il s'agit d'un effort louable de vulgarisation (quoique l'auteur oublie parfois que le grand public risque de ne pas comprendre certaines notions techniques, comme la preuve circonstancielle ou la corroboration). Le style est simple, parfois vulgaire: on sent l'avocat habitué à s'adresser à un jury.

Dans des chapitres respectivement consacrés au sexe et la loi, à l'avortement, à la législation sur la pornographie, aux juges, aux procureurs de la poursuite, sont mises à jour certaines failles, assez criardes d'ailleurs, de l'administration de la justice aux États-Unis. Il s'agit d'un fourre-tout d'où l'on peut dégager cependant quelques idées maitresses. Ainsi l'auteur s'indigne qu'une grande partie de l'énergie et des efforts des serviteurs de la justice (policiers, procureurs, juges) soit employée à réprimer certains crimes mineurs (qui dans certains États américains ou dans d'autres pays occidentaux sont des actes parfaitement légaux) comme le vagabondage, la fornication, l'adultère, l'avortement, le jeu organisé, alors que les vrais criminels restent souvent impunis. L'auteur déplore à maintes reprises la coloration politique et même partisane de la justice américaine en prenant des exem-

---

*W. F. Bowker, Director, The Institute of Law Research and Reform, Edmonton, Alberta.
ples d’actualité (l’affaire de Kent State, l’enquête concernant l’incident de Chappaquiddick mettant en vedette le sénateur Kennedy, les procès de Chicago, les déboires de Nixon dans ses nominations à la Cour suprême).

Malheureusement les griefs relevés par M. Rosenblatt ne sont pas nouveaux. Son ouvrage n’arrive pas à la cheville de Courts on Trial de Jerome Frank paru en 1949, par exemple. Finalement ce ne sont que les aspects les plus déplorables du système qui sont effleurés, sans suggestions sérieuses ou cohérentes de réforme. Il n’est reste pas moins que ce genre de livre est fondamentalement sain: nous ne vivons pas dans le meilleur des mondes et il est bon de le dire souvent. Même si Justice Denied s’attaque au système américain, des griefs reprochés s’adaptent, avec les nuances nécessaires, à notre système canadien, comme en témoignent d’ailleurs, les réformes récentes dont le législateur a doté notre Code criminel. Finalement c’est justement une perspective de réforme qui manque au livre de M. Rosenblatt. Ce dernier écrit: “Most politicians are mediocre.” Il ne serait pas étonnant de voir bientôt M. Rosenblatt aspirer à une carrière de politique.

ADRIAN POPOVICI*

* * *


The title of this book does not accurately reflect the scope of its content, which is overwhelmingly selective. The book deals with the techniques of using legal research tools only to the extent that they relate to law reports, statutes, encyclopedias and indexes to legal periodicals. In the author’s view “they are the ones which the student will use regularly”. Regrettably, Dr. Banks makes only a token attempt to apply this approach creatively to the many and diverse uses of other categories of legal research tools. Given the author’s emphasis on the necessity of studying such tools for effective legal research, one hopes that her next effort in the field will more fully reflect this eminently sound viewpoint.

The Guide is a revised and updated version of a manuscript used for a legal method course offered in the Faculty of Law, of the University of Western Ontario. It is divided into four chapters. Chap-

1 P. 268.
2 P. v.
Chapter I is essentially an illustration of how to use Canadian and English law reports mainly through a case approach, with the author explaining the various difficulties often encountered by law students when using them and discussing in detail their bibliographical features, such as, format, scope, year coverage, arrangement and the way of up-dating, and so on. Chapter II contains a relatively comprehensive survey of the various Canadian and English sources for finding statutes and regulations either through a subject approach or title approach. This chapter also includes a brief discussion of how to find tables and indexes of public statutes often offered in the various sources as well as valuable, though sketchy, information on the latest revision of the provincial statutes in Canada. Chapter III, comprising a hypothetical case used to illustrate the techniques of using some secondary sources of legal research, is in its entirety devoted to the illustration of the features of a few important digests, such as, the English and Empire Digest and the Canadian Abridgement, and so on, with particular emphasis on the logical and effective process involved in solving legal problems through the employment of case and subject approach. Chapter IV, entitled "Indexes to Periodical Literature", opens with a brief remark on the individual indexes often provided for by law journals, then proceeds with an analysis of the scope, bibliographical arrangement and format of some most frequently used indexes. The concluding part of this book, consisting of a select bibliography on legal research, a supplementary note to the Revised Statutes of Canada, 1970, and a combined index of the tables of cases and statutes, mentions, without detailed elaboration, some of the new features of the Revised Statutes of Canada, 1970, such as its new numbering system and its arrangement of some acts by subject matter.

I approach Dr. Banks' book with some hesitation. The topic is an important one and even a preliminary perusal reveals the dedication with which the author has approached her task. Yet some omissions do exist, which the author must also have shared. Little is said about the All England Law Reports, though their features would have provided an excellent opportunity to demonstrate the possible alternative techniques of employing different approaches for effective legal research. Nor do the Revised Reports receive the proper amount of attention that they deserve. In addition, there is a disproportionate emphasis on Canadian and English material, at least for an introductory course on legal method. I am of the opinion that the Guide should perhaps sketch the full range of the tools of legal research commonly used by the legal profession at large and then concentrate on an in-depth discussion of a few major categories of such tools.

The emphasis on the techniques of using law reports is most commendable, and students of legal method will find informa-
tion here which has not been often analyzed elsewhere. But on the whole the author’s practical approach toward the use of law reports leaves much to be desired. While it may be true that effective legal research demands a certain degree of familiarity with the bibliographical features of law reports, it is equally true that effective use of law reports requires some knowledge pertaining to the quality of their headnotes, the adequacy of their indexing arrangement, the kind of criteria used to determine the “reportable” decisions and, above all, their frequency. Frequency is of particular importance, for what “the lawyer wants is authority and the newer the better”.2 The relationship between authority and frequency is a dynamic one which should not be so easily cast aside.

There also appears a serious lack of evaluation regarding the value of those digests being dealt with in Chapter III. The Hon. James C. McRuer once observed that: “The value of a digest depends on a clear and accurate recognition of the principles dealt with in the decided cases and an equally clear and accurate statement of those principles.”3 It would be better if the content of this chapter did not limit itself to a hypothetical case. Despite the excellence of its method of presentation, the omission of some rigorous analysis of the value of such tools disappoints the reader, rendering him less attentive to their contextual accuracy.

To her task, however, Dr. Banks brings formidable talents—an ability to express herself clearly with a minimum of obscure language and a high order of analytical reasoning on a practical plane. A thorough reading presents ample evidence of the time and effort devoted to obtaining and explaining the numerous information with respect to the bibliographical history of some important tools. The analytical skill displayed in the presentation of the techniques of using legal research tools furnishes rewarding experience.

Even if one does not accept its approach, the reader will find that the Guide is a stimulating and contemporary work which should be seriously considered for adoption in every Canadian law library.

CHIN-SHIH TANG*

* * *


The compilers of this bibliography set for themselves the task of collecting, in one source book, a list of all those theses in the areas

3 1 C.E.D. (Ont. 2nd), Preface.
* Chin-Shih Tang, of the Faculty of Law, Common Law Section, University of Ottawa.
of economics, business and industrial relations submitted to Cana-
dian universities. They additionally broadened their work by in-
cluding, as well, those theses submitted to American and British
universities where the subject matter of the theses in the fields
enumerated above was Canadian. The items in the book are ar-
ranged first by country of coverage (Canada, United States, Brit-
ain) and then subdivided under each country, according to the
American Economic Association subject classification scheme.
This scheme, a copy of which is included by the authors as an
appendix to the volume, also determined the subject scope of the
bibliography. Rather than assume the almost impossible task of
writing an original individual abstract for each of the almost 2,500
theses listed, the authors chose to use the table of contents of
each item as their annotation. This device although somewhat
unique to the writing of annotated bibliographies, provides a gen-
erally adequate description of the contents of each thesis. The book
will undoubtedly be purchased by every Canadian library whose
patrons are concerned with research in the subject areas covered
by the list. Furthermore, because of the substantial interface be-
tween the subject matter of these theses and the law, the book
will be extremely useful to law students and legal scholars.

At a time when information is being generated in ever-expand-
ing geometric proportions, scholars must be concerned about the
bibliographic control of this information, so as not to spend need-
less amounts of their time discovering what has already been done
by others, or, more seriously, doing again that research which has
already been accomplished. This bibliography is a successful and
meaningful effort to provide this bibliographic control, and the
authors are to be thanked and commended.

R. F. Jacobs*

---

* R. F. Jacobs, of the Faculty of Law, University of Windsor, Windsor,
Ontario.