BOOK REVIEWS

REVUE DES LIVRES

Commentary on the British North America Act. By W.H. McCONNELL. Toronto: Macmillan of Canada Co. Ltd. 1977. Pp.x, 469. ($24.95)

Constitutional Law of Canada. By PETER W. HOGG. Toronto: Carswell Co. Ltd. 1977. Pp.xlii,548. ($18.50, paper, $34.50, bound)

The shame of Canadian legal scholarship, until recently, has been the dearth of satisfactory general textbooks. In no field has this lack been more evident or more unfortunate than in constitutional law. It is true that there have been some good casebooks, a few very good specialized monographs, and many excellent periodical articles. However, nothing published since the early works of Lefroy[1] and Kennedy[2] has offered a reliable overview of the subject which a student of constitutional law or a lawyer researching a constitutional problem could confidently regard as a sound starting point for their studies. Varcoe's book[3] may have been intended to serve this purpose, but its limited scope and the shallowness of its analysis prevented its doing so. Moreover, even Varcoe is now badly out of date.

What made the situation particularly distressing in the case of constitutional law was that of all legal topics it is probably the most peculiarly Canadian. In fields like contract law or tort law a Canadian lawyer can obtain useful preliminary guidance from English treatises, but although Canada's constitution is described in the preamble to the British North America Act[4] as "similar in principle" to that of Great Britain, the differences are much too numerous and too fundamental to permit safe reliance on British materials for all but a relatively few matters.

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[1] Canada's Federal System (1913).

[2] The Constitution of Canada (2nd ed., 1938).

[3] The Constitution of Canada (1965).

[4] 30 & 31 Vict., c. 3 (Imp.).

Late in 1977, two new treatises on Canadian constitutional law appeared, almost simultaneously. One of them meets this long standing need admirably; the other does not.

Professor McConnell teaches constitutional law at the University of Saskatchewan. His book, *Commentary on the British North America Act*, is a section-by-section treatment of Canada's major constitutional documents. The dullness inherent in the commentary format is relieved by a graceful writing style and (rare since Kennedy's writings) a concern for the historical and political background to many of the matters dealt with. Regrettably, the book is so seriously flawed that it cannot be recommended as a basic reference book for either lawyers or law students.

The quality of McConnell's commentaries is very uneven. Sometimes they are good, but all too often they suffer from inadequate or misleading explanations, from the omission of relevant data, and, occasionally, from erroneous or questionable assertions. The description of the *Anti-Inflation Act* case[5] makes no reference to the important and innovative discussion of the federal "peace, order and good government" power by Mr. Justice Beetz, for example.[6] The sections dealing with the functions of the executive branch often fail to distinguish sharply between constitutional law and constitutional convention.[7] The all-too-brief discussion of the "implied Bill of Rights" concept neglects to explain that it is based upon a link between the preambular reference to a "constitution similar in principle to that of the United Kingdom" and the establishment by section 17 of a federal "Parliament".[8] Speaking of the "implied Bill of Rights", it is surprising to find no cross-reference to that notion in the lengthy comment on the preamble.[9] It is even stranger to find no mention of the "manner and form" theory in the discussions on the Canadian Bill of Rights[10] or the Statute of Westminster[11] or, indeed, anywhere else in the book. The section on provincial taxing powers does not deal with the difficult problem of determining when a tax is "within the province",[12] and the later general discussion of the territorial limits to provincial jurisdiction makes no mention of the very significant

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[5] *Reference Re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452 (S.C.C.), discussed at p. 157.

[6] Pp. 510 *et seq.*

[7] Pp. 48 and 50.

[8] P. 445. See D. Gibson, (1967), 12 McGill L.J. 497.

[9] P. 25.

[10] R.S.C., 1970, Appendix III.

[11] 22 Geo. V, c. 4 (Imp.).

[12] P. 251.

Inter-provincial Cooperatives case.[13] The commentary on the "union" section of the British North America Act is silent on the highly topical question of whether a province has the right to secede.[14] Provincial jurisdiction to affect the rights of immigrants and naturalized persons is discussed without reference to the important case of *Quong-Wing* v. *The King*.[15] Federal control of the grain trade is attributed largely to the federal "declaratory power" under section 92(10)(c),[16] no mention being made in that context of the Supreme Court's use of the "trade and commerce" power in *Murphy* v. *C.P.R.*[17] The author seems to hold the mistaken belief that all international treaties require ratification in order to be binding,[18] and his assertions that federal authorities may not expropriate provincial land for national harbours,[19] and that the courts may refuse to apply the Canadian Bill of Rights to a statute which they believe was *impliedly* passed notwithstanding the Bill,[20] are debatable, to say the least.

One might attribute some of the omissions to space demands, if it were not for the author's penchant to insert frequent irrelevant sidelights on matters under discussion. The reader is treated, for example, to learned interludes on such diverse topics as the history and geography of Sable Island,[21] early North American coinage,[22] Keynesian economics,[23] the advantages of the metric system,[24] some aspects of patent and copyright law,[25] the function of Crown prosecutors,[26] and the virtue of granting temporary absences to penitentiary inmates.[27] If space were at a premium in the book, one would expect this type of material to be sacrificed before important constitutional information.

Some of the errors and omissions appears to be the result of a

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[13] *Interprovincial Co-operatives Ltd et al.* v. *The Queen* (1975), 53 D.L.R. (3d) 321 (S.C.C.).

[14] P. 26.

[15] (1914), 49 S.C.R. 440 (p. 230, McConnell).

[16] P. 266.

[17] [1958] S.C.R. 626.

[18] P. 381.

[19] P. 198.

[20] P. 428.

[21] P. 195.

[22] Pp. 203-204.

[23] P. 208.

[24] P. 213.

[25] Pp. 220-222.

[26] P. 276.

[27] P. 242.

considerable passage of time between the completion of the manuscript and its publication. When discussing the approaches to judicial selection taken by recent Ministers of Justice, for instance, the author concludes the section with Otto Lang, who has not held that portfolio since 1975.[28] This discrepancy between content and publication date is especially noticeable in the references to allegedly current events in Quebec. We are told that "a left-leaning separatist movement became powerful in Quebec",[29] but the election of Parti Québécois Government in 1976 is not mentioned. Indeed, Jacques-Yvan Morin, a prominent member of the first Parti Québécois cabinet, is described as: "now a Parti Québécois member of the Quebec National Assembly".[30] There is considerable discussion of the Bourassa Government's language legislation,[31] but no mention of the more radical Parti Québécois legislation,[32] or, for that matter, of any post-1974 aspect of the problem. The delay probably explains a number of errors and oversights, such as the puzzling statement that the Supreme Court of Canada sits "only rarely" as a full court,[33] and the failure to deal with the final Supreme Court decisions in several of the important cases discussed.[34]

While it is true that events move rapidly in this field, and that every author has to close his manuscript arbitrarily at some point in time while certain developments are still incomplete, the reader has a right to be told when the closing date is as far in advance of publication as it is in this case. Matters are made even worse by the fact that in a few selected instances more up-to-date information has been included. There is, for example, some coverage of the 1976 *Anti-inflaction Act* case,[35] and parenthetical reference is made to the Supreme Court's important decision in January 1976 in *Vapor Canada* v. *MacDonald*.[36] By bringing these topics up to 1976, while leaving others as of 1974 or 1975, Professor McConnell has created a trap for unwary readers.

There are some inaccuracies that cannot be blamed on delays in

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[28] P. 310.

[29] P. 252.

[30] P. 311.

[31] Pp. 390-392.

[32] The eventual legislation, La Charte de la Lange Française, did not receive assent until August 26th, 1977, but it was in existence in bill form long before that.

[33] P. 336.

[34] *Eg.*: *Roman Corp. Ltd et al.* v. *Hudson's Bay Oil & Gas Co. Ltd et al.* (1973), 36 D.L.R. (3d) 413 (p. 62, McConnell); *Morgan et al.* v. *A.-G. of P.E.I. et al.* (1975), 55 D.L.R. (3d) 527 (p. 231, McConnell); *Zacks* v. *Zacks* (1973), 35 D.L.R. (3d) 420 (p. 234, McConnell).

[35] Pp. 155-158.

[36] P. 173.

publication. To say that: "the various provinces have now enacted their own Bills of Rights . . ."[37] when in fact only three provinces have done so, is seriously misleading. If the author intended to include provincial anti-discrimination legislation in his reference to "Bills of Rights", he should at least have explained the difference to his readers. His description of the legislation involved in the landmark *Board of Commerce case*,[38] as "a federal statute aimed at eliminating profiteering in the Ottawa retail clothing business . . ."[39] confuses stimulus and response. Finally, no Manitoba born reviewer can leave unchallenged the statement that Manitoba "was founded by Louis Riel in 1871".[40] The province was, in fact, born in July 1870, and even those who are willing to attribute paternity to Riel and his illegal "provisional government" have to acknowledge that the blessed event could not have occurred without a considerable contribution from the mother—the Parliament of Canada.

If McConnell's book cannot be recommended, Hogg's can—enthusiastically. It provides an objective, up-to-date, and reasonably thorough survey of Canadian constitutional law that will be valued by both neophytes and experienced practitioners seeking an introductory spring-board from which to launch deeper research into particular problems. Precise and penetrating, readable and reliable, Professor Hogg's treatise is likely to be regarded as the standard work on the subject for some time to come.

Quibblers might take issue with a few of the author's organizational decisions. Placing the treatment of federal jurisdiction over banking in the chapter on "Companies" is difficult to understand, for example. However, any organizational approach to a subject as complex as constitutional law will inevitably be arbitrary and to some extent logically unsatisfactory. So long as every important topic is covered somewhere, and can be located by a dependable index or table of contents, a reader has little reason to complain.

The book covers most aspects of Canadian constitutional law, and the treatment is, for the most part, thorough enough for an introductory treatise. There are a few exceptions however. Inexplicably, the author decided not to include any consideration of constitutional jurisdiction over "navigation and shipping".[41] For more understandable but no more acceptable reasons, the problem of

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[37] P. 428. Saskatchewan, Alberta and Quebec are the only provinces with their own bills of rights.

[38] [1922] 1 A.C. 191 (P.C.).

[39] P. 174. [40] P. 289. [41] P. 323.

aboriginal rights was also omitted.[42] Failure to deal with the burgeoning field of telecommunications weakens an otherwise good discussion of communications control.[43]

In a few of the areas dealt with, the treatment is somewhat shallower than the reader of even a general survey has the right to expect. Jurisdiction over "near banks" is not examined adequately, for example.[44] Discussion of the vexed area of "trade and commerce" is disappointingly incomplete.[45] Failure to mention the "historical" or "categories" approach to the "direct taxation" problem,[46] or Professor Lederman's compromise solution to the treaty implementation dilemma,[47] deprives the reader of important insights in those areas. A number of additional illustrations could be cited, but these few should be enough to illustrate that Professor Hogg's work is not all of satisfactory depth. Nevertheless, for an introductory treatise the book is sufficiently thorough on most topics, and remarkably so on some.

Small errors mark the first editions of most books, and this one is no exception. Professor Andrée Lajoie will no doubt be chagrined to learn that her sex has been changed.[48] Happily, readers will discover relatively few mistakes of this kind. Professor Hogg does occasionally indulge in overstatement, however, which might mislead the uninitiated. He tells us that ". . . the Governor General . . . must *always* act under the 'advice' (meaning direction) of Ministers who are members of the legislative branch . . .",[49] when recent experience in Australia (of which Hogg admittedly disapproves[50]) provides strong authority for the view that it may sometimes be permissible for the Crown's representative to act on his own initiative, and even contrary to advice, in emergency situations. He says that ". . . it has *never* been seriously claimed that federally-appointed provincial judges would tend to favour the federal interest in disputes coming before them",[51] when in fact such allegations are heard with increasing frequency, and not only in the Province of Quebec. In concurring with the statement of another writer that Superior Court judges are "virtually irremovable",[52]

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[42] P. 385.

[43] P. 344.

[44] P. 368.

[45] P. 272.

[46] P. 404.

[47] P. 192. W.R. Lederman, Legislative Power to Implement Treaty Obligations in Canada, in J.H. Aitchison (ed.), The Political Process in Canada (1963), p. 171.

[48] P. 330, note 51.

[49] P. 141. Emphasis added.

[50] P. 157. [51] P. 40. Emphasis added. [52] P. 121.

Hogg overlooks the ill-fated judicial career of Leo Landreville, a former member of the Ontario High Court.[53] His assertion that "if the Parliament at Westminster enacted a statute purporting to alter the law of Canada without the request and consent of Canada, the courts would not deny validity to the statute"[54] seems to reject out of hand the legal efficacy of section 4 of the Statute of Westminster,[55] without revealing that the opposite view is held by many constitutionalists including, it seems, himself.[56]

These are all matters of detail which do not seriously mar an otherwise excellent product. My only major criticism of the book is that it seems to me to lack a sound historical perspective. Professor Hogg's generalizations about long range trends and tendencies often seem to me to suffer from faulty judgment. In the opening pages, Hogg labels as "unhistorical and naive"[57] the view of many Canadians that an extensive revision of our constitution is both desirable and achievable. Yet many of his own conclusions carry an aura of naiveté themselves.

". . . In Canada . . .", he claims, with no supporting evidence, ". . . civil liberties are better respected than in most countries".[58] Such a statement is as difficult to refute as it is to prove, of course. It may even be true, but the complacent conclusion about the adequacy of Canadian civil liberties protection to which it appears to have led Professor Hogg is most unfortunate. He leaves little doubt as to his belief that there is no need for improved legal controls over governmental activities, either by means of an entrenched Bill of Rights or of judicial activism. After a short paragraph in which brief passing references are made to British Columbia's vicious anti-Oriental legislation over more than two decades, long standing federal paternalism towards our native population, inexcusable governmental treatment of Japanese-Canadians during World War II, Quebec's blatant discrimination against Jehovah's Witnesses during the Duplessis regime, and the former Alberta legislation restricting the land-holding rights of Hutterite colonies, he concludes: "The real threat to egalitarian civil liberties in Canada comes not from legislative and official action, but from discrimination . . . by private persons . . .".[59] One wonders what kinds of governmental activities he would regard as threats to civil liberties.

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[53] See: *Landreville* v. *The Queen* (1977), 75 D.L.R. (3d) 380 (F.C.T.D.).

[54] P. 7.

[55] *Supra*, footnote 11.

[56] At one point he describes the opposing view as "possible" (p. 17, note 21), and later he refers to it as "the better view" (p. 27, note 66).

[57] P. 4. [58] P. 419. [59] P. 424.

Professor Hogg's observations about recent shifts in the relative constitutional powers of the federal and provincial orders of government are no more perceptive. Since World War II, he asserts, "the balance of power has tended to shift back toward the regions".[60] It is his opinion that the generally pro-provincial principles established by the Privy Council in the 1920's and the 1930's are "probably irreversible",[61] and that "constitutional lawyers have tended to lose interest in the once-heated debate" about the propriety of those decisions.[62] "One can debate a *fait accompli* for only so long", he says.[63]

It is necessary to consider only two decisions of the Supreme Court of Canada in recent months—that which deprived the provinces of the power to regulate cable television,[64] and that which found Saskatchewan's oil taxation legislation to be an "indirect tax" and an improper attempt to deal with interprovincial trade and commerce[65]—to realize how wide of the mark are these observations. In both cases plausible legal arguments could be advanced in support of the opposite conclusions. Indeed, the reasoning of the majority in the mineral tax case seems much less plausible than that of the dissenters. In both cases the result of the Supreme Court ruling was to restrict severely the power of the provinces to govern certain activities within the province. Without the right to play a significant role in the electronic communication of ideas, the provinces' ability to regulate cultural matters is crippled. Without the power to raise revenue from their own resources, the provinces' financial ability to carry out their various governmental responsibilities is severely hampered. While it is true that these cases were not determined until after Professor Hogg's book was published, the handwriting was on the wall long before then. The reason that it is no longer useful to debate the early decisions of the Privy Council is that so many of them have already been overturned judicially or circumvented by administrative devices such as the federal "spending power". What needs urgently to be debated is the overwhelming *centralist* tendency of recent Supreme Court decisions before *that* becomes a *fait accompli*.

Because I believe that our present constitution offers inadequate

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[60] P. 30.

[61] P. 38.

[62] P. 252.

[63] P. 252.

[64] *Capital Cities Communications Inc. et al.* v. *C.R.T.C. et al.*, (S.C.C.), Nov. 30th, 1977; *Public Service Board* v. *Dionne et al. and A.-G. of Canada et al.* (S.C.C.), Nov. 30th, 1977.

[65] *Canadian Industrial Gas & Oil Ltd* v. *Government of Saskatchewan et al. and A.-G. of Canada et al.*, (S.C.C.), Nov. 23rd, 1977.

protection for civil liberties, and that it has resulted in a dangerous imbalance of governmental powers, the reviewer is one of the "naive and unhistorical" people who supports an early resumption of attempts to devise a new constitution for Canada. In the meantime, however, Professor Hogg's commendable book will make easier the task of understanding the old one.

DALE GIBSON*

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For many long years we have lacked a general treatise on the constitutional law of Canada. Now Professor Hogg has given us one, and a very fine work of scholarship it is. His own description of the scope of his book, from his preface, is that, "while not a comprehensive treatise on constitutional law, [it] does attempt to cover most of the subject".[1] He is too modest. It is indeed comprehensive so far as I have knowledge of what would be comprehensive. It is remarkable to have accomplished this within the limits of about 450 pages of text, normal for a single volume of this type.

Within this compass, it was not possible for the author to go through in full the intricacies of controversy in the many areas of constitutional law where there are differences among the scholars. Nevertheless Professor Hogg does at least delineate these areas, give a succinct picture of the opposing views, and take his own position. Moreover, the footnotes are extensive and meticulous, so that if the reader wants to go more deeply into problems and differences than does the author's text, the references to cases and learned journals are there to permit him to do so.

A leading feature of the book is that it does not just treat the federal division of legislative powers, which is so often in itself identified as "Canadian Constitutional Law". This is only Part II. The author gives the full picture of what he does cover in his preface:[2]

> The book is arranged in three parts. Part I, *Basic Concepts*, consists of thirteen chapters which include such matters as the sources of Canadian constitutional law; the origin, status, amendment and patriation of the B.N.A. Act; the theory of federalism; the theory and techniques of judicial review; the federal-provincial financial arrangements; the evolution of Canada from colony to independence; the rules of responsible government; the Crown; and parliamentary sovereignty and its adaptation to a federal system. Many of the topics of this part of the book are not represented in conventional legal materials, and (perhaps for that reason) some of the topics have been neglected in law school curricula. However, in my view they are fundamental to an understanding of the Canadian constitution.

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[1] P. iii. [2] *Ibid.*

> Part II, *Distribution of Powers*, consists of ten chapters which cover the federal distribution of powers. This is the area of the law which has attracted most of the litigation, and most of the writing. While I have used chapter headings which are traditional, within many chapters I have organized the material along "functional" lines, bringing together all the cases on particular topics, such as competition law, Sunday observance, insurance, labour relations, marketing, securities regulation, and so on.
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> Part III, *Civil Liberties*, consists of two chapters, one on civil liberties generally, the other on the Canadian Bill of Rights. I decided to confine this part to two chapters because of the recent comprehensive treatment of the field in Walter S. Tarnopolsky's book on *The Canadian Bill of Rights* (2nd ed., 1975) and the earlier book by D.A. Schmeiser, *Civil Liberties in Canada* (1964). The alternative would have been a substantial increase in the size of the present book.

The timing is very good on Part I, because legal educators *have* neglected many of these topics, and now some of them have come to the fore with a vengeance in Canada's current crisis of national unity. There is considerable ignorance or naïveté abroad concerning custom, usage and convention, and their bearing on how one amends the constitution to accomplish patriation or permit the secession of a province, or deal with certain other constitutional issues like changes in the division of powers. This is an area where Professor Hogg and I have some differences. I believe (on some good authority) that constitutional usage can crystallize into full-fledged constitutional law, and that this has happened with respect to amendments affecting the distribution of powers and certain other matters. Professor Hogg disagrees. He says:[3]

> It is possible that the practice of securing provincial consent to amendments altering the distribution of powers has hardened into a binding convention. If such a convention has developed, does it bind only the Canadian federal government, or does it bind the United Kingdom government as well? W.R. Lederman argues that there is such a convention, and that it binds the United Kingdom government as well: "in the face of any provincial dissent, I think the present convention requires that the British government and Parliament do nothing, simply regarding the request from the Canadian Parliament in these circumstances as improper, that is, unconstitutional and illegal". Lederman's view is attractive from the point of view of protecting the interests of the provinces. But, as has been explained, there is no historical basis for the British government taking upon itself the ascertainment and effectuation of provincial views; and it appears (to me at least) to be an objectionable foreign interference in Canadian domestic affairs. My prediction is that the United Kingdom government would not be prepared to exercise the discretion contemplated by Lederman and would not regard itself as bound by any convention concerning the relations between the provinces and the Dominion.

My rejoinder is that, when confronted with a joint address from the Canadian Parliament in one of these specially-entrenched respects, and when there are significant provincial dissents, the British Government and Parliament are inescapably in the position of

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[3] Pp. 20-21.

exercising a discretion about vital Canadian affairs. If they honour the joint address, they prefer the position of the central Canadian Government, if they do nothing, they prefer the position of the dissenting provinces, that is the *status quo*. We would be stupid to put the British in such a dilemma, but if we do, I think they should prefer the *status quo*. That minimizes their interference.

Anyway, the point for present purposes is that the author has explained that I have a contrary position to the one he takes himself, and gives one of the key references for it in a footnote. What more could I ask or expect? This is typical of his method in all three Parts of his book, and obtains for the benefit of all the scholars to whose writings he makes reference. Moreover, the value of this for readers generally is obvious.

Quite properly in my view, under "Basic Concepts" in Part I, Professor Hogg deals with "Principles of Judicial Review" (Chapter 5) and "Paramountcy" (Chapter 6). His treatment of these subjects is systematic and sophisticated, and again, though full rehearsal of all scholarly controversy in these areas is not undertaken (and could not be), the essentials are explained and the references are there in the footnotes for those who wish to go further.

Nevertheless, there is just one respect in these areas in which the author might have gone a little further with what he included in his main text. There has to be a certain degree of particularity to the statutes of the parliaments in a federal system, duly related to the actual power-conferring terms of the division of legislative powers. In other words, some statutes may be so generally or broadly drafted that they cannot be sensibly related either to specified federal or provincial powers, and a search for "pith and substance" or resort to "reading down" does not save the situation. The unlimited discretion of the Quebec City Chief of Police in the *Saumur* case[4] is perhaps the outstanding example of this in the cases, and what Mr. Justice Rand said about it is, in my view, central to the whole process of judicial review:[5]

> Conceding, as in *Re Alberta Legislation*, that aspects of the activities of religion and free speech may be affected by provincial legislation, such legislation, as in all other fields, must be sufficiently definite and precise to indicate its subject-matter. In our political organization, as in federal structures generally, that is the condition of legislation by any authority within it: the courts must be able from its language and its relevant circumstances, to attribute an enactment to a matter *in relation to which* the Legislature acting has been empowered to make laws. That principle inheres in the nature of federalism; otherwise, authority, in broad and general terms, could be conferred which would end the division of powers. Where the language is

[4] [1953] 2 S.C.R. 299.

[5] *Ibid.*, at p. 333.

> sufficiently specific and can fairly be interpreted as applying only to matter within the enacting jurisdiction, that attribution will be made; and where the requisite elements are present, there is the rule of severability. But to authorize action which may be related indifferently to a variety of incompatible matters by means of the device of a discretionary licence cannot be brought within either of these mechanisms; and the court is powerless, under general language that overlaps exclusive jurisdictions, to delineate and preserve valid power in a segregated form. If the purpose is street regulation, taxation, registration or other local object, the language must, with sufficient precision, define the matter and mode of administration; and by no expedient which ignores that requirement can constitutional limitations be circumvented.

Even here, my criticism has to be mild. In a footnote in the "Reading Down" section Professor Hogg says: ". . . a law that is excessively vague and broad so that it cannot be characterized as in relation to a matter within a head of power will not be rehabilitated by a massive exercise in reading down".[6] He then gives the reference to Justice Rand in the *Saumur* case, though he does not quote the passage. Accordingly, the reader should bear in mind that there is real gold to be found in some of the author's footnotes.

Part III of the book is devoted to "Civil Liberties" and consists of two chapters totalling twenty-six pages. In spite of the brevity, they are remarkably comprehensive. The first chapter deals with the Common Law tradition of civil liberties, and also the concept of an "Implied Bill of Rights" arising out of the guarantee of parliamentary institutions in the British North America Act. The second chapter is devoted to a synoptic treatment of the jurisprudence concerning the Canadian Bill of Rights of 1960. As noted earlier, Professor Hogg explains that his treatment in Part III is brief because the Tarnopolsky book on the subject is readily available and up-to-date in a second edition.

Professor Hogg doubts the existence of an implied Bill of Rights, and in this I agree with him. Ardent civil libertarians among our peers no doubt take exception to this, but, in my view, they will have to face the fact that they may have been erecting extensive logical superstructures on very slender foundations, so far as precedential authority in the courts is concerned. And that is whence authority for an implied "Bill of Rights" must come. Also, Professor Hogg points out the rather limited effect in the courts so far of the Canadian Bill of Rights of 1960, though he definitely does point to some good effects. Again I agree, and I do so without prejudice to the fact that I believe I can claim to be as civil libertarian in my sympathies as most of my fellow professors. I think Professor Hogg would be justified in making the same claim. There is always tension between the law as it is and the law as it should be, and one is always trying to make the distinction at any given moment in time.

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[6] P. 91.

The author tells us that his book started as a series of notes prepared for his students and then developed a momentum of its own. Fortunate momentum! The book has the lucidity of style and freedom from jargon that marks fine teaching, and which readers of books need as much as students in classrooms. Readers of this review will have realized by now that I am enthusiastic about this book. Quite simply, it is first class.

W.R. LEDERMAN*

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Canadian Civil Procedure Cases and Materials. By GARY D. WATSON, S. BORINS, and N. J. WILLIAMS. Toronto: Butterworths. 1977. Pp. xix, 822. ($35.00)

Publications and interest in the field of civil procedure, at least in Ontario, appear to be increasing and reaching an all time high. It is true that the last few years have witnessed only relatively minor changes in the Ontario Rules of Practice.[1] However, within the same period the profession has seen the birth of one series of law reports dedicated to civil procedure,[2] one new journal aimed at the problems and preoccupations of civil litigators[3] and the establishment of the Civil Procedure Revision Committee under the aegis of the Ontario Law Reform Commission and the chairmanship of Walter B. Williston, Q.C.[4] In addition, the Ontario Law Reform Commission is studying the vexing problem of class actions and the Ministry of the Attorney General has recently presented the profession with the "Discussion Paper on Proposed Limitations Act".[5]

In the midst of all this activity it must have been with some misgiving that the authors[6] and publishers of this admirable teaching vehicle produced a second edition which will become dated within a

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[1] A list of amendments since 1970 to the Judicature Act, R.S.O., 1970, c. 228 and the Rules of Practice and Procedure, R.R.O., 1970, Reg. 545, can be found at p. 3 of the yellow pages, 4 Holmsted and Gale, Ontario Judicature Act and Rules of Practice (1975).

[2] Carswell's Practice Cases.

[3] Advocates' Quarterly.

[4] For a description of the membership and terms of reference of the Civil Procedure Revision Committee, see Williston, Revising the Ontario Rules of Practice—The Work of Civil Procedure Revision Committee (1977), 1 Advocates' Quarterly 18.

[5] Ministry of the Attorney General (Ontario), Discussion Paper on Proposed Limitations Act (Sept. 1977).

[6] In the preface to the second edition Professors Watson and Williams point out that the burden of judicial work on Stephen Borins since his appointment to the Bench in 1975 has prevented him from participating in the new edition.

very short time. No doubt the double requirement of haste and clairvoyance has affected this edition. From a technical point of view the new edition has less than a finished look, as the table of contents informs us in large block print that Chapter 7 deals with "FURTHER EXPANDION OF THE LITIGATION" and the index ends part way through the letter "T".[7]

The predictive qualities required of such an interim publication lend a certain "leave them hanging quality" to the book. For example, at page 9-115 the authors are forced to describe the Ontario experiments with pre-trial conferences and opine that the preliminary results suggest an increase in the percentage of cases settled.[8] Again, the vexing and contradictory case law dealing with The Negligence Act of Ontario[9] is nicely canvassed at pages 7-35 to 7-53. The authors quote at great length from the Ontario Court of Appeal decision in *Dominion Chain Co. Ltd* v. *Eastern Construction Co. Ltd*[10] rather than attempting a critical analysis of the reasons for judgment. No doubt the failure to take up the challenge was prudent in view of the then pending appeal to the Supreme Court of Canada[11] and the expected proposals for revision of the law relating to limitation periods.[12]

The book is a teaching tool and a very good one. Except perhaps for purposes of nostalgia I doubt that the profession would wish to be teased again by the pregnant hypotheticals and penetrating questions which so endear casebooks to our memories of law school.[13] In the first edition the authors gave us the fruits of their efforts to produce interesting, flexible and pedagogically sound materials for use in civil procedure courses. In the second edition they have maintained the model of the Ontario system with references to, and examination of, the procedure of other jurisdictions where appropriate. The chapters have been re-ordered and restructured in an attempt, I

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[7] These errors appeared in the paperback edition and may be corrected in the hardcover edition.

[8] By O. Reg. 32/78, new rule 244 dealing with pre-trial conference was added to R.R.O. 545 and became effective on March 1st, 1978.

[9] R.S.O., 1970, c. 296.

[10] (1976), 12 O.R. (2d) 201.

[11] By order dated June 1st, 1976, the Ontario Court of Appeal gave leave to Giffels to appeal the judgment of the Court of Appeal to the Supreme Court of Canada on six questions of law. The judgment of the Supreme Court of Canada (as yet unreported) was pronounced by Laskin C.J.C. on Feb. 7th, 1978. The Supreme Court twitted the Ontario Court of Appeal for including a question of law which had not been argued before that court but did not accept the opportunity of clarifying the law relating to contribution under The Negligence Act, *supra,* footnote 9.

[12] *Supra*, footnote 5, s. 4.

[13] Professor Sadinsky has opined that the first edition would be both instructive and rewarding to, *inter alia*, practitioners: (1974), 52 Can. Bar Rev. 154.

believe successful, to improve the book's conceptual and pedagogical qualities. A section on class actions[14] has been added as well as material responsive to the more important amendments to the Ontario Rules of Practice[15] since the first edition.

Anyone who has tried a hand at teaching will appreciate that a student must to some extent be sensitized to the relevant problems before any discussion concerning alternative solutions is possible.[16] In the context of civil procedure the challenge is to raise the problems of a civil action to a level of immediacy sufficient to make meaningful the study of the various problem-solving policies, devices and techniques common to systems of civil procedure.

This book is admirably designed to accomplish its stated purpose of teaching a basic course in civil procedure. The first chapter contains an overview including the structure of a civil action, an historical perspective, the organization of the courts and the adversary system. The second chapter of eighty pages on costs has been criticized as being too impractical as an aid to the understanding of the trial process. One wonders what could be more practical and essential to an appreciation of civil procedure than a preliminary acquaintance with such bottom line considerations. Perhaps the subject of costs ought to be studied a little later in the process but that can be easily accomplished by the teacher. The succeeding chapters deal with jurisdiction of courts, venue, initial process, expansion of the litigation by the plaintiff, pleading, expansion of the litigation by the defendant, amending proceedings, discovery and disposition of the case without a trial. If the book is a trifle voluminous that can be remedied by some judicious pruning appropriate to the course being taught.

The book does have two serious shortcomings: it is very expensive and it does not go far enough. Concerning the former, who can do anything about rising prices? Concerning the latter, the authors should be encouraged, even exhorted, to produce a second volume going beyond discovery into trial and appellate procedure. Such a second volume would be suitable for the proliferating courses in the nature of advanced civil procedure and advocacy.

In addition and conclusion, one should hope, when all the dust and feathers of procedural reform have settled, that the authors will produce a third edition to comfort and support the pedagogue and, perhaps, the profession at large.

GEORGE R. STEWART*

[14] Pp. 5-82 to 5-110.

[15] Ch. 4 responds to the 1975 amendments to the Ontario Rules concerning service *ex juris* and ch. 10, pp. 10-31 *et seq.* to the 1973 amendments concerning default judgment.

[16] Robertson (1975), 33 U. T. Fac. L. Rev. 117.

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Residential Tenancies. Third Edition. By DONALD H.L. LAMONT, Q.C. Toronto: The Carswell Company. 1978. Pp. xiii, 218. ($18.50)

Two years ago there appeared in this publication a review of *Real Estate Conveyancing* by Donald H.L. Lamont, Q.C.[1] who was at the time, and continues to be the head of the Real Estate and Landlord and Tenant Section of the Ontario Bar Admission Course. He also lectures in General Law at the University of Waterloo. He has now produced a revised edition of a valuable and comprehensive work in the field of landlord and tenant law in Ontario. It covers not only the extensive amendments to The Landlord and Tenant Act,[2] but also contains a precise analysis of The Residential Premises Rent Review Act.[3]

Few changes in The Landlord and Tenant Act occurred for many years until remedial legislation appeared in 1970[4] as a result of a ten year study by the Ontario Law Reform Commission.[5] The amendments are in Part IV of the Act under the heading of Residential Tenancies. The aim of the Commission was to ensure realistically the rights of tenants to premises in a good state of repair for habitation in accordance with current housing standards. Part IV also enables a municipality to establish a Landlord and Tenant Advisory Board which provides information and conciliation services. Finally, rent control was introduced by The Residential Premises Rent Review Act 1975 as amended.[6]

The author carefully examines each of the provisions of Part IV and refers to and comments on the court decisions. Commercial leases are not affected and the very title of the book can therefore be appreciated.

Since the publication of the second edition in 1973, the considerable legislative and judicial changes that have taken place have been carefully surveyed by the author and arranged in proper reference under suitable headings. In general, the recommendations of the Ontario Law Reform Commission have been adopted, but there are some exceptions. One is the practice of tradesmen making payments to owners or their building superintendents for permitting, for instance, only one milk supplier to sell milk and related products to the tenants of the property. By way of contrast, political canvassers are permitted reasonable access to apartment dwellers.

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[1] (1976), 54 Can. Bar Rev. 811.

[2] R.S.O., 1970, c. 236 as am. by S.O., 1972, c. 123, 1975 (2nd Sess.), c. 13.

[3] S.O., 1975 (2nd Sess.), c. 12, as am. by S.O., 1976, c. 2 and c. 36, 1977, c. 3.

[4] *Supra*, footnote 2.

[5] (1972)

[6] *Supra*, footnote 3.

Refusal by a landlord to permit political canvassing or distribution of election materials is an offense under section 94 and punishable under section 108.

There is a comprehensive appendix of forms followed by suitable index.

To conclude, I consider that Mr. Lamont has made a valuable contribution to legal learning.

J. RAGNAR JOHNSON*

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Mental Disorder and the Criminal Trial Process. By MARC E. SCHIFFER. Toronto: Butterworths. 1978. Pp. xxvi, 342. ($38.50)

Mr. Schiffer's work contains a comprehensive review of the major areas where psychiatry affects the outcome of criminal dispositions. It is a well-researched text which traces the development of Canadian jurisprudence, touching upon American and Commonwealth references wherever relevant. The logic of his organization is well founded, for he begins with the pre-trial stage and then proceeds to treat fitness, insanity and related defences. There is a separate chapter dealing with the ramifications of psychiatric evidence at trial. In the post-trial stage Schiffer deals separately with sentencing, dangerous sexual offenders, psychiatric treatment and release.

The author is fully aware of the difficulties facing practitioners in forensic psychiatry. Although he attempts to avoid taking sides on the extremities of current debates, it appears that he is deeply committed to civil liberties in all facets of the system. While the book lacks a sophisticated policy treatment of the seminal issues there are occasions where in addition to setting out the law Schiffer alerts us to what he regards as sensible resolutions to perceived conflicts. For example, on the question of police intervention Schiffer believes that the police should not be replaced by a special squad of psychiatric observers for fear that they would inevitably aggravate an already tense problem. Schiffer rightly hypothesizes that the social policy underlying pre-trial diversion is humanitarian, but it should not be forgotten, he argues, that the traditional rights guaranteed in the criminal process have by and large escaped our civil provisions pertaining to mental illness. His policy objective would be to tighten up existing provisions in order to remove diversionary powers from certain provincial officials and to restrict

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police powers to reasonable grounds. Above all he is dedicated to resisting double jeopardy in terms of prosecutorial diversion.

On the matter of a psychiatric privilege Schiffer contends that pre-trial psychiatric investigation should be absolutely limited to situations where the accused has given informed voluntary consent and should be joined to the American Miranda-type warning, including the right to have counsel in attendance. Having mustered forces in favour of psychiatric privilege, arising out of the Wigmore tradition, unfortunately the author resists responding to the array of critical material that unmasks the inefficacy of existing American privilege statutes; current legislation includes many exceptions in addition to the impracticability or meaninglessness of applying rigid criminal law standards to every aspect of psychiatric practice and investigation. Undoubtedly there are presently substantial abuses but it may be that Schiffer has gone overboard in accepting what might be properly described as the progressive conventional wisdom.

The position taken on fitness to stand trial is eminently sensible. In short he believes that the federal Law Reform Commission's proposal[1] should be adopted; that is, that the issue be postponed either until a *prima facie* case has been established or until the conclusion of the criminal trial. He also submits that the present system of lieutenant governor warrant cases, again concurring in the Commission's report, be abolished. Where the accused is of no danger either to himself or others he should be released; where not dangerous but effectively treatable as an outpatient he may be ordered to attend a facility for treatment; where in need of intensive treatment he should be given an order for mandatory hospitalization. Alas, Schiffer fails to investigate the civil liberties implications of his broad acceptance of the Commission's position. His analysis also lacks a practical review of the objections and difficulties which would ensue from the suggested alternatives.

The material on automatism and the insanity defence is competently dealt with but fundamentally adds nothing to the knowledge readily available to criminal lawyers in traditional texts. This is less true for his discussion of reduced responsibilities, for in that chapter he introduces lawyers to the range of possibilities that are applicable to "incapacity to form specific intent". He also summarizes the law on provocation and infanticide. The chapter on psychiatric evidence at trial treats case law on the subject of competence, credibility and character. The most enlightened models in the academic literature dealing with expert testimony have by and large appeared in American law journals and social science research

[1] A Report to Parliament on Mental Disorder in the Criminal Process (1976). Also Working Paper 14, the Criminal Process and Mental Disorder (1975).

reports. It is apparent from even a cursory glance at this section of the book that the discussion has not fully benefited from those insights.

Schiffer's chapter on sentencing provides a broad assessment of psychiatric input into the criminal sanction process. Although his observations reflect the social science findings of Hogarth[2] on the randomness of judicial reliance on psychiatry, and anti-psychiatric criticism of the unreliability of psychiatry, it is ultimately with difficulty that the reader sorts out what precisely his position is. It seems that Schiffer finds the radical perspective of Szasz[3] most compelling; this entails the premise that any notion of mental illness is fundamentally misguided. He enlarges upon this by concentrating on the apprehensions of Halleck[4] and Eysenck[5] on the lack of scientific proof about the effectiveness of psychotherapy. On balance then Schiffer builds the argument that psychiatry is not only bankrupt with respect to diagnosis but also in terms of treatment. Acknowledging that the criminal justice system is unlikely to accept total banishment of psychiatry for the present, Schiffer maintains psychiatric power should at least be substantially limited. He then sets out a series of suggested policies.

In the course of advancing this section he backtracks from the spirit of his earlier analysis. To begin with, he notes that remand provisions contained in provincial mental health legislation should be deleted, that psychiatric reports be confined exclusively to diagnosis and assessment of treatability, and that dangerousness be rejected as a criterion for imposing sentences. Furthermore, he proposes that psychiatric treatment should never exceed the ordinary expectation of criminal sentencing. On the other hand, Schiffer invites psychiatric meddling in stating that probationary psychiatric treatment should be voluntary "where possible". As well he is sympathetic to hospital orders. In the face of the hidden agendas that are potentially part of collusion between judges overly sympathetic to psychiatry and psychiatrists who are adversarial on behalf of their treatments, one should be less comfortable than the author is prepared to be. Admittedly he draws up a set of prescriptions which in principle document voluntariness on the part of the patient at all stages of treatment. It is a pity, however, that he does not explore the ways and means by which the patient may be gently coerced into

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[2] Sentencing as a Human Process (1971).

[3] Law, Liberty and Psychiatry: An Inquiry into the Social Uses of Mental Health Practices (1963).

[4] Psychiatry and the Dilemmas of Crime; a Study of Causes, Punishment and Treatment (1971).

[5] Crime and Personality (1970).

treatment when he might otherwise choose the prison system. If we are to take seriously Schiffer's understanding of the hopelessness of psychiatry in these matters, it is odd that simply because we are not prepared, in his view, to accept this, he is thus in favour of expanding judicial intervention on behalf of psychiatry through the mechanism of the hospital order. This compromise, logic would dictate, is simply unwarranted. Finally Schiffer is forced to accede to the fact that provincial mental health legislation, as in the case of remands, preserves the hidden hand of psychiatric involvement; for it is always possible for an offender to be involuntarily hospitalized. If this is so should Schiffer not argue that provincial mental health legislation ought to be inapplicable to the criminal offender?

The burden of Schiffer's remarks on the dangerous sexual offender is that by all reports attempts at objective grounding of violent behaviour in psychiatric terms have failed miserably. Psychiatrists have erred in the direction of overprediction and judges have apparently abandoned their faith in strict standards of proof in order to accommodate to psychiatric pseudo-science. Schiffer is of the opinion that the most rational course of action would be to eliminate the category of the dangerous sexual offender.

In turning to psychiatric treatment Schiffer explores an area of law which is increasingly of interest to both patients and psychiatric practitioners. The right to treatment weighed against the right not to be treated has prompted considerable jurisprudential controversy in the American courts. Schiffer is quick to point out that our federal Canadian Bill of Rights[6] does not afford a panacea of constitutional entitlements and that in many instances the patient in Canadian jurisdictions must rely on traditional torts remedies. He postulates that a hospital is under a positive duty to treat its disordered offenders. The only authority which he cites is an American case[7] which decided that a hospital was guilty of malpractice because a patient was restricted to custodial care for fourteen and a half years after a determination of unfitness to stand trial. Is this not an example, however, of a circumstance where there is clearly an obligation under our criminal system to prepare a patient for trial? In considering standards of treatment Schiffer initially concentrates on the criterion of treatment appropriate to the "individual". Here again he retreats to the "Szaszian" perspective. Where the individualized approach is followed Schiffer fears that unorthodox psychiatric intervention could be rationalized and he therefore arrives at a position which attempts to wed uniform and individual criteria.

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[6] R.S.C., 1970, Appendix III.

[7] *Whitree* v. *State* (1968), 290 N.Y.S. 2d 486 (Ct Cl.).

The problem remains nonetheless of regulating the evolution of criteria and joining them in a manner which will go beyond principle, and result in implementation. The track record in American jurisdictions is bleak with regard to the application of any number of break-through decisions on the rights and standards of treatment. Insofar as the Canadian standardization of medical care is by and large exemplary it may be that this area, which has enjoyed so much attention in the United States, could be effectively dealt with in Canada through statutory regulations.

Despite the fact that tort law demands of the medical practitioner that he obtain an informed consent from his patient the involuntarily committed mental patient is left treacherously close, by analogy, to the category of the unconscious person. It is often stressed that the very difficulty that one encounters with respect to these patients is that they are unaware of, defensive, and resistant to the treatments which are in their best interest. Jurisprudence in Canada is unsettled on this issue. In the Province of Ontario, for example, although a determination under the Ontario Mental Health Act[8] is made as to the fitness of the patient to manage his financial affairs the statute is silent on the capacity of the patient to render a free and informed consent. The status in Ontario (and in many other provinces) of the next of kin, administrative superintendents and medical directors is unclear.

Schiffer is sympathetic to the appointment of a committee to represent the patient's interests. The power and scope of authorization of such a committee remains puzzling. But more importantly, what can be done to advance our knowledge about effective criteria for competency to consent? The federal Law Reform Commission has moved in the unilateral direction of objecting to any form of forced treatment in the criminal sphere.[9] Undoubtedly this was decided because in a wide variety of institutional settings patients are believed to be highly vulnerable to manipulation if any license is given to coercive treatments. This is most dramatically true in radical interventions such as psychosurgery and the so-called experimental therapies. Schiffer objects to the determination in the now famous *Kaimowitz* decision[10] in which a Michigan court held that it was impossible for a prison inmate to give voluntary consent to psychosurgery. Schiffer insists that the court thereby violated the patient's right to consent. Once again it may be noted that Schiffer walks both sides of the fence, for having developed arguments that

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[8] R.S.O., 1970, c. 269.

[9] Report, *op. cit.*, footnote 1, p. 47, rule 36.

[10] (1973), 42 U.S.L.W. 2063.

expose the coercive dimension of psychiatry in institutional settings he wishes to preserve the patient's right to treatment, even though, by his own assertion, the voluntariness of the patient is questionable, and the intervention extraordinary, contentious and non-reversible.

Schiffer then considers the implications of American decisions on cruel and unusual punishment. Where patients receive treatment in Canada under the penumbra of federal legislation Schiffer is hopeful that our jurisprudence will seek to undermine psychiatric therapy, which in his words, has become "practically indistinguishable from science fiction", an exaggerated statement at the very least. Having earmarked the range of responses open to the mistreated patient—tort, habeas corpus, mandamus, injunction, and ombudsman—he leans in the direction of what is tantamount to a traditional common law approach, to measure the nature of the proposed treatment against the legal status of the patient. On the topic of consent, as elsewhere in the book, when he discusses policy his rhetorical passages fade in order to accommodate to pragmatism. His final proposal is that provincial boards be established to decide on involuntary therapy on a case by case basis. He tells us nothing about who would be most suited to sit on such awesome tribunals, the criteria according to which they would reason through their decisions, and the nature of due process that would be reserved for the patient in question. Neither does the author wish to enter into the hoary disputes of therapeutic versus experimental standards. His procedural mechanism attracts to itself all the hard questions which the chapter raises.

Schiffer completes his volume with the subject of release. In his judgment the appointment of a board of review should be made mandatory and the very same rights of due process guaranteed that are available to defendants in a criminal trial. His analysis of both criminal and civil review panels is regrettably thin. There is already a pressing literature available in Canada on the respective merits of inquisitorial and adversarial procedures being utilized in various provinces. Violations of patients' rights have been alleged, based on the incapacity of counsel to function effectively, on the fact that members of tribunals who do psychiatric assessment of patients serve as both judge and jury, that no reasons are given for decisions, and that political factors affecting Cabinet decisions in criminal cases have distorted objectivity and justice. Moreover, there are many issues of policy which must be raised in distinguishing the criminal from the involuntary patient. Indeed, the discretionary activities of administrative tribunals in this field are now ripe for close scrutiny. Perhaps here more than any other area the presence of

the psychiatric decision-maker is overpowering and conclusory without proper justification.

DAVID N. WEISSTUB*

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Equality and Freedom. International and Comparative Jurisprudence. Papers of the World Congress on Philosophy of Law and Social Philosophy. Three Volumes. Edited by GRAY L. DORSEY. Dobbs Ferry, N.Y.: Oceana Publications Inc. 1977. Pp. Vol. 1, xxx, 1-400, Vol. 2, 401-808, Vol. 3, 809-1203. ($75.00 U.S.)

It is not easy to know where to begin to review three volumes reproducing the edited papers[1] that were presented in English, French, German and Spanish at the August 1975 World Congress on Equality and Freedom held in St. Louis. The papers were subdivided into groups dealing with persons; participation; anticipation—itself subdivided into two sections covering environment and natural resources, and information science and human relationships; scientific manipulation of behaviour and legal protection of freedom; new legal institutions for social relations; equality among nations; and equality and freedom, past, present and future. The participants came from a variety of jurisdictions crossing both cultural and political ideologies—Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Czechoslovakia, Denmark, Egypt, England, Federal German Republic, France, German Democratic Republic, Hungary, India, Israel, Italy, Japan, Kenya, Mexico, Netherlands, Nigeria, Northern Ireland, Norway, Poland, Puerto Rico, Romania, Scotland, Spain, Sweden, Switzerland, U.S.S.R., United States, Venezuela and Yugoslavia—but not all delivered papers have been reproduced. The papers submitted by Canadians are by Professor Macleod of the Department of Philosophy at Queen's, entitled "Equality of Opportunity: Some Ambiguities in the Ideal", and by Professor McWhinney of Simon Fraser on sea law codification.

The method of classification causes questions at times. There is a contribution on "The Legal Settlement of Thalidomide Cases in Japan" by Mr. Yamakawa, a Tokyo lawyer who appeared for the plaintiffs. It is an interesting account of the whole sorry affair, complicated by the fact that the Japanese authorities did not withdraw the drug from the market until September 1962, a year after most other

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[1] 105 in all.

countries had done so. The affair dragged on until 1973 when it was settled by arrangement, with the defendants acknowledging both negligence and causation. Apart from monetary compensation a trust fund was established, and certain welfare measures instituted. The rubric under which this essay appears is "New Legal Institutions for New Social Institutions", and presumably the reason is that the Government paid out without a judicial decision; for the first time compensation was computed on an annual basis with an inflation clause built in; the litigation was virtually a *de facto* class action, even though such actions are unknown in Japan; and both Government and company undertook to insure to the utmost the safety of future drugs. Where the generic title does become relevant is perhaps in light of the author's proposal as to future treatment of such problems, involving scientific and technological developments with an international impact and requiring expert witnesses from all over. "In these circumstances it is not sufficient to lighten the burden of proof on persons injured by a new product. Some mechanism of international co-operation must be devised to more effectively screen new products and to more speedily compensate those injured when the screening process has failed."[2]

Ever since the establishment of the International Law Commission by the General Assembly of the United Nations, there has been an active instrument for codifying and developing international law. Among the more successful ventures of this body—at least successful in the sense that treaties materialized which came into force—has been that concerning the international law of the sea, even though it would seem that present endeavours in this area have reached deadlock. Professor McWhinney examined the codifying conference as an instrument of international law-making, taking the law of the sea as his example. He reminds us that the United Nations, its specialized agencies "and its specialized conferences are subject, no less than national governments, to Parkinson's Law on proliferating bureaucracy",[3] although this is perhaps only the least of the problems confronting this particular Conference, which appears to be no nearer finalization in 1978 than it was when Professor McWhinney wrote an epilogue to his paper after the 1976 New York session. As he indicates, "the problems over the years have not been legal problems *stricto sensee* [*sic*], but political problems. At issue are demands for freedom of access to the resources of the earth's seas, sea-beds and subsoils, or of equality in the appropriation of these resources".[4] While there may be some difference of opinion over his assertion that "there have never been any particular difficulties in defining the

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[2] Vol. 3, p. 968.

[3] Vol. 2, p. 454.

[4] *Ibid.*, p. 469.

existing positive law rules, such as they are, and even establishing the limits of analogical extension of these rules possible under the ordinary rules of construction accepted by most legal systems'', there would probably be general agreement with the comment that ''the difficulty has been that while some countries have a vested interest in the maintenance of the legal status quo in this area, very many other countries have every reason in the world for concluding, politically, that they should reject the existing positive law as unfair or inimical to their own national self-interest, as they themselves would choose to interpret it''.[5] In other words, codification in this area is subject to the same political pressures and jealousies as every other question of the day. In view of this, one is perhaps entitled to question the author's suggestion, interesting and apparently advantageous though it might appear, that it might have been better not to proceed by way of a legal codifying conference, but to have made use instead of ''national delegations widened . . . to give prime emphasis to economists, engineers, marine biologists, and, not least, professional, non-legal, Foreign Ministry negotiators''.[6] If the Canadian experience is anything to go by, this would have been the fact with most delegations, for after all at the first session in Caracas there were some 5,000 delegates and observers from 148 states.[7] And where such experts were not included in the delegations, there is little doubt that they were consulted during the preparatory stages.

For those interested in the individual as a legal person and in his rights as such, the first 250 pages of volume 1 constitute a veritable gold mine. Where else after reading the views of Plamenatz of Oxford on ''Persons as Moral Beings'' and Dr. Simone Goyard-Fabre on ''Les deux figures de la liberté au XVIIIème siècle'', would one be able to appreciate why ''the concept of 'person' is not primary, as non-Marxist social and legal philosophers assume, in understanding the relations of society and the state. Such a primary concept is an illusion or an intentional myth of the bourgeois ideologists of the contemporary capitalist world''?[8] For those who are not convinced by this dogmatic statement, perhaps the account of ''The Full Development of Personality in Socialist Societies'' by Dr. Popoff of the Bulgarian Academy of Science may prove enlightening. They may find however the views of Dr. Peschku of Budapest on the correlation of personality and law less alien.[9]

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[5] *Ibid.*

[6] *Ibid.*, p. 470.

[7] *Ibid.*, p. 453.

[8] Vol. 1, p. 245.

[9] Vol. 1, p. 199.

One could go on at length selecting papers and indicating their appeal. Enough has, however, been said to indicate the wealth of jurisprudential and philosophical material to be found in these volumes on *Equality and Freedom*. It is to be hoped that students in these fields will be made aware of their existence and be prepared to dig a little into the realms of comparative juristic study.

L. C. GREEN*

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Laws of the Alamans and Bavarians. Translated, with an Introduction and Notes, by THEODORE JOHN RIVERS. Philadelphia: University of Pennsylvania Press. 1977. Pp. xi, 208. (No Price Given)

The five centuries from 500-1000 A.D., generally referred to as the Franco-Germanic period, formed an important stage in the history of the law of Western Europe. It was during this period that the laws of the early Germanic people were for the first time laid down in writing. The time when law was customary, delivered by word of mouth from generation to generation, was over. Legal development became conscious and deliberate. Pen and ink, to be replaced in the fulness of time by the typewriter, the tape recorder and the xerox machine, became the tools of the lawyer.

The codes of the Germanic peoples—Franks and Burgundians, Angles and Saxons, Frisians, Alamans and Bavarians—are known as the *leges barbarorum*. Perhaps the most famous of them is the *Lex Salica*. Codification of the law of the Salic Franks, it applied in Northern France and travelled with William the Conqueror to England. The Alamans were first mentioned in sources of the early third century A.D. By the late fifth century they settled in what is now Alsace and Switzerland. They were conquered in 495 A.D. by Clovis and incorporated in the Frankish Empire. The *Baivarii* settled in the region in Southern Germany where they have lived ever since.

Like the other barbarian codes, the laws of the Alamans and the Bavarians were no codifications in the modern sense but complications of tribal custom. They deal, not very systematically by modern concepts, with a variety of subjects close to the hearts of the men and women of those early days, from boundary disputes to Sunday observance, from trespass to succession, from the "gift of the morning" which a husband gave to his wife on the morning after the wedding to the rights of a widow in her late husband's estate. The greater part of the codes consisted of a tariff of fines. There was a

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fine for every (then) conceivable wrong—murder, manslaughter and bodily injury, theft of horses, cattle, sheep and dogs, indecency, blasphemy and witchcraft.

The scale of fines reflects contemporary values and throws a bright light on the social pecking order. Thus, looking at the code of the Alamans, we find that the amount of compensation to be paid for killing a woman was twice that for killing a man, an early case of discrimination against the male sex; that to lie against her will with the forewoman in a textile shop cost the offender six solidi, while the same offence committed against one of the working girls in the shop could be committed at the bargain price of three solidi; and, quite logically, that to steal a hunting dog who "runs first" was punished with a fine of six solidi, while the theft of a less ambitious hound called for a fine of three solidi.

It was not an equalitarian society. To kill a nobleman was twice as expensive as to kill a commoner ("freeman") and no discount off the fine was granted to the poor.

A judge who, through greed, envy or fear, judged a case contrary to law was liable to the unjustly treated party for twelve solidi and in addition had to compensate him for his loss. To bury a corpse with malice in foreign ground—after all, not a recently invented crime—was punished with a fine of twelve solidi.

Anyone who has ever tried his hand at translation knows what a hard and exacting job it is. Mr. Rivers' translation of the Alamanic and Bavarian laws deserves the highest praise. His language is crisp and lucid and conveys with precision the meaning of the original texts. An able Introduction provides us with a picture of the social and economic conditions and laws and customs of the early Germanic peoples. We learn that on her husband's death, the widow received a portion of his estate equal to that given to her children; if there were no children, she received half of his estate while the other half reverted to her late husband's relatives.[1] It was certainly a far less involuted solution than Ontario's recent legislation on the same subject.

Mr. Rivers has earned the gratitude of the shrinking tribe of legal historians who are interested in pre-Reception European law, for rendering the laws of two of the more important early Germanic peoples into English. Too, general historians, anthropologists and

[1] P. 29.

sociologists will find his work helpful. Its usefulness is enhanced by a glossary of Germanic and Latin terms, a comprehensive bibliography and a general index.

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