Power on Divorce and Other Matrimonial Causes. Third Edition. Vol. 2. *Other Matrimonial Causes*. Edited by CHRISTINE DAVIES. Toronto: Carswell. 1980. Pp. 352 ($52.00)

Volume 2 of Power's authoritative work *on Divorce and other Matrimonial Causes* deals with marriage, nullity, judicial separation, restitution of conjugal rights together with certain other matters of interest to the practitioner such as agency in the matrimonial context, jactitation of marriage, loss of consortium, deserted wives and children's legislation, quantum meruit claims, reciprocal enforcement of maintenance orders, and custody orders other than those arising under the Divorce Act. It is important to emphasize that Professor Davies, the present editor, indicated in her Preface that "matrimonial property" was too volatile to be usefully covered at the present time.

In fact even in areas within the scope of this book the fluidity of the present state of family law has posed problems for Professor Davies. If the present constitutional debate on returning responsibility for divorce to the Provinces is accepted, the provisions for reciprocal enforcement of maintenance will clearly need drastic overhaul (particularly at the tracing and enforcement stage). Statutory provisions in relation to enforcement of extra provincial custody orders are expected in Quebec and Ontario, and in Nova Scotia the Family Maintenance Act[1] has drastically changed the law since the manuscript was completed. Important cases such as *Polglase*[2] have also arisen since the manuscript's completion.

None of this is intended as a criticism of the book but rather is intended as a way of highlighting the problem of trying to portray a shifting field of law at one particular point of time. Despite the limitations imposed on the author by the fluidity of the subject matter, the book is clearly a product of painstaking research and certain sections such as the sections on change of name, reciprocal enforcement of maintenance orders and custody of children will be invalu-

[1] S.N.S., 1980, c. 6.

[2] 18 R.F.L. (2d) 17 (B.C.C.A.).

able to the practitioner. Equally good, though most practitioners will rarely relish having to use them, are the sections on nullity (including conflicts aspects) and alimony as an independent remedy. This latter involves a referential system of drafting possibly requiring the reader to discover what the law of England was on a particular date such as 1893 or 1896, and Professor Davies' treatment is particularly helpful.

In a work of this kind it is always inevitable that some minor omissions are found—for example, it might have been helpful to have referred to Professor Hahlo's monograph on *Nullity* (with a sideways look at concubinage) at page 48 of the text.[3]

For those who wish to broaden their family law coverage without embarking on the paperchase of the various looseleaf services, there is much to commend this volume provided that its limitations in the field of maintenance and property are kept in mind.

ALASTAIR BISSETT-JOHNSON*

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Canadian Income Taxation. By E. C. HARRIS. Toronto:Butterworths. 1979. Pp. xxiv, 840. ($39.95)

Legal practitioners in the field of income taxation have not been blessed, or cursed, with a surfeit of textbooks. The dearth of Canadian treatises on the law of just about anything has been decried for years, and only relatively recently have some brave souls attempted to redress the situation. In the case of taxation, the historical absence in this country of general works of interest to lawyers or the legally-minded has been especially noteworthy and, for this reason, those who have sallied forth with ambitious texts receive praise, and merit it, quite apart from or at least not necessarily in consonance with the technical merit of the piece. Such works tend to shine because they exist, whether or not the lustre is real. None of these prefatory comments should be construed as backhanded criticism of the efforts of Professor Harris.

Precisely because there are so few texts on the subject of income taxation in Canada, it is difficult to review one of them without reference to the others. Although the federal income tax has been imposed since 1917, there appear to have been only a couple of generally available texts on the subject, or more properly annotations,

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* Alastair Bissett-Johnson, Dalhousie Law School, Halifax, N.S.

[3] (1979).

preceding the major statutory revision in 1948.[1] Then, throughout the amendments which shaped the Income Tax Act as we knew it prior to the event known as "tax reform" (a label which seemed more apt in prospect than it does in retrospect) only one other major text was published.[2] There is much that is valuable in these earlier works. The clear and practical text of LaBrie is particularly helpful in its treatment of the broad concepts which have never changed (notwithstanding some apparently concerted efforts on the part of the legislators). But any pre-1972 text has been sufficiently surpassed by events that it is not generally useful in many areas of the law, and positively dangerous in the hands of a novice.

This leaves us with the two major works of the present era. One is a text which carries the name of Arthur Scace (although in the most recent edition, Mr. Scace has called upon a number of other equally able and well-known contributors for assistance),[3] and the other is the solo effort of Professor Harris. The two stand starkly alone and for this reason beg to be reviewed together.[4]

At the outset, it is important to appreciate the disparate audiences to which these two texts are directed. *Scace* is published by the Department of Continuing Education of the Law Society of Upper Canada and it both arises out of and is the basis for the portion of the Ontario Bar Admission course dealing with taxation. This text is primarily pedagogical and oriented towards the legal profession. On the other hand, although Professor Harris is himself a distinguished member of the Faculty of Law of Dalhousie University, his text has been designed:

> . . . as an introductory (but not elementary) treatise on Canadian income taxation for students of accounting and business in universities, community colleges and various professional training programs . . . . While it does not purport to be a legal treatise, the text includes references that the practitioner or student of law may find helpful as an entry point for study or research.[5]

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[1] Including the ill-fated Frears, Annotated Income War Tax Act and Excess Profits Tax (1947), published one year before the repeal and replacement of the statutes annotated. See also H. Plaxton, The Law Relating to Income Tax and Excess Profits Tax of the Dominion of Canada (2nd ed., 1947). The contents of an early series of Law Society lectures almost qualify as a text. See the papers delivered by H. Heward Stikeman, Special Lectures of the Law Society of Upper Canada on Taxation (1944).

[2] F.E. LaBrie, The Principles of Canadian Income Taxation (1965), which is a successor to the same author's Introduction to Income Tax Law (1955). See also the more limited manual W. G. Leonard, Canadian Income Tax for Accountants (1957), and successive editions.

[3] A.R.A. Scace, The Income Tax Law of Canada (4th ed., 1979).

[4] It is not a novel suggestion that two such similar efforts be reviewed together in these pages. See J. MacIntyre, Collective Agreement Arbitration in Canada (1979), 57 Can. Bar Rev. 162.

[5] Harris, p. v.

Thus, the newer work is aimed at a broader spectrum of readers and not exclusively or even primarily those who are or are becoming legally trained. This difference has some effect on the tone of the two works, although perhaps not quite so much as one might expect. Each contains a substantial table of cases (although it is true that *Scace's* is probably twice as long). Both, in my view, place too much reliance on Departmental Interpretation Bulletins, perhaps a more understandable short-cut in the case of *Harris*. Such pronouncements are helpful, and may even have some weight before the courts, but they are not law, and often tend further to date the presentation, since the official view changes. Simply to adopt Departmental interpretations, it seems to me, is unwise.[6]

The two texts naturally follow similar general headings in approaching the subject matter, since these are dictated or at least suggested by the very structure of the Income Tax Act. *Harris*, however, adopts a somewhat unusual approach under which, in most instances, each area of inquiry is subdivided into a first section representing an overview of the material, a second dealing with basic rules of general interest at a moderate level of detail and difficulty and a final subdivision which contains the more detailed or technical discussion. Perhaps the reviewer of this text should be a professor of accounting or business. Viewed from my own narrow legal vantage point, this organization is not entirely successful and renders the work itself even more unwieldly than any such income tax textbook must necessarily be. *Scace* follows a much more direct approach, plowing through the subject with a seemingly relentless and tireless will to reach the end. Indeed, this characteristic of energy is one I find in both works. Only an author with great dedication to his subject, tremendous will and a good helping of adrenalin could, it seems to me, ever manage to finish a relatively complete work on a subject so vast, so changing and, in a sense, so unrewarding as income taxation.

The reason I use the word "unrewarding" is because, as everyone knows, either from experience or rumour, the income tax law of Canada has become so complex and unsettled that any penetrating consideration of it is necessarily incomplete and, in many ways, inaccurate. In this regard, my own view is that both *Scace* and *Harris* probably go too far in attempting the impossible task of summarizing all of the law. Indeed, it seems that detailed consideration of certain technical areas belong more properly in the looseleaf services (which are, admittedly, more expensive) or the annually produced accounting manuals than in a textbook. The text format suffers both because the law changes and because it knows too many subtleties and exceptions.

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[6] As Harris does, for example, in defining "active business", p. 579.

The four editions of *Scace* in the space of seven years attest to the fact that the more precise one tries to be, the more prone one is to error. The reader of Professor Harris' preface is sure to feel some unease at such time-bound statements as this:

> The text incorporates amendments to the Income Tax Act and Regulations, case law, articles, and Departmental pronouncements up to the end of December, 1978. It also assumes the enactment of the amendments to the Income Tax Act contained in Bill C-37 which was introduced on January 29, 1979 and died when Parliament was dissolved on March 26, 1979. The amendments as finally passed will probably differ in some respects from Bill C-37.[7]

Both books are of impressively high technical quality. Again, I suppose, part of the reason for being impressed is that the subject is covered at all. Further, however, the presentations are remarkably clear and surprisingly free from error. Yet it is very easy to cite instances where the author, in an effort to keep his work finite, makes statements which are not, strictly speaking, correct, or at least so simplified as not to state the whole truth. Just to cite an example, Professor Harris states that the term "leasing property" refers to "moveable depreciable property"[8] while technically there are certain types of leasing properties which may not be "moveable" in either the colloquial or the international legal sense of that term. Again, in an attempt, which in my own view must necessarily be vain, to summarize the effect of the obtuse subsection 87(7) of the Income Tax Act, he says:

> The assumption by the new corporation of debts owing by the predecessors has no tax implications to either the predecessors or the new corporation.[9]

Would that most of us were so sure that that is what the subsection means.

These types of inaccuracies or, more properly, abbreviations may be harmless or they may be serious. The problem with trying to say too much is that the inevitable lacunae can amount to misinformation: omission becomes commission. For example, *Harris* goes to the trouble of discussing foreign affiliate surplus accounts in some detail. He correctly identifies "preacquisition surplus" as a residual pool and notes that dividends paid out of this account are deductible in computing taxable income.[10] His failure to note, in the same breath, that such dividends reduce the adjusted cost base of the shares could lead the overly trusting reader into error.

These types of criticism merely point out the impossibility of the task and do not detract from the work as a whole so long as one keeps

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[7] Harris, p. vii.

[8] Harris, p. 224.

[9] Harris, p. 705.

[10] Harris, pp. 719-720.

in mind what it is all about. I refer again to the preface and to Professor Harris' own observation that the text is an introductory treatise for students essentially in the non-legal disciplines, and to a lesser extent a manual for practitioners.

It may be that income tax textbooks will never read like other legal texts. They seem, unfortunately, to take their lead from the statute upon which they comment. The Income Tax Act has been the object of numerous criticisms, and one of the most just is certainly its penchant for detail, a kind of legislative hubris. Both *Scace* and *Harris*, perhaps because they follow the Act in their own presentations, exhibit to some extent the same "forest and trees" problem as does the statute. This harkens back to an earlier comment that the truly valuable parts of taxation texts, in this reviewer's opinion, are those that deal with principles—taxation year, computation of income, cash and accrual accounting, residence, tax avoidance, the structure of corporate taxation—matters which do not change quite so readily from year to year.

Consider, for example, the Canadian taxation of capital gains. *Scace*'s chapter on the subject begins with a summary and a discussion of how gains are computed and included in the charge to tax. Under the heading of "dispositions", there is nothing more than citation of the relevant provisions of the Act and an Interpretation Bulletin, with one or more pertinent questions posed. There follows a summary of some of the deemed dispositions in the Act. In the case of *Harris*, the chapter again contains a discussion of the general scheme and then launches into a seemingly endless consideration of the myriad of rules involved in determining the cost and adjusted cost base of property. Once again, under the heading of "dispositions", there is a summary of the relevant provisions of the Act which treat a transaction as involving a disposition or not involving a disposition. In neither case is there any attempt by the author to consider the legal or philosophical underpinnings of the system. What is a "disposition" within the meaning of our law? There is a substantial case law on the subject, generally involving other statutes and, indeed, other areas of legal enquiry. This is not merely a technical question, it is a question of principle. What types of alterations of property rights or ownership are intended by the Act? What is the thrust behind the somewhat tortuous definition[11] of the term? How has Departmental practice honed in on the policy question of when taxation should be imposed and when it should be allowed to be deferred?

This criticism may relate to the thrust of each text and its intended audience. In the case of *Harris*, it may be justifiable to

[11] Which, like so many so-called definitions in the Income Tax Act is merely inclusionary, and not actually a definition at all.

concentrate on structural and technical aspects rather than principles, although I find it harder to accept this in the case of *Scace*. It may also be nothing more than a choice made by the authors that one cannot do everything and this is what one shall do. It is, however, unfortunate that a text such as that of LaBrie could not have been up-dated without succumbing to the temptation, or more properly the threat, held forth by the Income Tax Act.

Both of these texts are, overall, excellent and I hope that the reservations I may have voiced are not read as detracting from or qualifying this judgment. In a sense, what I am saying is not that the books are not good enough, but rather that they are not the books I had been hoping to read.

By way of postscript, I suppose as a dutiful reviewer, I should comment on the physical presentation of the texts. Any remark in this regard does not, I should think, reflect upon the author so much as the publisher. To my way of thinking, *Scace* wins hands down on this point. I find the typeface to be clearer and generally the layout to be easier to follow, more modern and less tiring. The paragraphs are generally shorter (or seem shorter) and the footnotes are less distracting. Cross-references are easier to follow.

ROBERT COUZIN*

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Citizens, Aliens and Immigration. Being Title 27 from Volume 4 of the *Canadian Encyclopedic Digest (Ontario)*. Third Edition. *Immigration*. By JANET V. SCOTT, Q.C. *Citizenship and Aliens*. By ROBERT C. STONEHOUSE. Toronto: The Carswell Company Limited. 1980. Pp. 154. (24.50)

As in other areas of life, so too in law, it seems to be feast or famine. When I began practicing immigration law in 1974 there was a dearth of books or articles available on the topic. Suddenly we seem to be inundated with such books.

This particular book is, as the title indicates, a reprint of Title 27 of Volume 4 of the third edition of the *Canadian Encyclopedic Digest (Ontario)*. In spite of that fact, I recommend purchasing it for your own library. It is, perhaps, the best and most comprehensive summary of immigration law available. One of the authors, Janet Scott, is the Chairman of the Immigration Appeal Board, and one of the out-

*Robert Couzin, Partner, Stikeman, Elliott, Robarts & Bowman, Toronto, Ontario and Stikeman, Elliott, Mercier & Robb, Montreal, Quebec.

standing scholars in the field. The book reflects her depth of knowledge of immigration law.

Immigration law is one of the most dangerous areas of law in which to practice. Not only is the Act convoluted and lengthy but a major portion of the substantive law is contained in the Regulations which are frequently and hastily amended. Both the Act and the Regulations are hard to obtain and much of what is called "law" in the area is set out in interdepartmental directives and memos. This creates a situation where even the most diligent practitioner may not be able to find "the law" when preparing for a case. This book, while not solving all the problems, goes a long way towards consolidating the available statute and case law. It also serves as a good introduction to the area for someone who needs an overview but it is not deep enough to seriously challenge someone who routinely practices in the area.

The book contains an excellent and very detailed Table of Contents, Index and Table of Cases and Statutes. The latter table allows you to find the cases which have been decided under any section of the Act (as well as related statutes) or Regulations. The cases cited are extremely complete and up to date covering both old and new Immigration Acts. Many unreported and otherwise unobtainable cases are cited and it should prove to be a valuable resource to the researcher. The book may also prove to be useful as a teaching aid for both basic and law school classes in immigration law.

The format of the book is such that the applicable law is covered in a sequential way under various headings such as: persons who may come into or remain in Canada, admissible classes, exclusion and removal, Convention refugees, appeals, redetermination and judicial review, detention and release from detention and offences. Under each category short statements of law are made. These statements are supported by very extensive footnote references to cases and legislation. While the short statements are good, they are often made with an inadequate explanation of the import or the implications of the statement. They often assume too much knowledge on the part of the reader. It is here that the footnotes are very useful. In most instances the footnotes will give a brief résumé of the case so that the point might be better understood. In this way the book provides some very useful information on some fairly obscure points which is not found elsewhere.

The sections of the book on citizenship and aliens are excellent. Here one will find much information which is, to my knowledge, consolidated nowhere else. There is a wealth of information on property rights of aliens and personal rights and liabilities of aliens both in peacetime and in time of war. Lists are included of statutes which

specifically limit these rights and liabilities. The discussion of citizenship is very readable and includes references to previous legislation. Here again though, as in the section on immigration, too much reference is made to sections of the Act and Regulations without setting out the specific wording of the legislation. The text of the legislation would be a useful inclusion.

In spite of my above comments, I am not completely uncritical of the book. Some of my criticism, while valid, is due to the nature of the book. As I previously stated, much of "the law" in the area of immigration is not found in the legislation. The book has chosen to confine itself to a discussion of the law vis-à-vis the legislation and the case law relating to that legislation. There is a wealth of law in the area based on directives, policy memos and similar extra-legislative sources. There is also a large number of cases decided on the basis of these extra-legislative sources. Little of this material is covered in the book.

An example will illustrate the problem. The book goes into detail about the statutory scheme whereby someone who claims, at an inquiry, to be a refugee has his or her claim processed. This leaves the impression that if one wants to make a claim to refugee status, this is the only way in which it can be done. But, because of the nature of a refugee claim, many extra-statutory methods have arisen to meet the needs of reality. Similar procedures exist in relation to other seemingly rigid procedures under the Immigration Act. Another prime example of this is "inland sponsorships" which make it possible to get around the rigid legal requirement for those who wish to become permanent residents to apply from outside of Canada. By not mentioning these type of procedures one is left with the impression that they do not exist. This could work to the detriment of anyone using the book to learn the ways to proceed with various applications pursuant to the Act or Regulations.

Another area which deserves a more complete treatment is the one of the selection criteria. The book refers to there being criteria by use of which potential immigrants are selected to come to Canada. No details of these criteria are set out in the book. Rather, the reader is referred to the Regulations for more information. As the Regulations are not in the book, nor are they readily available, this may prove to be a relatively serious inadequacy.

A further criticism arises with regard to paragraph 345 under the heading "Aliens". That paragraph states unequivocally: "The Canadian Bill of Rights applies to all classes of individuals in Canada, including aliens." The explanatory footnote does not add much to this statement. Earlier in the book, in paragraph 4 the author states: ". . . The Canadian Bill of Rights, does not apply to them [aliens]." For

this proposition the author cites the case of *Jolly* v. *Minister of Manpower and Immigration*.[1] This latter statement is a correct one and leaves one wondering what the author of the section on aliens meant.

Finally, a comment on the choice of authors for the section on immigration. I have previously mentioned that Janet Scott, the author of that section and Chairman of the Immigration Appeal Board, is one of the outstanding scholars in the field. Unfortunately, her role as Chairman of the Immigration Appeal Board places her in an awkward position as the author of this section. One of the roles of a legal scholar is to make comment and constructive criticism of the decided cases in the area. An author must be prepared to strongly criticize tribunal and court judgments and show how the state of the law is being misdirected by erroneous or ill-conceived judgments. Miss Scott has placed herself in the unfortunate position of having to criticize her own Board's judgments as well as those of the Federal Court of Canada—the very court which reviews her own decisions. Immigration law is an area where much critical comment is needed. It is an area where precedent and *stare decisis* seem to be sadly ignored. While Miss Scott does make some critical comments in her section, I respectfully submit that the book would have been better served by having this section written by someone in a better position to deal with the case law in a truly independent fashion.

These critical comments notwithstanding, I still would recommend this book to anyone interested in immigration or citizenship law either as a basic reference work or as an introduction to the area. It is a good starting point.

LAURENCE KEARLEY*

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Aspects of Privacy Law: Esssays in Honour of John M. Sharp. Edited by DALE GIBSON. Pp. xix, 443. ($46.95)

These essays add up to a good book. The subject is timely and this collection, unlike many volumes of essays, has unity, few gaps and little overlapping. It is an appropriate tribute to the late Professor John Sharp. He had written a monograph on *Credit Reporting and Privacy:*

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*Laurence Kearley, of the Faculty of Law, University of Windsor, Windsor, Ont.

[1] (1974), 10 I.A.C. 51, rev'd on other grounds, [1975] F.C. 216 *sub nom A.G. Can.* v. *Jolly* (C.A.).

the Law in Canada and the U.S.A.,[1] had drafted Manitoba's Privacy Act[2] and at his death was engaged in writing a treatise on the law of privacy.

His colleagues in the Faculty of Law at the University of Manitoba conceived the idea of the *Essays* as a way of completing that treatise. Professor Dale Gibson became editor with an Editorial Board of Professors D. T. Anderson, J. Irvine and P. Osborne. Professor Anderson's dedication is a sensitive, and indeed moving, tribute to Professor Sharp. Each of the other three contributed an essay. The editor in particular deserves credit for the selection of topics and authors. We have had considerable writing on privacy in Canada in recent years but I know of no single book that covers the subject as does this one.

The book is in four parts: Introductory, with one essay; General Legal Protection, with two; Legislative Protection, with three; and Particular Problems and Solutions, with seven.

The introductory essay written by a professor of philosophy, Arthur Schafer, describes the difficulty of defining privacy and right of privacy. He concludes a useful discussion by saying that privacy can be defined by combining two conditions (1) control over information about one's self and over who can sense us, and (2) non-interference in private affairs. He then discusses privacy as a value in our society and the fact that it may be opposed by other values such as crime detection and freedom of expression.

The section entitled General Legal Protection has an essay by Professor Peter Burns on Privacy and the Common Law and one by Professor Patrick Glenn on the Right of Privacy in Quebec Law. Professor Burns says there is no right of privacy *per se* at common law but goes on to show that privacy is protected at least peripherally by various causes of action—trespass to land, chattels and the person, nuisance, defamation, injurious falsehood, wilful infliction of nervous suffering, breach of contract, passing off, appropriation of personality and breach of confidence. He concludes that although common law and equity have given considerable protection to the interest in privacy, there is no general right and only legislation could provide a coherent body of categories of invasions of privacy that would be actionable.

Professor Glenn's essay centers on article 5 of Quebec's 1975 Charter of Human Rights and Freedoms[3] which says: "Every person

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[1] (1970).

[2] S.M., 1970, c. 74.

[3] S.Q., 1975, c. 6.

has a right to respect for his private life." It appears that two types of conduct have been found incompatible with that right—intrusions on solitude and intrusions on anonymity through dissemination of information. Generally, only intentional invasions have been held wrongful and even then there may be defences. Professor Glenn examines them in turn. The remedy for violation is damages and in a proper case an injunction.

The author next deals with privacy and public law—the control of improper dissemination of information by government and credit reporting agencies. He then considers the problem—an intractable one everywhere—of dissemination within government both vertically and horizontally. The author's conclusion is that the right of privacy is fairly well protected in civil law but there is a greater need for reform in public law.

The next collection of three essays, under the heading "Legislative Protection" begins with one by Professor Philip Osborne on the Privacy Acts of British Columbia,[4] Manitoba[5] and Saskatchewan.[6] Each creates a statutory tort of invasion of privacy. The author describes the growth of the tort in the United States, beginning with the article by Warren and Brandeis in 1920, and then Dean Prosser's equally famous article of 1960 which concludes there are four unrelated torts—unwarranted intrusion, public disclosure of embarrassing facts, appropriation of the plaintiff's name or likeness for purpose of gain, and publicity which places the plaintiff in a false light in the public eye. The author then turns to Canadian law and concludes that protection of the right of privacy is "fragmentary and incomplete". He analyzes the three provincial Acts. Their weakness lies in uncertainty of application, the heavy burden on the plaintiff, the broad and nebulous defenses and lack of access to the Small Claims Court. However he thinks that since these Acts are drafted in general terms the courts may in time put flesh on their bones so as to give substantial protection from invasions of privacy.

The next essay by Professor Gibson is entitled Regulating the Personal Reporting Industry. It deals with provincial legislation designed to ensure fair reports by credit reporting agencies. The United States Congress passed a Fair Credit Reporting Act in 1970[7] and in Canada seven provinces passed such Acts in the next four years. They vary greatly one from another. In 1977 the Uniform Law Conference adopted a Uniform Information Reporting Act (which Professor

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[4] S.B.C., 1968, c. 39.

[5] *Supra*, footnote 2.

[6] R.S.S., 1978, c. P-24.

[7] Oct. 26th, 1970, P.L. 91-566, 84 Stat. 1114, Tit. 6.

Gibson calls a Model Act). It provides for licensing and regulates the collection of information, its storage and reporting and requires notice to the subject of the fact of an investigation of him and gives him the right to ask to see the information and to correct errors. The author points out that the Uniform Act does not deal with civil liability and that the general law of defamation applies. He agrees with the Alberta case of *Gillett* v. *Nissen Volkswagen Ltd.*[8] which holds that a commercial credit reporting agency does not have a qualified privilege when its report is libellous. The author concludes that the Uniform Act is an improvement on the existing provincial Acts, although no province has yet passed it.

The last essay under the heading "Legislative Protection" is by Professor Deutscher on the 1974 amendment to the Criminal Code of Canada which regulates electronic eavesdropping and creates the crime of unauthorized eavesdropping. This essay is entitled The Protection of Privacy Act: Whose Privacy is it Protecting? It covers the history of the legislation, its provisions, the cases interpreting it and the 1977 amendment. The author's opinion is that the provisions as interpreted are loaded in favour of the interceptor and give more "privacy" to the intercepting process than to the person whose conversation has been intercepted.

The remaining seven essays in the volume are headed Particular Problems and Solutions. The first two are the longest in the book. The first is by Professor John Irvine on The Appropriation of Personality which is one of Prosser's four torts. This sprightly essay "dissects" the components of personality and different kinds of appropriation. The argument is that the tort of wrongful appropriation, as distinct from defamation and passing off, should be kept within a narrow compass. Recovery should be allowed only for damage to the plaintiff's material interests or reputation. The author concedes that the latter really belongs under defamation. Then follows a close and eminently readable scrutiny of the case law on appropriation of the plaintiff's name and of features such as appearance or voice. The discussion ends with an analysis of the two Canadian cases *Krouse* v. *Chrysler Canada Limited*[9] and *Athans* v. *Canadian Adventure Camps Ltd. et al.*[10] His conclusion is a vigorous argument that the plaintiff should succeed only if he can prove material damage.

The next essay by Professor H. J. Glasbeek is entitled Limitations on the Action of Breach of Confidence. A person who has received information in confidence should not disclose it. Common

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[8] (1976), 58 D.L.R. (3d) 104.

[9] (1974), 1 O.R. (2d) 225.

[10] (1978), 17 O.R. (2d) 425.

law has long enforced this obligation through an award of damages, and equity through the injunction. The author's thesis is that the courts should maintain the present law and should not propound a new tort of invasion of privacy. He divides actions for breach of confidence into three categories: (1) unlawful disclosure of trade secrets; (2) protection of contents of letters, lectures, manuscripts and the like; and (3) protection of professional relationships such as lawyer-client and doctor-patient. In each of these categories the author gives a detailed and useful analysis of the cases. He concludes that the purpose of the action for breach of confidence is to protect the interests described and that protection of sensibilities and dignity is at most secondary. The author submits it would be unfortunate for the courts to attempt to develop a right of privacy on a case to case basis. The courts cannot built up a rational set of principles by attempting on a case to case basis to weigh the harm to the plaintiff's sensibilities as against the public's right to know.

The concluding part of this essay deals with the privilege that a party may assert when called to produce evidence, such as Crown privilege and the solicitor-client privilege. The author is concerned to keep these recognized categories narrow. Privilege should not be extended to every case where disclosure would be a breach of confidence. He discusses Wigmore's four criteria to determine when privilege should be granted and criticizes *Slavutych* v. *Baker*,[11] saying that the majority in the Supreme Court confused privilege with confidentiality.

The essay by Professor (now Dean) Jack London is on Privacy in the Medical Context. The author is not a strong proponent of confidentiality of medical information. He makes an analysis of eight different interests that may come into play and must be balanced one against the other to determine whether confidentiality should be protected. The doctor may refuse to disclose information on the basis of his ownership of the medical records in opposition to the patient's right to know; he may refuse to disclose to outsiders because his professional responsibility obliges him to observe the Hippocratic oath, but on the other hand there may be excuses for disclosure even without the patient's consent; disclosure might be justified in the interest of maintaining high standards of medical care, for instance for research; there may be third parties who have a legitimate interest in obtaining medical information about another; and in trying to decide whether medical information should be privileged in judicial proceedings, the interest in confidentiality must be weighed against the interest in making available all relevant evidence; and finally there is

[11] [1976] 1 S.C.R. 254.

the patient's interest in privacy as against the public interest in obtaining information about him.

Chapter 10 by Bernard Pinsky is on Telephone Solicitation and Privacy. This is an interesting discussion of the prankster and of the "drummer" who solicits by telephone, of the technique of telephone solicitation and the public attitude to it. There is a passing reference to the significant Alberta case of *Motherwell* v. *Motherwell*,[12] where the Alberta Court of Appeal held that persistent abusive telephone calls amounted to a private nuisance so that the plaintiffs were entitled to an injunction and nominal damages. After discussing several possible ways to restrain solicitation, the author makes an interesting suggestion, apparently conceived by a California law student, whereby a person whose name is in the telephone book could have it starred. The star means that the subscriber objects to commercial solicitation by phone.

The next essay is by Ronald Coke on Freedom of Information. It describes obstacles to the obtaining of information from government—for example, Crown privilege, lack of status before the courts, and government secrecy. The essay describes the American Freedom of Information Act and then the proposed Canadian Act as described by the Honourable John Roberts at a meeting on March 23rd, 1979. (No mention is made of the report of the Standing Joint Committee on Regulations and Other Statutory Instruments. That report, made on June 28th, 1978 is the basis of the proposed Act outlined by the Honourable Mr. Roberts.) Of course the author did not have available the actual Bill C-43 entitled An Act to Enact the Access to Information Act and the Privacy Act which was introduced on July 17th, 1980. The essay ends with a discussion of drafting problems in framing a Freedom of Information Act. There is an appendix of administrative policy manuals issued in connection with Part 4 of the Canadian Human Rights Act, which is entitled Protection of Personal Information. It will of course be replaced by the proposed Privacy Act.

The essay by Professor Roland Penner is on Illegally Obtained Evidence and the Right of Privacy. He describes our rules of evidence, which admit testimony or things even though illegally obtained. He says that such evidence is usually obtained by an invasion of privacy. He approves the American rule which excludes evidence obtained by an unreasonable search and seizure. He does not rest his support on the argument that exclusion is an effective deterrent to high-handed seizures, but on the ground that it is essential to "judicial integrity"—that is, its purpose is to guard against the bringing of the administration of justice into disrepute. He regrets *R.*

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[12] (1976), 73 D.L.R. (3d) 62.

v. *Wray*,[13] which denies to the trial judge any discretion to exclude evidence merely because it was obtained by improper or even highly objectionable means. He argues that the court should have a discretion to exclude such evidence as a means of preserving judicial integrity. A discretion is of course a more moderate change from the present law than an outright exclusionary rule would be. This is a careful well-reasoned argument in favour of a discretion. The author makes an important point near the end, namely that Parliament has already given the judge a discretion to exclude evidence obtained by way of illegal electronic eavesdropping where the admission would bring the administration of justice into disrepute.[14]

The last essay is by Professor Ronald Price, and entitled Of Privacy and Prisons. The first part is on the meaning of privacy and right of privacy, thus returning to the theme of Professor Schafer's essay. Professor Price favours a definition of privacy as "the control over or the autonomy of the intimacies of personal identity". The portion on privacy and the prison describes the invasions of privacy to which inmates are subject. Some are incidental to mass activities but some take the form of surveillance and the most demeaning are "body cavity searches". Even room searches can be offensive.

The author then deals with the inmate's right of association—that is, to have visitors and even to marry. As to censorship of mail, Canadian procedures are less liberal to the inmate than are the American. Next the author considers confidentiality of information about the inmate, especially medical and psychiatric.

Lastly Professor Price deals with abuses in the form of programmes designed to modify the inmate's behaviour and then with the completely different problem of supervision of inmates by one of the opposite sex. In conclusion he makes the plea that inmates should not have to forfeit all their rights of privacy, and invokes the golden rule.

My first observation, which is not a criticism of the subject matter of any of the essays, is that the terms "privacy" and "right of privacy" have been used in so many senses that they lose all meaning. We have in Canada three provincial statutes which create a statutory tort of breach of privacy. Each is called the Privacy Act. Then when Parliament in 1973-74 proposed an amendment to the Criminal Code to regulate electronic eavesdropping and to create an offence of unauthorized eavesdropping, it called the amendment the Protection of Privacy Act. The new part IV.1 of the Code embodying it is entitled "Invasion of Privacy". Later, when Parliament in 1977 passed an anti-discrimination law under the title of Canadian Human Rights

[13] [1971] S.C.R. 272.

[14] Cr. C., s. 178.16 enacted by S.C., 1976-77, c. 53, s. 10.

Act, it included as Part IV a number of provisions to protect the confidentiality of information held by the federal government on individuals. It gave them the title "Protection of Personal Information". This title is acceptable though "Confidentiality of Personal Information" would have been better. In any case Bill C-43, introduced on July 17th, 1980 provides that Part IV will be replaced by a Privacy Act, as a companion to the proposed Access to Information Act. While one is glad to see Part IV emerge from its half-hidden location in the Canadian Human Rights Act, the new title gives less of a clue to the subject matter of the Act than did the title to Part IV.

In Ontario the Williams Commission made its *Report* in October, 1980 on *Freedom of Information and Individual Privacy*, Volume 3, entitled Protection of Privacy, principally deals with the confidentiality of information held by the provincial government. This criticism of the title of the Commission and of the title of Volume 3 of its report in no way reflects on the seventeen admirable research publications of the Commission or on its most impressive *Report*. It will be noted that the title of Mr. Justice Horace Krever's Commission is the Royal Commission of Inquiry into the Confidentiality of Health Records in Ontario.[15]

The distinction between privacy and confidentiality emerges in Professor Glasbeek's essay. It appears too from *Malone* v. *Comm'r of Police (No. 2)*.[16] The plaintiff asked for declarations that the tapping of his telephone by the police was illegal. He argued that it was a breach of privacy *and* of confidentiality. Vice-Chancellor Megarry held that there is no general right of privacy in English law and then went on to hold that there was no violation of the plaintiff's right of confidentiality. He did not treat the two as synonymous.

Too often however, the so-called interest in privacy threatens to swallow all the other interests in personality. If one looks at Roscoe Pound's catalogue of individual interests he has three large categories—personality, domestic relations and interests of substance. The interests of personality he divides into five heads: the physical person, freedom of will, honour and reputation, privacy and sensibilities, and belief and opinion. It will be seen that privacy is only one out of five and in his discussion of that right Pound confines it mainly to "the demand made by the individual that his private personal affairs shall not be laid bare to the world and be discussed by strangers", together with the suggestion that this right should protect a person's feeling and sensibilities, concluding with the comment that

[15] His report was made public on Dec. 30th, 1980.

[16] [1979] 2 All E.R. 620.

"the problems are rather to devise suitable redress and to limit the right in view of other interests involved".[17]

Another example to show that privacy is only one of a number of interests in personality is found in Quebec's Charter of Human Rights and Freedoms. It will be recalled that Professor Glenn's essay deals with article 5 which says: "Every person has a right to respect for his private life." The Charter also says that every person has a right to life, and to personal security, inviolability and freedom; a right to the safeguard of his dignity, honour and reputation; the inviolability of his home; and right to non-disclosure of confidential information; and the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association. This enumeration comes remarkably close to Pound's and, like it, shows that privacy is only one of a number of interests in personality.

We have in Canada no constitutional protection of the right of privacy. Indeed it is not mentioned in the Canadian Bill of Rights Act nor in the proposed Charter of Human Rights. However, the Canadian Bill of Rights Act, which has quasi-constitutional status, declares "the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law". One might wonder what this could have to do with privacy. However in the United States the due process clause has been the main basis of Supreme Court decisions which establish "zones of privacy" into which the state may not intrude even by legislation. In the name of the right of privacy, the court has struck down laws that prohibit the sale, use or distribution of contraceptives, even to minors; laws that prohibit or regulate the procuring of abortions in the first trimester of pregnancy or that require parental consent to a minor daughter's abortion, and in some circumstances at least, that require notice to the parents; laws that prohibit the possession of pornographic films in one's home; and laws that impose zoning regulations for family dwellings and exclude grandchildren from the definition of family.

Attempts to regulate the grooming of hair have run afoul of the new constitutional right of privacy in many lower courts, though the Supreme Court has upheld such regulations for policemen. Attacks on laws requiring the wearing of motorcycle helmets and prohibiting the smoking of marijuana have usually failed, though in *Ravin* v. *State*,[18] the Alaska Supreme Court held that the state could not prohibit the possession of marijuana for personal consumption in one's home. In Alaska the right of privacy is spelled out in an admendment to the

[17] Jurisprudence (1959), Vol. III, ch. 14, §83.

[18] (1975), 537 P. 2d 494.

state constitution. The court's reasoning is the same as that of John Stuart Mill—the state should not legislate so as to interfere with the individual's conduct, for example, in moral matters, unless that conduct affects others.

There are cases asserting a right to "informational privacy", in opposition to state laws providing for the gathering and dissemination of information about individuals, and other cases raise the right to "associational privacy" as a basis for striking down, for example, state laws requiring disclosure of membership lists of an organization. The interest which the individual asserts in each of these cases is far from identical, and each differs from that asserted by the person challenging a law that prohibits or regulates abortion. In the last case the claim is to be able to make a choice as to child-bearing, free from interference by government.

Another example where the individual may assert the right to make a choice has to do with the decision to accept or refuse medical treatment. The patient should have this right where he is capable of making an informed choice, though it is hard to see what it has to do with a right of privacy. In any case, the New Jersey court in *Matter of Quinlan,*[19] said of a comatose patient that her right to terminate her existence "was a valuable incident of her right of privacy". The court did not stop there. It held that her guardian could assert that right in her behalf. Then in the "Brother Fox" case[20] the New York Appellate Division held that a competent person clearly can make this decision and then went on to say that when the person is incapable, his representative can exercise the patient's right, subject to control by the court. This judgment says that the essence of the right of privacy is "autonomy over matters of personal integrity", including control over one's body. This of course is vastly different from most of the definitions of that right. Moreover even if one accepts it, I have difficulty in appreciating why a third person should be able to exercise that right.

Is there any likelihood that our courts will invoke the word "liberty" in the Canadian Bill of Rights Act so as to hold inoperative legislation of the kinds that have been struck down in the United States? I think not. The only Canadian case of which I am aware that even touches on the question is *Morgentaler* v. *The Queen,*[21] where the accused invoked the American decisions in *Wade* [22] and *Bolton*[23]

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[19] (1976), 355 A. 2d 647.

[20] *Eichner* v. *Dillon* (1980), 426 N.Y.S. 2d 517, aff'd by Court of Appeal (New York Times, April 5th, 1981, p. 8 E).

[21] [1976] 1 S.C.R. 616.

[22] *Roe* v. *Wade* (1973), 410 U.S. 113, 93 S. Ct. 705.

[23] *Doe* v. *Bolton* (1973), 410 U.S. 179, 93 S. Ct. 739.

(the so-called abortion cases). Chief Justice Laskin, who was the only member of the court to deal with the question, declined to apply the American cases, though I read his judgment as leaving open the question whether "liberty" in our Bill of Rights Act could ever include privacy or freedom of choice in connection with such matters as abortion.

I turn now to another question—whether it is desirable for each province to have a statute creating the general tort of invasion of privacy. In view of the vagueness of the term and the breadth and uncertainty of the various defences that would be available, I am not persuaded. My reason is that the tort has no discernible boundary. One can then ask—should the provinces pass an Act that embodies Prosser's four torts? Two of them are really close to defamation—public disclosure of embarrassing facts and publicity which places the plaintiff in a false light in the public eye. The latter certainly has an affinity to defamation. This can be seen in *Burnett* v. *The Queen*,[24] which Professor Burns cites. The plaintiff claimed huge damages for invasion of privacy alleging that the Canadian Broadcasting Corporation has surreptitiously taken pictures of him and used them on television in a broadcast called Connections. The reported judgment merely refused to strike out the statement of claim. As to disclosure of embarrassing facts, if it were desired to give a cause of action to the reformed prostitute whose lurid past is disclosed in the press, then the defence of justification could be removed. I point out, however, that even in the United States where this tort has been recognized, the plaintiff faces a formidable obstacle in freedom of speech and press. This is clear from *Cox Broadcasting Corporation* v. *Cohn*.[25] In that case state law made it an offence to publish the name of the victim of rape. The Supreme Court set aside the conviction of a television station for violating the law. The actual ground was that the victim's name was a matter of public record in criminal proceedings. However the judgment strongly implies that even if the information is not a matter of public record it may be hard for the plaintiff to succeed.

Prosser's third tort is appropriation of another's personality for business purposes. In *Athans*[26] the plaintiff succeeded without a statute to help him. However the plaintiff in that case was not claiming for intrusion on his privacy. Rather he was asking compensation for the appropriation of an asset analogous to goodwill. He wanted all the publicity he could get as long as he received compensation. Almost thirty years ago Judge Jerome Frank spoke of the "publicity value" of a man's photograph and the corresponding "right of public-

[24] (1979), 23 O.R. (2d) 109.

[25] (1975), 420 U.S. 469.

[26] *Supra*, footnote 10.

ity''. The case was a dispute between two chewing gum companies over the use of the pictures of baseball players for insertion in packages of chewing gum. Frank J. said that ''in addition to and independent of the right of privacy'' a man has a right in the publicity value of his photograph. He added that this right might be called a right of publicity. ''For it is common knowledge that many prominent persons (especially actors and ball-players) far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways.''[27]

When the actor Cary Grant brought an action against *Esquire* magazine for running his picture superimposed on the torso of a model, he sued both for breach of his right of privacy and of his right of publicity. In refusing to strike out the statement of claim the court noticed that the action for appropriation of personality can protect two different interests. The reticent person who genuinely objects to the publicity truly makes a claim for breach of privacy whereas the person who likes the publicity and merely wants to be paid for it is claiming for something analogous to goodwill.[28]

Finally, the Supreme Court in *Zacchini* v. *Scripps-Howard Broadcasting Co.*,[29] which Professor Irvine cites, flatly holds that an action for damages arising from the showing on television of Zacchini's ''human cannonball'' act at a county fair was for infringement of Zacchini's right of publicity.

Professor Irvine argues strenuously that this action should be confined to cases where the plaintiff can show a monetary loss because the defendant has for business purposes appropriated an aspect of his personality. This would certainly keep the action from getting out of hand—but what about the actor Alastair Sim who was offended when the Heinz company engaged an actor to simulate Sim's distinctive voice in broadcasts? Mr. Sim certainly did not object to appearing in public but he was genuinely offended by the simulation of his voice to sell pickles. Then there is the case of the pretty but shy Miss Roberson,[30] who found her picture on advertisements for flour. Each of *Athans, Sim,* and *Roberson* asserts a different interest but it seems to me they all deserve protection against the unauthorized use of name, picture or voice for commercial purposes. If the courts cannot confer an action in all these cases under common law and equity then

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[27] *Haelan Lab.* v. *Topp's Chewing Gum* (1953), 202 F. 2d 866.

[28] *Grant* v. *Esquire* (1973), 367 F. Supp. 867.

[29] (1977), 433 U.S. 562.

[30] The name is mispelled on p. 81.

there should be a statute—and unlike Professor Irvine, I would extend it to *Sim* and even *Roberson*.

The fourth of Prosser's torts is intrusion on solitude. There are many such intrusions that should be the subject of an injunction, and in the proper case, damages. I am not at all sure, however, that a statute is needed to protect them. *Motherwell* v. *Motherwell*[31] was a welcome decision. There are other flagrant intrusions that involve a trespass to land or assault. They are covered by existing torts. Then there may be cases which are doubtful. Let us take the American case of *Galella* v. *Onassis*.[32] There a photographer persisted in hounding the widow of President Kennedy and her children, taking photographs wherever he could. The United States Court of Appeals granted an injunction against this "outrageous" conduct, though the majority, with undue solicitude for freedom of the press, framed the injunction in much narrower terms than the dissenting justices would have done. I agree with the dissent. On similar facts would a Canadian court grant an injunction? Section 381 of the Criminal Code makes it an offence to bring compulsion on another by persistently following him about from place to place or by besetting or watching his dwelling house or the place where he resides, works, carries on business or happens to be. Whether or not such conduct constitutes a nuisance at common law I think the court could properly take cognizance of that conduct and enjoin it. In *Burnett* v. *The Queen*,[33] mentioned earlier, plaintiff's counsel invoked section 381 to support his argument that breach of privacy is actionable.

As a final comment on the difficulty with privacy, right of privacy and invasion of privacy, an article by Raymond Wacks, which appeared after the *Essays* went to press, effectively expresses my criticisms.[34]

My comments about the tort of invasion of privacy have had to do with the common law provinces. In Quebec the draft Civil Code of 1977, which so far as I can ascertain has not yet been enacted by the Quebec legislature, has as Title One, Chapter III the heading Respect of Privacy. It confers the right to privacy and forbids invasion of the privacy of another without his consent or unless expressly authorized by law. Then there is a catalogue of particular acts that are prohibited. It has the virtue of omitting the two of Prosser's torts which are related to defamation. As for the other items some are covered by existing law. Then there is one which says that "no person may . . . observe a

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[31] *Supra*, footnote 12.

[32] (1973), 487 F. 2d 986.

[33] *Supra*, footnote 24.

[34] The Poverty of Privacy (1980), 96 L.Q. Rev. 73.

person's private life by any means". This seems rather wide. In any case, the civil law system may be able to work with a provision like Chapter III but it does not seem to me to be appropriate in the common law system.

There are two remaining matters which I shall mention. The first has to do with information about individuals in government files. I shall use medical records as an example. We should start with the proposition that these records are to be kept confidential. Professor London is less concerned about this than I am. There is even a question as to the extent to which this information should be circulated within government. Part IV of the Canadian Human Rights Act and the new Bill intended to replace it permit use of information for administrative purposes and for compatible uses. It seems to me that this is proper, though there will be problems as to what is a compatible use.

As to disclosure to outsiders the general rule should be that it is forbidden. Information gathered by government about individuals should generally be treated as confidential, unless it is a matter of public record. There may be cases where third parties should have access to information but these should be spelled out. Sometimes proponents of freedom of information seem to be indifferent if not hostile to the concern for confidentiality. This is completely misconceived. The purpose of access to information is to enable the public to know how the government is run and not to enable third parties to pry into information about individuals, and gathered in confidence or under statutory compulsion. Let us take an example. There are widespread claims that women who have been awarded maintenance against their husbands or ex-husbands have difficulty in collecting. Often they cannot even locate the man. Should the woman be able to compel a provincial Health Care Insurance office to disclose the husband's address? In 1978 Ontario enacted a Family Law Reform Act. It deals with support obligations and section 26 empowers a court to order any person or public agency to supply the address of a person against whom an application or order for support has been made, and this section binds the Crown. In Alberta, the Institute of Law Research and Reform made a recommendation along the same lines in its *Report on Matrimonial Support*. This type of provision troubles me though I was a party to the Alberta recommendation. Are we going to move toward a national registration that is public? I hope not. It may be that in the particular case of an elusive husband, the interest in obtaining support for the wife should outweigh the interest in confidentiality. Generally however I do not think that either the government or an employer should give out a person's address, to say nothing of other information, to a member of the public.

There is another problem connected with confidentiality, particularly of medical records and school records of older children. Should they be accessible to the parent? This is an exceedingly thorny area. In the name of family cohesion there is strong objection to any proposal that enables the child to shut off information from his parents. On the other hand a child seeking medical care may want to keep the fact from his or her parents, and there is a strong case for saying that the usual confidentiality should apply. Recently the Australian Law Reform Commission made a tentative proposal that in relation to medical and education records a child of twelve should have the right to object to doctors and teachers making information, claimed to be confidential and personal, available, even to parents or guardians. This proposal attracted a barrage of criticism.[35]

Professor London's analysis of the different interests that are involved in deciding upon the physician's rights, the patient's rights and the right of third parties who might want the medical information is helpful though he does not show as much solicitude for confidentiality as I would. It would have been useful had he examined some of the recent legislation that deals with this subject. For example in Alberta every statute dealing with medical records contains a strict secrecy provision with the right in the Minister to release information for specified purposes, for example, research. It seems to me that this is the proper way to deal with this subject. The Krever *Report*, made public just before New Year's, 1981 contains many helpful recommendations.

My last comment has to do with Professor Penner's essay. He argues in favour of discretion in the court to reject evidence that has been obtained in a manner that is discreditable to our system of justice. I firmly agree with him that we should not use despicable means to find out where the gun is hidden. For a long time I agreed with Cardozo's famous statement that an accused should not go free because of a policeman's error but I am now persuaded that a discretion such as Professor Penner proposes and is found in the electronic eavesdropping provisions in the Criminal Code is warranted. I still do not think however that this is the most effective sanction to curb this type of abuse. The eighteenth century cases involving John Wilkes which give a remedy in trespass for illegal ransacking of a home in a search for evidence of a crime are still part of our law. We have had judgments awarding damages against peace officers for tortious conduct, and convictions for such crimes as assault.

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[35] [1980] Reform 112.

Conduct that is a discredit to the administration of justice will be diminished if everyone connected with enforcement of the criminal law constantly bears in mind

(1) The elder Pitt's declamation beginning: "The poorest man may in his cottage bid defiance to all the forces of the Crown."[36]

(2) The judgment of the Ontario Court of Appeal in *Fleming* v. *Spracklin*.[37]

(3) The comment of Mr. Justice Hope in *R.* v. *Container Materials Ltd.*[38]

W.F. BOWKER*

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The International Law and Policy of Human Welfare. Edited by RONALD ST. JOHN MACDONALD, DOUGLAS M. JOHNSTON and GERALD MORRIS. Alphen aanden Rijn: Sijthoff & Noordhoff. 1978. Pp. xviii, 690. ($92.50)

If the scholarship in international law in Canada began to reveal itself in 1974 when Professors Macdonald, Johnston and Morris published the landmark collection of Canadian essays *Canadian Perspectives on International Law and Organization,* the present volume suggests the additional miles travelled by Canadian international lawyers and related scholars toward some general standard of professional competence and interdisciplinary co-operation.

Whereas *Canadian Perspectives*, except for a few essays by non-lawyers, was essentially a disparate series of papers on a variety of topics, more demonstrative of individual scholarly interests and capacities than it was of a unified field or integrated subject matter (when treated by many hands), the present volume has a powerful and

[36] The complete quotation may be found in *Miller* v. *United States* (1957), 357 U.S. 301, at p. 307.

[37] (1921), 50 O.L.R. 289, at p. 290, per Meredith C.J.C.P.: "If the law is to be respected, and properly enforced, the enforcement of it must never be committed to such persons as the defendant, it must be left to trained, experienced, and impartial officers of the law."

[38] (1941), 76 C.C.C. 18, at p. 52 (Ont.): "It is gravely disturbing at a time when respect for the law much needs to be fostered to find it treated with contempt by officers employed to defend it and to secure obedience to it."

*W.F. Bowker, Alberta Institute of Law Research and Reform, Edmonton, Alberta.

demanding theme, namely, the "Law and Policy of Human Welfare". Within this embracing concept it has been possible to cover many disciplines in a well-organized approach to the legal and non-legal problems of transnational social standards and general welfare measured through the eyes, primarily if not exclusively, of the international lawyer.

Indeed, there are at least three characteristics of this second effort by the editors that must be recognized for some originality and imagination. The first was, of course, an interesting exercise in deciding that there was an emerging and unifying theme whose legal aspects on the international plane deserved exploration and definition, namely, "human welfare" ranging from classical-modern "human rights" problems to the third world—North-South dialogue now so fashionable in politics and policy. The second was the decision taken by the authors to recognize that the concept of "welfare" embraced a wide variety of questions and that, therefore, the lawyer alone could not manage the range of knowledge and perceptions that would be required for a comprehensive overview of the technical and policy issues involved—from law to education, from migration to economic development, from foreign investment to producer cartels and the labour movement, from technology to the food-population equation, from energy to crime and international disasters. The third element that attracted the authors, and perhaps gave them their final rationale for undertaking so wide-gauged an exercise, was the recognition that the problem of "welfare" had, on the international plane, a unity of functional concepts that should be delineated parallel to the unities and norms being imposed by an emerging legal order reflecting or adapted to the international welfare system. Indeed, it was this last inspiration which perhaps deserves the support of the professional community to which the book is addressed. For it represents the first Canadian effort to unite in one volume the international legal order and the substantive social values and systems that the order embraces; achieving a coherent statement that describes and evaluates the nature of the legal framework now emerging from the substantive welfare decisions and dilemmas of states and international organizations in the closing years of this century.

Moreover, such a decision to sponsor a series of essays within this multi-disciplinary and inter-disciplinary framework necessarily would provide an opportunity for Canadian international scholarship to demonstrate what an overly "positivist" tradition has so frequently ignored, namely, that the substantive questions from energy to health and human rights, from food to criminal justice to employment standards, require perceptions and knowledge that the majority of working international lawyers—unless personally involved in a particular sub-field—do not possess. Therefore, they should be develop-

ing many legal ideas and needs in association with substantive experts in those fields that provide the political and social substratums—the raw or refined data with which law must deal.

The authors themselves say:[1]

> What we attempt to do in this book, therefore, is to provide, chiefly for the benefits of international lawyers, a conspectus on the overlapping areas of human rights, national development, social welfare, and human needs. This study consists, then, of a collection of essays designed around the theme of "human welfare", as that concept is to be interpreted in the conditions of the late twentieth century. As we explain in some detail in the opening chapter, we intend the concept of human welfare to be construed in the fullest sense suggested by our understanding of "human development". The reference is, therefore, to all the psychic aspects of individual welfare, such as those normally encompassed under the international law of human rights, as well as to physical needs and aspirations now placed at the center of concern with the development of the new international order.

They are not, of course, the first to see the dilemma confronting much of the work of the international lawyer where the substance of problems, for instance human welfare, have their own specialized content and require their own expertise. But they have learned well from the methodological lessons of Laswell, McDougal, Jenks and Friedmann in recognizing that there are value systems and concepts which can be used to better understand the content of the legal order. At the same time individual issues are made to serve that understanding through being fitted into a common conceptual framework. Neither Jenks nor Friedmann were as "dogmatic" or as specific as McDougal and Laswell may have been about a chosen value system and its semantics. But as pioneers they all shared this "feel" for the movement away from normative-positivist-prescriptive models of law-formulation to something more closely related to the operational dynamics of social and political life and yet professionally usable by lawyers and related disciplines even more effectively perhaps than the standard textual approach may have provided.

The volume has four main parts: Structure, Value and Process; Human Dignity; Economic Development; and Physical Welfare. Between five and seven essays are to be found under each of these headings with an introductory chapter by the authors (as the first paper in Part I) providing an overview of their intellectual rationale and their aspirations for the study as a whole.

Some indication of the variety of disciplines involved in the collection may be gleaned from the following: of the twenty-seven contributors, twelve are lawyers—teachers or in practice or in the public service; seven are various social scientists from other fields—sociology to labour to economics; and eight are national and inter-

[1]Preface, p. vi.

national public servants with varying degrees of experience at very senior levels in the welfare-legal complex of bureaucratic activities.

The tone of the book set by the opening chapter sounds a tocsin calling for the widest of perspectives to be applied to the nature of human welfare in the context of a human destiny that both promises and threatens the planet. In developing models of national welfare experience by organizing materials around the "Military State", the "Occupied State", the "Laissez-faire Capitalist State", and the "Welfare State", the ambitions of the authors at first sight seem to go beyond manageability for a single volume and even for the competence of the twenty-seven contributors involved. All this is given an international law rationale by examining "the changing priorities in International Law" taking the reader through five stages of development from the classical period of Grotius and his contemporaries down to the United Nations and post-United Nations period. Here the line of description tends toward advancing the proposition that the legal framework of the international order has moved but not swiftly enough to keep pace with that of national welfare systems and, therefore, some new approach is required. Admittedly, much progress marks the changes in the modern international legal order, in its new-found concerns with "human welfare", at least since the late nineteenth century modestly and, more intensively, since the end of World War One and World War Two in the League of Nations—International Labour Organization—United Nations—Specialized Agencies complex of institutions and emerging law of international organizations. But, say the authors, this has not been enough. They suggest that more is required both institutionally and in the substantive law as well. "What we propose, then, is the establishment of an agency which, above all, would exist and operate entirely outside the system of the United Nations, free from all the inhibitions, complexities and distortions which have sapped that organization's vitality in recent years".[2] They go on to say: ". . . its chief functions would be the collection and organization of data, the interpretation of trends and events, the promotion and execution of studies, and the making of policy-related recommendations . . . . Even though its purposes would include 'legal planning' for the world community, its welfare orientation should be regarded as requiring a solid representation of other areas of special knowledge and professional expertise."[3]

Clearly what the authors have in mind as, they frankly admit, is the creation of a new "think tank" which eventually would acquire international status and prestige on the basis of its work, recommendations and interventions. It would have the benefits of a Non

[2]P. 64.

[3]P. 65.

Governmental Organization in its dealings with the United Nations family, and, in general, it might become a kind of human welfare "Brookings" or "Rand Corporation" or a "Max Planck Institute" for the world—but run by international lawyers, in partnership with other experts and disciplines.

A sympathetic reader is entitled to ask whether this ambitious objective—which would involve both constant pressure on the need to improve the direction of international legal ideas and rules shaped toward some global vision about, and obligations in respect to, human welfare, as well as create a new agency for research and studies—is really a necessary addition to the present proliferation of institutional machinery on the international plane. The essays are in a sense superior footnotes to this dominant objective. When they are read either hurriedly or in detail they certainly suggest an urgent need for international data, for intellectual-professional pressures, for advocacy and for the impartial status and respectability that such a "think-tank" would represent. Above all the volume is intended to direct attention to the re-shaping *now required* if the international legal system is to meet the tests of the twenty-first century as it inherits the problems of the twentieth.

Indeed, the concentration on Third World economic and social problems, and on human rights and international justice themes, dominate the concerns of almost all the authors. Were it not for some of the firmly stated and analytically well-grounded papers on international law itself, particularly those of Douglas Johnston, Leslie Green and Eric Suy, there would be a tendency to conclude that the authors were primarily interested in the welfare-human rights-third world complex of problems as such, rather than the international legal changes required to shape the world order of the future.

To some extent, therefore, the book is a mixed success, although individual essays are in themselves valuable and significant contributions to the evolution of Canadian scholarship generally. Indeed, just as the introductory chapter itself, by the editors, was bound to give an impression of an ambition perhaps beyond the reach of Canadian interdisciplinary skills, the remainder of the book happily comes to the rescue by demonstrating that a multi-disciplinary approach to international welfare questions is indispensable for analysis and exploration particularly if the objective is to forecast the changing rules of the international legal system and the related institutions that may result from these changes. For the system must be able to provide answers to the welter of welfare issues now besetting a planetary population divided between one-quarter affluent and three-quarters at various levels of mass poverty and under-development.

Some understanding of the precise content of the book's contents can be had from identifying those papers that concentrate on, and

illuminate, the central theme of the collection: Timothy Shaw's "The Elusiveness of Development and Welfare"; Douglas Johnston's "The Foundations of Justice in International Law"; Leslie Green's "International Law and the Control of Barbarism"; J.R. Kidd's "Human Development through Education"; Ernst -U. Petersmann, "The New International Economic Order"; Nathan Keyfetz' "Nation, City and the World Community"; and Messrs Fulford and Blackburn, "Energy and International Economic Welfare". With other papers on Human Rights (Macdonald and Copithorne), population and migration questions (John Claydon and Mary Caldwell), public health (Ruderman) and international producer cartels (Messrs Martin and Osberg), the range of research harnessed to support the general thesis of the editors becomes self-evident.

Yet in this very imaginative embracing of many of the problems of international human welfare there are some striking omissions. One of these, of course, is the absence of a paper on so serious a problem as trans-boundary pollution and the control of toxics and contaminants with their international as well as domestic implications, both on land, in the air and in fresh waters and onto the seas. Another omission of some consequence for the general coverage of the volume is the neglect to deal with the extent to which development—third world questions or the North-South dialogues—are becoming dangerously confused by the multiplicity of United Nations and non-United Nations organizations involved already in presuming to be the sources of wisdom and remedial action. Some critical attention ought to have been given in these papers to the dilemmas now posed by the sheer duplication of agencies and organs within the United Nations family and outside of it, now involved in the North-South-development complex of questions. Of course, in fairness to the authors the book was written over the period 1976 to 1978 and published in the latter year while this reviewer received it many months ago and is at fault accordingly. But the perspectives provided by the recent years of mounting concerns for third world needs and ambitions enable a reviewer today to evaluate such a volume in the light of the growing involvement of Canada and most developed countries with the entire range of problems about the growing gap between the rich and the poor of this besieged planet. And if Canadian governmental commitments and actions are measured with realism there is still a large moat between promise and performance.

Naturally the styles, the standard of scholarship, the quality of the insights—and of the minds involved—vary markedly in any such a collection. But what is gratifying to a Canadian reader is to recognize the solid international level to which this volume rises. That is to say if Canadian standards, in any field, must match the best that are offered elsewhere in the international community then this assem-

blage of papers, and the imaginative theme that unites them, does credit to the moving target of Canadian thought in these fields. Whether it advances competence in multidisciplinary-interdisciplinary studies, in the name of international law, will continue to be debated even though in this reviewer's opinion international law in Canada has gained by this alliance of the disciplines to further the legal precepts that will have to regulate survival and fulfillment in the twenty-first century.

MAXWELL COHEN*

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Space Policy and Programmes Today and Tomorrow: The Vanishing Duopole. By NICOLAS MATEESCO MATTE. Toronto: Carswell Company Limited. 1980. Pp. xiii, 183. ($15.00)

The occasion of a new book by Professor Matte is always significant for the study of space law. This is the fourth volume[1] in less than ten years from his energetic pen, all of them touching the legal implications of space technology. As the Foreword points out, the present volume is a revised version of a paper presented by the author at Smithsonian Institution in early 1979. Despite the main title, Professor Matte is concerned primarily with the vanishing dominance long enjoyed by the two polar-states in space technology, that is, the United States and the Soviet Union.

Space Policy and Programmes Today and Tomorrow is divided into seven chapters. Chapter 1, an introduction, is devoted to an outline of those factors governing the formulation of national space policy and programmes, with the author stressing—succinctly in this reviewer's opinion—the influence of the very survival of mankind upon the traditional concern of national security. Chapter II[2] contains a valuable, though sketchy, survey of governmental programmes, scientific and military, introduced during the embryonic stage of the space age from 1957 to 1961. This part also includes a brief discussion on state's research in rocketry before the launching of Sputnik I. As

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*Maxwell Cohen, Q.C., Emeritus Professor of Law, McGill University; Scholar-in-Residence, University of Ottawa.

[1] Legal Implications of Remote Sensing from Outer Space (1976), and my book review in (1979), 25 McGill L. J. 129; Aerospace Law: From Scientific Exploration to Commercial Utilization (1977), and my book review in (1978), 10 Ottawa L. Rev. 224; Telésat, symphonie et la coopération spatiale régionale (1978).

[2] 1957-1961—The Infant Age: Beeps, Greetings and Routinely Directed Programmes.

might be expected, the events mentioned in this chapter are in large part historical in character, with emphasis on the implications of mankind's space firsts on the international scene. Also included, however, is a historical account on the formation of the United Nations Committee on the Peaceful Uses of Outer Space pursuant to United Nations Resolution No. 1472 (XIV) of December 12th, 1959.

Chapter III, entitled "Today Is Yesterday: Two Decades of Forging Policies Conditioned by Mistrust Between the Space Duopole", is in its entirety devoted to state's space policies and programmes from 1961 to 1969, and from 1969 to 1979 respectively. In the first section of this somewhat lengthy chapter covering the period from 1961 to 1969, Professor Matte examines the achievements and the long-term goals of space activities both by states and regional governmental organizations. He wrestles with some serious philosophical and legal problems posed by The Outer Space Treaty of 1967,[3] that is, "[the failure] to render obligatory the peaceful use of the whole of outer space"[4] and the acquiescence in permitting the use of conventional weapons in orbits or weapons of mass destruction in fractions of orbit.[5] This is followed in the second section of the chapter by some expository material on the proliferation of space technology and a description of reasons leading to the vanishing duopole in the period under review. These pages examine in great detail the complex elements that affect experimental and operational activities in space and analyze the policies and programmes pursued by states both on a bilateral and multilateral basis. This part tends to buttress an already well documented first section. Professor Matte suggests that an assessment of the Soviet space policy may best be approached through its desire to exploit the prestige value of space technology and to maintain a prominent role in political leadership as a reflection, rather than distortion, of Soviet scientific and technological advances. Accordingly, any part of space advances is likely to be captured by state's interests in Soviet programmes, the more so as satellites become an important instrument in fulfilling Soviet's military and economic needs.[6]

On the other hand, a different political process is responsible for a different style of planning and formulation of goals in programmes between the United States and the Soviet Union. The United States, during the period under review, vindicates a short-term space policy.

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[3] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967), 18 U.S.T. 2410; T.I.A.S. No. 6347.

[4] P. 42.

[5] *Ibid.*

[6] P. 45.

The key to an effective understanding of the American short-term space policy, according to Professor Matte, is the overriding conflict in choosing national priorities, needs, and goals sought by decision-makers in the Executive, Congress, and the bureaucracy and the lack of enthusiasm shown on the part of private sectors in anticipation of the potential benefits to be derived from long-term investments in space programmes.[7] Much of the story is not new. The assurance of NASA's survival during the Nixon-Ford administration and the impact of the White House Facts Sheet in Carter's administration are concisely sketched and authoritatively discussed. But Professor Matte is also concerned about the areas of peaceful use of outer space in which other industrialized states have successfully merged their national goals and programmes with international co-operation of space activities. Particularly in an illuminating examination on the impact of space technology upon the Canadian space policy, he emphasizes the "need for a governmental organization that will provide the necessary supervision and planning in this increasingly large and important section of the Canadian economy".[8]

Not the least significant aspect of the book under review is the discussion, in Chapter IV,[9] of the question of the emerging international space law. The fundamental rights of states have in recent years been much more effectively challenged from the concept of limited functional sovereignty, the growing interdependence among states, and the equality before law than it ever was from the traditional principle of absolute territorial sovereignty, independence and *de facto* quality.[10] The crux of the problem facing national states, as Professor Matte sees it, lies in the strong tendencies, built into the new socio-economical and cultural transition, for questioning a few obsolete space law agreements and conventions to prevail at the expense of future international co-operation, and for the creation of a new world organization and mutual sharing in its administration and management may flourish and an equal access to space technology is assured.[11]

Finally, in Chapter V,[12] Professor Matte calls for a new order to govern the potential benefits of space technology to be employed for mankind's survival through a continuous effort.[13] The remaining part

[7] Pp. 53-54.

[8] P. 85.

[9] Tomorrow: National and International Suggestions for New Policies and Programmes. Emerging Space Law.

[10] P. 127.

[11] P. 123.

[12] Final Remarks: For an Integrated Civil Space Policy and Corresponding Space Order Implemented by Successive Appropriate Goals.

[13] P. 130.

of this book is a very useful collection of document types, messages to Congress, press releases, and speeches (Chapter VI—Annexes), with a bibliography (Chapter VII) professionally cumulated.

This is a readable book. Professor Matte is concise and well versed in the literature, and able to illustrate a difficult subject aptly and in detail from his long-involved experience in the field.

C.S. TANG*

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English Law and French Law. A Comparison in Substance. By RENÉ DAVID. London: Stevens and Sons. Calcutta: Eastern Law House. 1980. Pp. 223. ($52.00)

Accurate scholarly generalization is an art. Notoriously, every generalization contains greater and lesser degrees of truth and fiction. *English Law and French Law. A Comparison in Substance* by René David, the 1976 Erasmus Prize winner, is a book of generalizations most of which contain a greater proportion of truth than fiction. This volume comprises the Tagore Law Lectures delivered in 1979 in Calcutta and attempts to compare and contrast the common law and civil law as instanced primarily by their English and French manifestations respectively. On the whole the book succeeds in presenting clearly the generally accepted views on the subject. It is particularly well written and in a simple and direct style amenable to university students as well as the interested lay reader in comparative law, whether a lawyer or not. The general balance is also good; Professor David not only compares and contrasts the two systems but also delineates the advantageous and less advantageous aspects of each system. Throughout the analysis is fair-minded; generous when generosity is warranted, critical when criticism is required. Particular comment should be made with respect to his use of historical explanations for the differences which adds perspective as well as his appreciation of how to mesh the procedural and substantive aspects of the development of the two systems. A good example of this is found at pages 59-60 in his discussion of the relative availability of default judgments in France and England. If one had to criticize the text at this general level it would be with respect to the typographical errors. I stopped counting at twenty and would suspect that there are at least twice that number. More rigorous proof-reading is called for here.

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* C.S. Tang, of the Faculty of Law, Common Law Section, University of Ottawa.

The book contains eleven chapters and several "Annexes", including excerpts from the Declaration of the Rights of Man and Citizen (August 26th, 1789), the Constitutions of 1946 (Fourth Republic) and 1958 (Fifth Republic) and from the Civil Code and several cases cited in the text. The eleven chapters could be broken down into three groups. Chapters one to five compare the two systems at the broadest level. The chapter titles illustrate the point: "A Law of Remedies and A Law of Rights"; "Codified Law and Case Law"; "Courts and Lawyers", and so on. Chapters six and seven deal with constitutional and administrative matters: *droit constitutionnel* and *droit administratif*. Finally, chapters eight to eleven deal with four areas of substantive law, contracts, mercantile law (only company law and commercial arbitration are discussed), torts and labour law.

The quality of these three groups of chapters varies. The first group is by far the best, particularly chapter one, "A Law of Remedies and a Law of Rights", chapter two, "Codified Law and Case Law", and chapter five, "Procedure and Evidence". Here is the comparative law core of the volume in which Professor David successfully characterizes the philosophical, historical and psychological approaches to the law of the common lawyer and the civilian. The second group is the least well done. After explaining too briefly the differences between constitutional law and *droit constitutionnel*, and administrative law and *droit administratif*, the author proceeds to write a rather potted version of the French structure without attempting the admittedly difficult task of comparison with the English structure. Here the comparative approach has broken down completely. Granted the discussion in chapters six and seven presupposes a knowledge of English constitutional and administrative law and granted the lectures were presented to an audience familiar with English public law (despite Mrs. Ghandi), yet the failure here to compare makes the book less valuable to the civilian reader in search of a comparative analysis which elucidates the common law. Were it not for the one-sided analysis in these two chapters, the book would have served both audiences admirably. The third group of chapters simply compares and contrasts the major concepts in the four areas of substantive law previously named. These are adequately discussed, although there are several blunders, the most amusing of which is the confusion of joint tortfeasors and victims in the discussion of contributory negligence.[1]

The book has no conclusion! It merely stops at the end of the discussion of labour law in chapter eleven! Given the expertise possessed by Professor David in the area of comparative law and the

[1] Pp. 162-163.

interesting hints given in chapters one, two and five as to the future development and cross-pollination between the two systems, one would have hoped for an articulate and informed perspective. Alas, none!

However, given the parameters within which the book was conceived it succeeds in presenting an interesting and valuable comparative introduction of the substance of English and French law.

M.H. OGILVIE*