
In the opening paragraph of his Preface to this major contribution to the literature of the law of evidence in the common law world, Professor Schiff emphasizes that his choice of the title, Evidence in the Litigation Process, in preference to "the usual label, 'Cases and Materials on the Law of Evidence'", was deliberate. The author's central theme is that the law of evidence must be assessed and developed "in the constant light of the process which alone gives it meaning". The fundamental rationality of this approach cannot be gainsaid. Indeed, it could be seen as so clearly representing a self-evident truth as to make its assertion almost banal. The vicissitudes of the historical and contemporary development of the law of evidence, however, give Professor Schiff's approach a different and important significance.

The earliest beginnings of the common law of evidence are undoubtedly to be found in the habits and practices of those directly involved in the litigation process, and almost exclusively in that process at the trial level. Over the decades these habits and practices gradually hardened into rules of law. The onset of spurious certainty and of real inflexibility was hastened by the appearance in the course of the latter half of the nineteenth century of books and treatises on the subject. This occurred at a time when in large areas of the substantive law the fashion was to formulate and to propagate legal principles of unwarranted rigidity and width. The law of evidence did not escape: if specific illustration of this is needed, one only has to look at the early editions of Stephen's Digest.¹ With the resulting emergence of the law of evidence as a truly "legal" subject, came the ever-increasing treatment of evidential problems and issues at the appellate court level, and, in addition, some (although modest) increase in legislative intervention in the evidence field. In due course a reaction set in, and much of the later literature on the subject has become progressively more and more intellectually sophisticated. In recent times many

¹ Stephen, A Digest of the Law of Evidence (first published 1876).
writers on evidence have made free and often highly-skilled use of the tools of logical and linguistic philosophical analysis. A widening gap has been created between legal learning and trial court life. Indeed, there is probably room for the view that the divide between the practitioner and the legal scholar is now more marked in this branch of the law than in any other, and probably there is no branch of the law in which such a divide is more incongruous.

Professor Schiff has sought to bring us back to fundamentals. The law of evidence can only sensibly be seen in its real context, and this is a very practical context. An essential characteristic of a wisely conceived and well formulated rule of evidence is that it be certain and capable of speedy and easy application in situations which are liable to arise with little or no warning in the hurly-burly of the trial process. However, it in no way follows from this that the rules of evidence must be rough and ready, arbitrary or inadequately thought out. On the contrary, the need for instant applicability makes it all the more necessary that a rule be carefully thought out and fully formulated in advance. Any supposed antithesis in this field between the ideal and the practical is false: the proper search must be for ideal solutions to intensely practical problems. The constraints imposed by the nature of the subject do not warrant anti-intellectualism. The point is simply that the intelligent student, teacher or practitioner of the law of evidence must never lose sight of the peculiar role and purpose of adjectival law. This makes his task in many ways more, rather than less, intellectually exacting. In the execution of this task the student and teacher (and, one hopes, practitioner) can undoubtedly derive great help from Professor Schiff's book.

Evidence in the Litigation Process is a two volume work. It is arranged in sixteen chapters, the first five of which constitute Part One, and the remaining eleven constitute Part Two. In Part One, entitled "The Foundations", the author directly elaborates and illustrates his general theme. After an introduction to the nature and scope of the subject (Chapter 1) followed by a consideration of the notion of relevancy as understood in the law of evidence (Chapter 2), some seventy pages (Chapter 3) are devoted to "The Adversary Trial Process: Functions of Counsel, Judge and Trier of Fact". Then this is followed by two relatively short chapters, dealing respectively with the role of an appellate court in evidential matters (Chapter 4), and the impact of federal and provincial legislation upon the law of evidence in Canada (Chapter 5). Part Two (Chapters 6 to 16) is entitled "Basic Problems of Evidence Law". These eleven chapters deal pretty comprehensively with the topics which are customarily regarded as con-

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2 A point which seems very largely to have eluded the framers of the Report of the Law Reform Commission of Canada on Evidence (1975).
stituting the law of evidence; although, perhaps somewhat surprisingly, virtually no treatment is accorded to even the evidentiary aspects of the law of estoppels. Opinions may differ as to the most appropriate and useful order in which the various parts of the subject should be presented. This reviewer, while welcoming Professor Schiff's decision to introduce his readers both to the general nature of testimonial evidence and to the hearsay rule at an early stage, has some reservations about the relegation of burden of proof, standards of proof and presumptions to the very end of the book. Again, it is not altogether obvious why the treatment of judicial notice should be sandwiched between a long chapter on the credibility of witnesses and a chapter on real and demonstrative evidence. However, as each chapter in this Part of the book is very largely self-contained, the individual teacher and student can easily order his or her use of them so as to accommodate his or her personal preferences or whims.

Essentially *Evidence in the Litigation Process* is a casebook in the literal sense that the great bulk of it comprises excerpts from the reports of decided cases. In his choice of cases for inclusion Professor Schiff has cast his net widely but with marked discrimination. The majority of the selected authorities are, of course, Canadian, but there is a fair sprinkling of cases decided in other common law jurisdictions, especially England, Australia and the United States. The basis upon which the author proceeded in his careful selection of this non-Canadian case material would appear to have been twofold. He has given priority to cases dealing with points upon which Canadian authority is what might euphemistically be described as sparse. But at the same time he has included a number of cases which are noteworthy, either for the historic part which they have played in the development of the common law, or for the exceptional quality of a judgment which they contain. Professor Schiff has clearly done a lot of very effective research, in the course of which he has ransacked the law reports of common law jurisdictions, and as a result he has been able to produce an extremely useful compilation of case law.

In addition to the case material, each chapter of the book contains, where appropriate, excerpts from, and references to, Canadian statutory material. Several chapters also incorporate extracts from the literature on the law of evidence. At the end of a chapter, or section of a chapter, the author has provided a short bibliography of further reading. Often these references are simply to the relevant portions of standard works, particularly Wigmore,3 McCormick4 and the fourth edition of Cross,5 supplemented by a few references to periodical

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literature. In the opinion of the present reviewer Professor Schiff has here been too selective, and many of these bibliographical lists could with advantage be fuller, sometimes quite a lot fuller.

Although primarily a collection of materials on the law of evidence, _Evidence in the Litigation Process_ incorporates a significant amount of the author's own text. This performs sometimes an introductory, and sometimes a connecting or interstitial, role. Differing views may be held as to how much text ought to be injected into a casebook. The present reviewer thinks that Professor Schiff has got the balance just about right. No one could accuse Professor Schiff of verbosity; but the very (occasionally almost abrupt) conciseness of parts of his commentary may mean that the more leisurely-minded student will require the assistance of his or her teacher in their elucidation.

In a major compilation of this sort inevitably a few slips creep in. The present reviewer has noticed two or three. For example, in the last line of page 72 "subsections 2 or 3 respectively" should read "subsections 3 or 2 respectively"; the words 16 lines down page 386 "threatening plaintiff" should read "threatening X Co., the third party"; and on page 1016 the reference to _Hoskim v. Metropolitan Police Commissioner_ should be to _Hoskyn v. Metropolitan Police Commissioner_. Blemishes of this sort are trivial and they seem to be very few in number. Nor does the present reviewer find it easy to take issue with Professor Schiff on many matters of substance. It is, however, surprising that in his treatment, at p. 391, of _Cuff v. Frazee Storage and Cartage Co._ the circumstance that the issue there was as to the existence of a preliminary fact, that is as to the non-availability of a hearsay declarant, and not as to a fact in issue or relevant fact, seems to have escaped even Professor Schiff's customary vigilance.

It has been the present reviewer's good fortune to teach an evidence course in a Canadian law school on more than one occasion. His first experience of Professor Schiff's collection of materials was when it was still in draft form. It was then already invaluable as a teaching tool. In its published form it demonstrates even greater strengths. Moreover, its value to legal learning is by no means confined to its usefulness to Canadian law students and their teachers, great as this may be. _Evidence in the Litigation Process_, unlike the majority of collections of legal materials designed primarily to satisfy the needs of students, can stand in its own right as a contribution to scholarship. Not only does it constitute a source of first resort for any non-Canadian lawyer who wishes to immerse himself in the rapidly

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7 (1907), 14 O.R. 263.
expanding wealth of Canadian authority on the law of evidence, but it is a model of what a really well-planned casebook should be.

The law of evidence is at present passing through a phase of (relatively) rapid development. It will be a pity indeed if the impressive end-product of Professor Schiff's erudite researches and painstaking labours is not kept up-to-date by the publication of successive editions.

P.B. CARTER*

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This, the eleventh edition of Phipson's Manual, improves on the previous editions, the intent of which was defined in the very first edition by S.L. Phipson himself: "for the use of students being an abridgement of the fourth edition of the author's larger treatise on the same subject."¹ Professor Elliott noted that "traces of this origin remained through many editions"² and he questioned the suitability of this format for the systematic study of evidence.³ As a result, the current edition has been re-arranged and a large part of the text has been rewritten, making it more suitable for this purpose.

The subject of evidence does not lend itself to any particular order of analysis and the arrangement of this edition is, given its size and purpose, very good. It is organized into seven conceptual areas of law. Each part consists of several related chapters and the chapters are further subdivided under subject headings. Part IV, for example, deals with the protection of the accused. The subdivisions examine corroboration, the right to silence, the character of the accused, and judicial discretion to exclude evidence. The chapter on confessions is indicative of the arrangement of the material in the other chapters. It begins with a short synopsis and then proceeds to examine the particular issues in a very logical fashion (what is a confession? the voir dire and burden of proof; test of involuntariness; derivative evidence; and

¹ P.B. Carter, of the Middle Temple, Barrister at Law and Honorary Bencher; Fellow of Wadham College, Oxford; sometime Visiting Professor, Osgoode Hall Law School.

² P. vi.

³ P. v.
rationale for exclusion). The author suggests proposals for reform with reference to the Eleventh Report of the Criminal Law Revision Committee. This arrangement of the material is helpful to understanding evidence.

The subject matter of the text has been reorganized and is presented differently than in the previous editions. The approach of the tenth edition tended to analyze rules in isolation illustrated by one or more examples. The reader would be required to skip back and forth between the text and the example to determine if he had mastered the principle. In contrast, the eleventh edition examines the principles in a conceptual manner and the examples are sprinkled throughout the text to demonstrate the principle.

However expert the author, the text is only helpful to the extent that it is comprehensible. The writing here is clear and understandable. One reason for the clarity is economy: "where a point is well settled by one authority, redundant cases are not cited." Also, because it is not meant to be another practitioner's tome, many of the more technical areas of the law are not belaboured.

In the preface to the book, the author states that the overall objective is "to teach the beginner to swim without throwing him into the deep end of the pool". The book is written for students of English law and therefore the question is whether it is suitable for Canadian law students. This question receives a mixed response.

It is only after reading a text on evidence in one sitting that one realizes the extent to which the Canadian and English law of evidence differ. There are the well-known distinctions, such as the Civil Evidence Act 1968, which gave a death blow to the hearsay rule in civil proceedings, a matter which still flourishes in Canada. Also, our Supreme Court adopted the minority opinion of the House of Lords in Myers v. D.P.P. concerning the creation of new exceptions to the rule against hearsay.

But there are other differences which are not as well known. For instance, a prisoner has the right "to make an unsworn statement from the dock, either as an alternative or in addition to evidence on oath from the box". Or, there are special rules governing the examination of the accused with respect to his bad character—it is allowable if "the nature or conduct of the defence is such as to involve imputations

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4 P. vi.
5 Ibid.
6 16 & 17 Eliz. 2, c. 64.
9 P. 128.
on the character of the prosecutor or the witness for the prosecution".10 Neither of the above matters are part of the Canadian law of evidence.

Therefore, a student who does not have a firm foundation of the Canadian position may be misled and fall into the "deep end". Unlike Cross,11 the book does not discuss or refer to Commonwealth authorities. Nevertheless, some chapters, such as burden of proof, presumptions, and so on, would assist the Canadian law student in learning the law.

I would recommend the book to academics and practitioners alike because of the book's concise explanation of the common law principles of evidence and for its lucid discussion of the current law in England. I would be more cautious in recommending its suitability for Canadian law students.

A.W. BRYANT*

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Studies in Contract Law, an addition to Butterworths' Canadian Legal Studies series, is edited by Professors Swan and Reiter, who have contributed greatly to the analysis and reformulation of the law of contracts in this country over the past few years.

Previous volumes in this series were criticised for purporting to be national in scope when in fact they rarely included any material from Quebec and perhaps this explains the decision not to include the epithet "Canadian" in the title of the present volume. The decision, for whatever reason it was made, was undoubtedly wise because this book does not have the national credentials of its predecessors, in that all of the contributors except one are from Toronto and indeed all save two are members of the Faculty of Law of the University of Toronto. The editors are apparently sensitive to this point, as they mention in the preface that the number and variety of contributors was restricted by the need to keep the book to an acceptable length. However, if one adopts the editors' own sceptical approach of questioning the merely verbal justifications for judicial decisions in the law of contracts, it will be seen that this explanation is entirely unconvincing. The editors

10 P. 214, The Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36, s. 1, proviso.

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themselves are responsible for nearly half of the book and Study 2, by Professor Swan, is merely a revised version of an article which has already been published in a Canadian law journal. This would suggest that rather obvious means were available to widen the range of contributors.

This feature of the book is most unfortunate. One of the benefits of previous volumes in the Canadian Legal Studies series was to bring to bear on areas of basic law the perspectives of writers from across Canada. In some cases in the late sixties, for example the first editions of Studies in Canadian Tort Law and Studies in Canadian Company Law,¹ the ventures had a modest effect in encouraging more distinctively Canadian approaches to law. The parochial origins of this volume have to some extent restricted the range of views which are applied to problems in the law of contracts and may well prevent it from enjoying the same influence as some of its predecessors.

The book consists of twelve essays, which may be placed into three broad categories for the purposes of review. The majority of the contributions offer analyses of the development of fundamental areas of contract law in Canada and cover consideration, mistake and frustration, remoteness of damage, specific relief, the remedies of the part performer and the relationship between contracts and torts. Two studies are specifically concerned with contracts of employment and the final group deal with broader questions of reform, through a consideration of the techniques available for the reform of the law of contracts, the policies underlying the emerging doctrine of unconscionability and the remedies available to the parties in long term “relational” contracts.

As a philosophical prelude to the detailed studies, the editors in the first chapter discuss some of the basic theory of contracts, which provides a “common perspective” reflected throughout the other contributions. This chapter is the most disappointing part of the book, because the initial promise of a useful analysis is not sustained. In general approach, Swan and Reiter borrow heavily and fruitfully from the writings of Karl Llewellyn as they seek, in a manner which recalls nostalgically the realists of the thirties, to describe what courts, legislatures and administrative bodies do in fact, rather than to analyse the rules or doctrines which they offer as justifications for their decisions. The application of this admirable methodology leads to the revelation that the fundamental theme of the law of contracts is “the protection and promotion of expectations reasonably created by contract”, although this purpose must occasionally give way to other

competing principles and policies. This theme is supported by the purpose of contract law, which is to promote economic efficiency by permitting resources to move to their most highly valued uses.

Although the editors pass quickly on from this initial discussion, it is clear that there is a tension between the underlying theme which they adopt and the purpose of promoting efficiency. If, as both the objective theory of contracts and Swan and Reiter demand, the law protects only the reasonable expectations of the parties and ignores their subjective expectations, it is surely not possible to assert that the enforcement of a contract will necessarily result in a trade which promotes economic efficiency. For example, a bidder at an auction may offer to purchase property which he considers to be lot A and lot B for $100.00 and the seller may accept in the belief that he is selling only lot A. Faced with a dispute, a court might well conclude that the bidder's subjective view of the identity of the property sold is unreasonable and that the contract exists on terms which accord with the seller's interpretation. However, the resulting contract certainly need not maximise value in the economic sense, because the bidder may well not have entered into the transaction at all if he had realized that he would be required to purchase only lot A for $100.00. Similarly, as Professor Trebilcock illustrates persuasively later in the book, well intentioned courts may choose to intervene in a number of cases in which the conduct of one of the parties can be described as unconscionable, often in an effort to protect the reasonable expectations of the parties, and produce a result which tends away from economic efficiency.

The "theme" of protecting reasonable expectations and the "purpose" of encouraging economic efficiency are often therefore not complementary, as Swan and Reiter would suggest, but contradictory. Although there are frequently good reasons, such as a sense of justice, for choosing economically inefficient results in contracts cases and different methods of attaining economic efficiency, for example by creating incentives to encourage conduct which will maximise value in the long term rather than in the individual case, the editors rarely address them. It would be interesting to discover how they might resolve the conflicts between the theme and the purpose that they ascribe to the law of contracts and the grounds that they see as relevant to those decisions. In the course of their own contribu-

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2 Pp. 6, 9.

3 The hypothetical facts are based loosely on Staiman Steel Ltd. v. Commercial and Home Builders Ltd. (1977), 71 D.L.R. (3d) 17 (Ont. H.C.).

4 See especially the discussion of Macaulay v. Schroeder Publishing Company, [1974] 1 W.L.R. 1308, at pp. 396-404; the editors link the concepts of unconscionability and protection of reasonable expectations at p. 22.
tions, Swan and Reiter usually avoid the conflicts, because they clearly regard the protection of reasonable expectations as the primary standard by which the merits of judicial decisions are to be judged and pay little attention to efficiency criteria. Thus, judicial decisions are characterised as "right" if they protect the reasonable expectations of the parties and "wrong" if they fail to do so, at least unless clear reasons are given for any deviation from the overriding policy.  

Swan and Reiter have accordingly provided themselves with one method of appraising contracts decisions. Although they recognise that other values are at work in this area of law, the protection of reasonable expectations is accorded primary significance. The danger, however, is that the application of the general test sometimes leads to a dogmatic condemnation of some decisions as "wrong" and to a lack of emphasis on other significant policies which underly the law of contracts, such as the promotion of economic efficiency and what Professor Atiyah has recently described as the tendencies to base liability on notions of reliance and benefit as much as on expectations.

Although the analysis of the philosophy of contracts is superficial, it does not prevent the substantive studies written by the editors from being very useful indeed. They have courageously chosen to analyse fundamental and controversial areas of the law from a highly critical standpoint. It is hardly surprising, therefore, to find areas in which it is possible to disagree with them in matters of detail.

In Study 2, Professor Swan provides a good functional analysis of the doctrine of consideration and points out its limitations as a method for determining whether promises should be legally binding. In particular he examines the perennially controversial areas of adjustments to "going transactions", firm offers and family and non-commercial arrangements and concludes that consideration does little but obscure the real issues involved in each of them. In the first of these categories, Professor Swan considers in great detail again the case of *Gilbert Steel Ltd. v. University Construction Ltd.*, which is very much the bête noire of both himself and Professor Reiter and represents apparently everything that is wrong with Canadian decision making in the law of contracts.

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5 Pp. 2, 11.


7 The first two of these areas are discussed in detail in Gilmore, The Death of Contract (1974). It is interesting to note, in view of the criticism of "black-letter" approaches by Canadian academics and courts, that the third area was discussed from a realist perspective in Milner, The Law of Contract: 1923-1947 (1948), 26 Can. Bar Rev. 117, at pp. 123-124.

8 It is heavily criticised on three separate occasions in the book. See pp. 17, 26-40, 434-435, and also by Swan, Consideration and the Reasons for Enforcing Contracts.
In the light of the overwhelming criticism of this case, it may seem heretical to offer even a partly contrary view. However, because both editors have made it a central feature of their critique of the law of contract, it is necessary to make some comment. Gilbert Steel involved a contract by the plaintiff, the largest supplier of fabricated reinforcing steel in the Toronto area, to supply structural steel at a fixed price to the defendant developer. The contract addressed the possibility of price fluctuations by allowing a price increase if it was not completed within one year. Approximately five months after the contract was made, the plaintiff was faced with an increase in the price of steel by its supplier and it sought to pass on a portion of the increase to the defendant. In the face of conflicting evidence, the trial judge held that the defendant had agreed to pay an increased price to the plaintiff, but that it had avoided doing so by “rounding down” the amount of its progress payments to the plaintiff until finally it succeeded in paying only the original contract price. Both the High Court and the Ontario Court of Appeal dismissed the plaintiff’s action for the difference between the increased price and the original price on the familiar ground that, following Stilk v. Myrick, there was no consideration for the defendant’s promise.

Both the lineage of this decision and its underlying policy have elicited a litany of complaints from both editors. Firstly, it is pointed out that the authority of Stilk v. Myrick is very doubtful because there exist two conflicting reports of the case. In Stilk v. Myrick, two seamen on a voyage to Russia deserted at Cronstadt and the captain offered to pay the wages of the deserter to the rest of the crew if they took the undermanned ship back to England, as they did. Upon the failure of the owners to pay this additional amount, an action by the crew was dismissed, according to Espinasse’s report on the sole ground that enforcement of the captain’s promise would be contrary to public policy, and according to Lord Campbell’s report because there was no consideration for the captain’s promise. It may seem at first sight, therefore, that Stilk v. Myrick became a leading case on consideration only by accident, because Lord Campbell’s report was always cited while the alternative view expressed by Espinasse was forgotten. However, this cannot be accepted as a sound theory, because all the evidence suggests that there were very good reasons why Espinasse’s report was neglected and Lord Campbell’s version accepted as authoritative. The inaccuracy of Espinasse’s reports was notorious; it


was said by Pollock C.B. that he "heard only half of what went on in court and reported the other half" and other judges openly condemned his reports as unreliable. Indeed, the unfortunate Espinasse himself cast the most severe doubt on his version of Silk v. Myrick, when he wrote that in 1807 he suffered a severe nervous illness after which he was incapable of taking notes with a great accuracy and mentioned that the final volume of his Reports (in which the case is reported) was reconstituted two years after the event from notes which he had taken as counsel. Although strands of authority contrary to Silk v. Myrick exist, it is surely not possible to argue simply on the basis of the existence of the Espinasse report that there is considerable doubt as to the theory on which it was decided.

More crucial is Professor Swan's criticism of the policy of the Gilbert Steel decision. He points out that once the court found that there had been no duress in the narrow common law sense, the application of the doctrine of consideration simply allowed the defendant to ignore by deceitful means its promise to pay extra for the steel without any good reason. However, it is suggested that there is considerable justification for the reluctance of courts to enforce promises to pay extra for an existing contractual entitlement and that this provides a better explanation for the continued survival of the principle of Silk v. Myrick than the theory of blind judicial adherence to "black-letter" rules of law propounded by Swan and Reiter.

There are two reasons for judicial scepticism, which manifests itself through the doctrine of consideration, where promises are made in exchange for the performance of an existing contractual duty. Firstly, many of the cases involve what Professor Trebilcock describes later in the book as an impaired market, in which the promisee enjoys a "situational monopoly". In these circumstances the promisee often has unusual market power, which is exercised so that the promise is made under practical compulsion, short of actual duress.

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11 Williams, Learning the Law (10th ed., 1978), p. 31; both Gilmore, op. cit., footnote 7, p. 27 and Reiter, op. cit., footnote 8, at p. 461, refer to the known unreliability of Espinasse but neither mentions the extent of that unreliability. Indeed, the harshest comment on the reporter comes from Lord Blackburn in Readhead v. Midland Ry. Co. (1866-7), L.R. 2 Q.B. 412, at p. 437, where he suggested that Espinasse did not possess "such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the judge was rightly understood . . .".

12 6 Esp. v. at p. vi.


14 Pp. 392-396.
There were certainly suggestions that such a monopoly may have existed in *Gilbert Steel*, although Pennell J. decided on the facts that there had been no common law duress.\(^{15}\) Secondly, Posner argues that the relevant economic inquiry in cases of this nature seeks to discover which party originally took the risk of increases in the price of steel during the life of the contract. In *Gilbert Steel*, there can be little doubt that the supplier had assumed the risk of rising prices and the express term of the contract to this effect makes it arguable that the price which the developer agreed to pay had already compensated the supplier for that eventuality.\(^{16}\) It is difficult to see why the developer should be required to pay again when the risk materialised, as the only advantage then allegedly obtained by it was the rather lame promise of favourable consideration by the plaintiff on a future project.

Some of the objections taken by the editors to the pre-existing duty cases are thus open to criticism. However, there is little doubt that they are correct in their final objection to *Gilbert Steel*, when they point out that an analysis purely in terms of consideration tends to obscure the real policy issues at stake by diverting attention from the circumstances in which the promise to pay extra was made and from the question of compulsion.

In his second substantive contribution to the book, Swan notes the similarity of the problems raised in mistake and frustration, which are concerned respectively with the effect of unexpected circumstances existing at the time of contracting and arising after the contract has been made. In each instance, the function of the courts is essentially to allocate the risk of the occurrence of the unexpected event to one of the contracting parties, though this has sometimes been obscured by the justifications of decisions offered by courts and commentators. Professor Swan performs a valuable service by analysing many of the difficult cases in these areas with reference to the express or implied allocation of the risk by the parties. This approach is undoubtedly most fruitful, though perhaps the author overemphasises its novelty when he condemns "traditional analysis" for obscuring the problem of risk allocation. On the contrary, when cases are analysed according to the fact patterns which they present rather than the rubric under which they have been reported or classified, it will be seen that courts have often reached decisions in the areas of frustra-

\(^{15}\) (1973) 36 D.L.R. (3d) 503. The defendant had alleged that the plaintiff had threatened to delay deliveries and that it had inquired "what does a contract mean?". He alleged that one of the principals of the plaintiffs responded "A contract doesn't mean nothing".

tion and mistake by concentrating on the allocation of risk between the parties. In frustration, this tendency has at times been explicit and courts have shown little inclination to be bound by inflexible rules. The more notoriously difficult mistake cases were frequently dealt with by the implication of terms to cover the unexpected event, which usually had the effect of placing the risk on one of the parties and of focussing attention on the terms of their agreement.\textsuperscript{17} Indeed, it seems that courts have been diverted from their usual methods of analysing these problems more by technical theories, especially of mistake, put forward by text writers and commentators than by the effect of their own precedents. For example, the influential judgment of Lord Atkin in \textit{Bell v. Lever Brothers Ltd.},\textsuperscript{18} which Swan treats as an example of the traditional approach, when carefully read disposes of most classical mistake cases by placing the risk of the mistake on the promisor. For all practical purposes, the original judgment leaves only a very narrow field in which mistake can relieve a party from liability. Even then, by suggesting the possibility that any relief could be based on an implied condition precedent, it invites an inquiry whether on the construction of the contract one party has assumed the risk of even a fundamental mistake.

Perhaps then “traditional analysis” was not as hidebound as Professor Swan suggests. Nevertheless, there is no doubt that at the present time, Canadian courts are still experiencing enormous difficulties with cases in the mistake area\textsuperscript{19} and it is to be hoped that Swan’s article will assist in removing the arid conceptual debates and in re-establishing the need to inquire into the scope of the contractual obligation assumed by the parties.

Professor Reiter adds to the analysis of basic areas of law a thorough discussion of the interaction of remedies in contract and tort, a subject which has caused considerable problems for Canadian courts since the decision in \textit{J. Nunes Diamonds Ltd. v. Dominion Electric Protection Company}.\textsuperscript{20} His thesis is that “the increased specializa-

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\textsuperscript{18} [1932] A.C. 501. The examples cited by Lord Atkin which narrows the operative area of mistake are found at p. 224.

\textsuperscript{19} See, for example, the extraordinary analysis in \textit{Alessio v. Jovica} (1974), 42 D.L.R. (3d) 242 (Alta A.D.).

\textsuperscript{20} (1972), 26 D.L.R. (3d) 699 (S.C.C.).
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tion and interdependence in Canadian society" has created "high levels of social interaction", which have compelled the law to recognize the crucial importance of "relationships" and of the reasonable reliance and expectations that relationships inevitably engender.\(^21\)

The law should protect reasonable reliance without being limited by the technical barriers thrown up by the time-worn distinctions between contract and tort.

Initially, it is difficult to see how these new "high levels of social interaction" have occurred, as the reader is required apparently to accept their existence as a sociological fact, together with the compulsion that they have exercised over the law. In the absence of any real justification for these statements, the reader is left to wonder why the law should require such sudden change, especially since some of the phenomena which Reiter discusses in this context, such as the propensity of careless builders to injure remote purchasers by their negligence, seem to have been with us for a very long time. Fortunately, however, these wide generalisations do not adversely affect the remainder of Reiter's study, for he has produced an excellent analysis of policy and law in the minefield which exists at the borders of contract and tort. In an area which has produced a vast literature in the form of both judicial decisions and periodical articles, Reiter has provided a comprehensive treatment. Its only defect, apart from the opening flourish already mentioned, is a marked tendency to verbosity in both the text and footnotes. Indeed the discursive references, apart from generally distracting the reader from the theme of the essay, become so extensive at one stage as to create a page which consists entirely of footnotes.\(^22\)

The remaining substantive studies are concerned with remedial questions. Professors Swinton and Sharpe offer good discussions respectively of remoteness of damage and specific relief in contract, which have both previously escaped detailed and systematic treatment in Canadian law. Both studies take a sceptical approach to the principles which courts have used to justify their decisions and analyse the policies behind limitations on the recovery of damages and the availability of specific relief. Swinton is cognisant of the wide judicial discretion bestowed by the general verbal formulations of remoteness principles and she examines the cases for the real factors which courts look to in drawing the lines of permissible recovery. Sharpe, on the other hand initially, analyses the policies underlying a decision to grant specific relief with a commendable grasp of the recent law and economics literature on the subject and then investigates in a more cursory fashion how far the historical limitations on

\(^{21}\) P. 236.

\(^{22}\) P. 271.
the availability of specific performance and injunctions further those policies. Both studies provide a good starting point for further research and can be safely commended to students, especially those who might consider that remedial questions are decided by the mere application of rules to concrete facts.

In the third remedial study, Professor Waddams considers the rule of *Sumpter v. Hedges* 23 that where one party has agreed to render full performance in exchange for a lump sum there is no obligation on the part of the promisee to pay anything until performance is complete. As he notes, the unfairness which the strict application of this rule would engender has produced a large number of devices, such as the doctrine of substantial performance, to mitigate its rigours. As the real objection to the rule is that one party to the contract can be left with a benefit for which payment is not required, Waddams suggests that its avoidance should be based on the law of restitution and the principle of unjust enrichment.

The obvious objection to permitting recovery by the part performer who has agreed not to be paid unless performance is complete is that it might well run counter to the express allocation of the risk of non-performance in the contract. Waddams addresses this problem by arguing that there should be a presumption in favour of restitution for the part performer, rebuttable on clear evidence that the contract was a genuine contingency agreement. 24 While this may be an acceptable safeguard, basing liability in restitution may deflect courts from a proper inquiry into the allocation of risk. Restitution by its very nature tends to focus attention on the benefit obtained by the recipient rather than the contractual terms which were agreed. Surely the crucial question is whether, on the normal construction of the contract, the part performer freely agreed to forego payment except on completion and there is no particular need to influence this inquiry by the insertion of a presumption. If the answer to this question is affirmative, then the clear rules of the contract prevail. If it is negative, then the next question is whether there is anything in the contract to show that the parties contemplated the consequences of part performance. Only if there is not should there be room for the operation of principles of unjust enrichment, for otherwise a "presumption" in favour of restitution seems to offer an invitation to courts to override the wishes of the parties in an economically inefficient direction and in the pursuit of an ill-defined goal of fairness. The difference in emphasis may seem minor, but it does underline that the starting point of analysis is the express or implied wishes of the parties.

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23 [1898] 1 Q.B. 673.
24 P. 167.
Two of the studies, by Professors Beatty and Swinton, deal in detail with contracts of employment and are less concerned with fundamental contractual concepts. Beatty asserts that labour is not a commodity and that the purely contractual model of the employment relationship protects only the economic aspects of the relationship, while neglecting its importance in providing the employee with identity and dignity. The contract model, he claims, is also inappropriate because inequality of bargaining power between workers and employers means that employment is not based on genuine consent. His solution is to refuse to permit an employer to terminate the employment relationship without just cause or, in the event of a redundancy, without placing the employee in another comparable position. In a complementary study, Swinton sees that courts have begun to recognise a wider range of employee interests in wrongful dismissal cases and expresses the hope that courts will recognise that indefinite contracts of employment should be terminable only for just cause and not on reasonable notice. From this brief description, it will be seen that both contributions depend heavily upon the adoption by the reader of the authors’ philosophical starting point, which is certain to be controversial.

The final group of studies are loosely concerned with matters of reform. Professor Brown adopts MacNeil’s distinction between single transaction contracts, in which the rules of the law of contracts were first developed, and long-term “relational” contracts, to which the rules are now often applied, sometimes inappropriately. He points out that the collective agreement is a typical example of a “relational contract”, which is planned only in outline at the beginning and sets up a flexible framework for future relationships. As “relational” contracts are now a common feature of commercial life, he argues that the general law of contract should take into account the lessons drawn from the experience of labour arbitrators in fashioning remedies for breach. His study indeed provides food for thought for the draftsmen of long-term skeletal contracts, though it is interesting to note that his advocacy of more frequent use of specific relief in long-term supply contracts is in marked contrast to the view of Professor Sharpe, who points out that this can frequently lead to overcompensation of the plaintiff.

In his study, which has already been referred to, Trebilcock examines the increasing number of cases in which courts have chosen to intervene in contracts on grounds of unconscionability. He points out that the vague legal notion of unconscionability is used to attack the economic problem of transactional unfairness. However, in the

\[26\] Pp. 130-132.
absence of any coherent content in the notion, its employment is sometimes capricious and it can as often strike down fair and desirable bargains as objectionable contracts. Trebilcock successfully sets out useful economic criteria of unconscionability and applies them to the decided cases, where they often suggest that an economically incorrect solution was reached.

Professor Trebilcock's analysis is crucial to the development of this area of law in Canada, where judges are frequently inspired by vague notions of fairness to produce decisions which in the long term are quite likely to disadvantage the very groups they are trying to protect. For the most part, he avoids the pitfall of jargon, which sadly prevents the insights of many writers in law and economics from having any significant impact on the judiciary. In several places, he describes complex economic concepts with great lucidity, but occasionally there are distinct signs of hasty production which will reduce the clarity of the essay to the prejudice of the non-economist reader at whom it is aimed. For example, at an early stage, Trebilcock clearly presupposes some economic background in the reader when he introduces without explanation the notion of equilibrium and yet later he returns to a very basic level in defining economic efficiency, upon which much of the preceding discussion has already been based.27 Although it is often difficult to balance specialised research with effective communication of the results to a general audience, Trebilcock has come close to the goal and could have reached it successfully with small revisions.

In the final remedial study, Professor Belobaba considers the appropriate methods for reform of the law of contracts. Although he sees a role for judicial law reform in commercial contracts, he advocates the adoption of a legislative and administrative model to deal with consumer contract problems. Some of the features of the model he suggests are designed to ensure that administrative regulation will function in reality rather than just appearance and he is aware of the significant problem of evaluating its cost effectiveness, which is an often neglected item when governments adopt regulatory techniques.

From the description set out above, it will be seen that Studies in Contract Law, like its predecessors, is a mixed bag, a collection of law review articles with only a loose connecting theme. Physically, it is an attractively presented book, though with more than an acceptable number of typographical errors and a disturbing tendency to uneven spacing between the lines of text, which is evidenced

27 Pp. 396, 409. There are many other less important signs of hasty production throughout the essay; e.g., Anderson J. suffers an identity crisis and becomes Davidson J. in the discussion of the Three Spruces Realty case (1977), 79 D.L.R. (3d) 481, at p. 388 and a number of cases are simply cited as "op. cit." at p. 393.
particularly in Professor Reiter's chapter when no doubt the skills of the printers were overwhelmed by the sheer volume of words they were required to process. Functionally, some of the studies will be useful for law students, but not a sufficient number to warrant advocating its purchase, and fewer will be useful to practitioners. However, the institutions and libraries upon which publishers increasingly rely to absorb high-priced and specialised works will in all likelihood provide a ready market.

DAVID R. PERCY*

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It is five years since the appearance of the sixth edition of this casebook. In that time, the law of trusts has continued to be the battlefield on which taxpayer and government wage single, if unequal combat, testators have persisted in making ambiguous gifts, to the despair of executors and the delight of scholars, and Lord Denning M.R. has continued his singlehanded push for the adoption of an English remedial constructive trust. These and other recent developments would be reason enough for the appearance of a seventh edition. However, D.J. Hayton has taken the opportunity to alter significantly the scope of the casebook. To quote the words used in the Preface, "The success of the trend in the previous edition has led to this edition becoming a self-sufficient combined textbook and casebook". It would be an odd reviewer indeed who could resist the challenge inherent in that statement to review this casebook in the light of its success in that undertaking.

Insofar as case selection and general editing are concerned, only minor criticisms can be made. The book retains its orthodox organization, and the cases are for the most part well chosen and illustrative of the commentary. Recent English developments are well canvassed, although Canadian cases are, not surprisingly, poorly represented.

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There are occasional instances where one might query the selection of materials. The discussion of trusts to defraud creditors might usefully have referred to *Goodfriend v. Goodfriend*, in which the Supreme Court of Canada discussed the circumstances in which the presumption of advancement may be rebutted by evidence of such an intent. A notable omission to English eyes must be the failure to refer to section 10 of the English Perpetuities and Accumulations Act in discussing the view that gifts to an unincorporated association may take effect as an accretion to members’ property held subject to contract.

There is, however, one instance where Hayton falls considerably short of the high standards he sets in the balance of the casebook. In discussing constructive trusts, Hayton disparages the efforts of Lord Denning M.R. to create an English remedial constructive trust. His commentary verges on being a personal attack on the Master of the Rolls. The result is a less than dispassionate analysis of the concept of a remedial constructive trust. In the light of the recent decision of the Supreme Court of Canada in *Becker v. Pettkus*, this flaw impairs the utility of the casebook for Canadian students.

Hayton’s dismissal of Lord Denning’s efforts as a “vague and wooly formula . . . for dispensing palm tree justice” would be more convincing if American authority were not so cavalierly dismissed in a footnote. Do the American courts administer palm tree justice? Are there no lessons to be learned from the American (and for that matter, Canadian) experience? Hayton is prepared to cite a New Zealand trial judge to buttress the narrow approach to constructive trusts, but surely the broader approach of the Supreme Court of Canada in *Rathwell v. Rathwell* was equally important, and, more to the point, equally available to him. The rejection of a remedial trust by English courts is to some extent a reflection of the uncertain status in English law of the principle of unjust enrichment. One would have expected in this respect some reference to the discussion in Goff and Jones’ book *The Law of Restitution* of possible criteria to govern the imposition of proprietary interests to prevent unjust enrichment, if only for the sake of completeness. Moreover, if a fiduciary relationship is the *sine

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5 1964, c. 55. For such a discussion see J. Hackney, [1971] A.S.C.L. 379. See also B. Green, The Dissolution of Unincorporated Non-Profit Associations (1980), 43 Mod. L. Rev. 626, at p. 629.
6 Pp. 383 *et seq*.
8 P. 387, footnote 49.
10 (2nd ed., 1978), Ch. 2, pp. 60 *et seq*.
**qua non** of imposing a constructive trust, then some discussion of the readiness with which both English\(^ {11} \) and Canadian\(^ {12} \) courts are willing to create fiduciaries to order would be appropriate.

However well edited this casebook may be, its chief value lies rather in the extremely lucid commentary which accompanies the materials. Hayton's writing is crisp and economical, and is admirable both for its clarity and its organization. Hayton is careful to explore whenever appropriate the different legal rules which might apply to a given set of facts. For example, the discussion of gifts to unincorporated associations is prefaced with a short discussion of five possible interpretations which might be placed on such a gift, ranging from a valid charitable trust to a valid absolute gift. Such attention to the needs of students should effect a significant saving in time and effort. One may also suspect that most practitioners would not find this approach unhelpful.

If this casebook has a major flaw, it is simply that its format does not lend itself to the extended analysis which one would expect in a textbook. Even though Hayton's comments are published in smaller type, the discussion is often truncated by the need to include primary materials. As often as not, these materials, although essential in a casebook, prove to be annoying interruptions of the commentary. The result is that Hayton must gloss over issues on which his opinion would be highly instructive.

One is, for example, somewhat disappointed by Hayton's uncritical acceptance of the superadded test of administrative workability proposed by Lord Wilberforce in *McPhail v. Doulton*\(^ {13} \). A student of the law of trusts might well be forgiven for thinking the question of administrative workability to have been settled by the adoption of the "is or is not" test for conceptual certainty. If a discretionary trust in favour of the residents of Greater London is conceptually certain, how can it be unworkable, as Lord Wilberforce suggested it might be in *McPhail*? Other examples come readily to mind. What light does the validation of certain private purpose trusts in *Re Denley's Trust Deed*\(^ {14} \) throw upon the concept of a "charitable" purpose generally? A testator may settle a gift upon an unincorporated association in the hope that the money will be used for the purposes of the association. Nevertheless, under the theory that such a gift takes effect as an


\(^{13}\) [1971] A.C. 424.

\(^{14}\) [1969] 1 Ch. 373.
accretion to the association’s funds subject to contract, it would appear that the members may apply the money to any purpose, including distributing it among the members beneficially, merely by a variation of their contract inter se.15 Should such private cy-près schemes be controlled by courts or by legislation? Should it make any difference if funds are collected by public subscription for a specific purpose?16

The seventh edition of Nathan and Marshall is primarily an English casebook, and it would therefore be unfair to criticize it for failing to comment on Canadian cases and legislation. Although it is a first class introduction to trusts, it is not a book which one could recommend as the basis for a course on the Canadian law of trusts. On the other hand, it is a book which will repay close study by students of equity. Hayton’s writing is of such a high quality that one can only hope that the “success of the trend” which led to the attempt to convert the seventh edition into a “self-sufficient combined textbook and casebook” will lead to the next edition becoming a fully fledged textbook.

F.W. HANSFORD*

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Although there are many who cling tenaciously to the belief that decisions made by a court must always be based on the traditional model—two parties and a judge as impartial arbiter—there is a growing realization that that model is ill-suited to resolve some issues arising out of today’s complex society. Many of the most important issues simply do not affect people primarily on an individual basis but are important as much for their effect upon many individuals as for their effect on any one of them: the litigation is “public” in its impact.

So how—if at all—should such issues be resolved? That simple question contains within it many others: should the courts or should some other body decide these issues? If the courts are to entertain these issues, should the cases be made to conform to the conventional pattern of litigation or are significant departures required? Should the

15 See Neville Estates v. Madden, [1962] Ch. 832.
16 As in Re Bucks Constabulary Fund (No. 2), [1979] 1 All E.R. 623.

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remedies available be any different? Who should be empowered to bring such litigation?

The Law Reform Commission of British Columbia has focused its attention on the last question raised: standing to bring the lawsuit. The concept of standing has been in such a mess and the interpretation given to it by the courts has been so restrictive that it obviously had to be addressed if individuals were to have a sizable role in public litigation. Yet, as indicated, that issue is only one of many which has to be addressed in working out how such litigation will be conducted. The Commission's Report is entitled Civil Litigation in the Public Interest: an indication of an expansive treatment of the relevant issues. Instead, the Report focuses almost all of its attention on the standing question.

Clearly, standing is central. Until the right of an individual to bring an action in which she has been affected in no greater degree than others is recognized, suits concerning matters that have a widespread impact will be drastically curtailed. The role of the Attorney Generals as the gate-keepers in this kind of litigation has always been unsatisfactory. Actions by Attorneys General themselves to protect the public interest are few and far between and the veto the Attorneys General enjoy over relator actions has always been viewed with suspicion as continuously influenced by political factors. More fundamentally, the notion that a politician should be the sole arbiter of what is the public interest and on what occasions it needs protection probably was always somewhat difficult but in today’s society of competing and complex interests, where any consensus is fragile, it seems to verge on the fanciful.

The Law Reform Commission of British Columbia in its Report recommends loosening the grip of the Attorney General on such litigation and its recommendations clearly point in the right direction. The Report recommends that a person who wants to start a “public

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1 The present state of the law is fully described in the Commission’s Report, pp. 31 et seq. In a sentence the present law is that a private individual, subject to some exceptions, has no standing to institute proceedings to protect public rights unless he can show a direct personal interest in the issues in the lawsuit or convince the Attorney General to consent to a relator action. Of course what constitutes a “direct personal interest” has been the subject of more lawsuits than any sensible person would care to count. The Report also discusses the “quality-quantity” fracas (at pp. 34 et seq.) and the Draft legislation (5.53) states that the plaintiff in respect of a public nuisance, other than a public interest proceeding, is not barred from seeking relief only because his damage differs in degree from the public’s at large.

interest proceeding"3 should serve on the Attorney General an application requesting the Attorney General to commence the proceeding and a copy of the proposed originating process.4 The Attorney General may respond to such applications by indicating either that he will conduct the litigation or that the individual may conduct the litigation in the Attorney General's name.5 To this point the recommendations follow, generally, the procedure which exists now when an individual wants the Attorney General to conduct a public interest suit or to permit the individual to conduct such a suit.

The significant departure of the recommendations is that, if the individual does not receive an indication that the Attorney General proposes to follow either of the two courses just mentioned, the individual is not stymied as he is now. Instead, the individual may apply to the court to give its consent to allow him to undertake the litigation in his own name.6 The court, on conditions it considers appropriate, shall give its consent unless it considers that there is not a "justiciable issue" to be tried.7

The recommendations are also innovative because they specifically sanction the court, in a public nuisance case, awarding damages, payable to the Attorney General, to remedy the nuisance and on the same basis as in a private nuisance case.8 The Attorney General may spend the money in whatever way he considers appropriate, shall give its consent unless it considers that there is not a "justiciable issue" to be tried.7

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3 Defined in the Draft Legislation, s. 50, at p. 74 to mean: "... a civil proceeding which can by law but for section 51, be brought by the Attorney General, either on his own initiative or at the request of a relator, in the Supreme Court, in respect of a present or apprehended violation of a public right, including a proceeding
(a) in respect of a public nuisance, or
(b) to restrain
(i) a person from violating an enactment, or
(ii) a public body from exceeding its powers.

4 See Draft Legislation, s. 51(1), p. 74.

5 See Draft Legislation, s. 51(2), p. 74.

6 See Draft Legislation, s. 51(3), p. 74.

7 See Draft Legislation, s. 51(5), p. 75. The applicant shall serve the Attorney General and any proposed defendants or respondents with a copy of the petition (s. 51(4) p. 75) and in a proceeding undertaken with the consent of the Supreme Court, the Attorney General may intervene or shall on his application be joined as a party of record (s. 51(6), p. 75. The Report, p. 73, describes an issue as justiciable "... if it raises a question that may properly come before a court and which is appropriate for decision".

8 See Draft Legislation, s. 52(1), p. 75.

9 See Draft Legislation, s. 52(2), p. 75.
particular claims but can, on a compensatory or deterrent basis, be awarded for damages suffered by the group as a whole. ¹⁰

However, three criticisms can be made of the Report: first, its recommendations allow the Attorney General to maintain too great control of public litigation; secondly, it does not address the fundamental questions of how such litigation is to be conducted, regardless of whether the Attorney General or someone else brings it; finally, the Report does not address the basic issue of how such suits are to be financed.

The reasons given by the Commission for permitting the Attorney General the choice whether or not he will conduct the suit or authorize the individual to conduct it, on their face, seem harmless enough. In its discussion the Commission stated: ¹¹

We believe it desirable that the Attorney General should continue to have an opportunity to participate and exercise some degree of control over public interest suits. He may wish to participate for a number of reasons. For example, he may have doubts as to the competence of the person to conduct the proceeding, or that the case is one which would benefit from having the full resources of his ministry behind it.

The particular reason referred to in the quote, the individual’s competence, will be returned to shortly. What is wrong generally with the Commission’s recommendation is that it would allow the Attorney General to control the litigation exclusively once he initiated it or allowed the individual to initiate it on his behalf. As a result this could mean that the Attorney General, after initiating the litigation, would not proceed with it or proceed but then agree to an unsatisfactory settlement ¹² or proceed with it and request remedies which those who

¹⁰ The ability to award monetary relief on an "aggregate" basis is an important matter in class actions in the United States. Most class actions will be manageable if it can be demonstrated that the harm done by the defendant can be calculated on one basis. Schemes also have to be propounded when the money recovered is not totally distributed to members of the class. See, for example, Newberg, Class Actions (1977), Vol. 3, s. 4620, pp. 84-85 and Note, Managing the Large Class Action: Eisen v. Carlisle & Jacquelin (1973), 87 Harv. L. Rev. 426. The Draft Legislation makes explicit that calculating and utilizing damages based on harm to a mass of individuals rather than any one of them should not be defeated by arguments of the defendant that it does not comport with traditional notions of compensation.

¹¹ For example, P. 72.

¹² For instance, the Attorney General for Ontario, in 1971, started an action against Dow Chemical Company for mercury pollution to the Great Lakes in which he claimed $35 million. The novelty of the Attorney General’s action was its claim for damages based on injury to the environment and the public at large. The claim, therefore, was presumably like those authorized by Draft Législation, s. 52: see supra, footnotes 8, 9 and 10, and accompanying text. The suit by the Attorney General was eventually settled, seven years later. The perceived lack of diligence in prosecuting these claims
are affected do not consider satisfactory. These possibilities could occur because there are no mechanisms for the court to control how the Attorney General or someone on his behalf will conduct the litigation.

The foregoing invites two responses. First, why not simply allow the Attorney General to bring such a suit if he is so inclined but not permit him to exercise control over others. If others do bring such litigation and the Attorney General has reservations, for example, about the individual’s ability, let him make that case before the court and ask to be substituted in his place. The cases suggest that acting as a screening mechanism is an awkward responsibility which—at least this is the perception—the Attorney General has not discharged well. At a minimum, if the Attorney General does not want to take the litigation himself he ought not to be able to control the individual indirectly through what appears to be the Report’s version of the relator action.\(^{13}\)

The second response involves a discussion of the criticism, noted earlier,\(^ {14}\) that the Report does not address how these “public proceedings” are to be conducted—regardless of whether the Attorney General or some individual brings the suit. Aside from general language which authorizes the courts to stipulate conditions when it gives permission to the individual to bring a suit, the draft legislation does not address the question of how the litigation is to be conducted both from the perspective of court supervision and from the perspective of allowing others beside the immediate parties to participate in what is, by definition, litigation which will have an impact on many others besides the immediate parties. The statutory language describes these actions as “public interest proceedings” but the Report and the framework for litigation it recommends treat the action like one between two individuals litigating merely private issues. The section authorizing the action contains no provisions for testing the adequacy of the individual to bring the action, for giving notice of the suit and the relief sought to those affected, for allowing intervention by those affected to make representations on the issue of liability or relief or both, for prohibiting settlement or discontinuance without the court’s permission and, finally, for giving res judicata effect to the court’s decision.


\(^{13}\) As mentioned, the Draft Legislation, s. 51(2)(b) would allow the Attorney General to permit the applicant to conduct the litigation in the Attorney General’s name.

\(^{14}\) Supra, at p. 113.
Those who are familiar with expanded class action mechanisms, for example United States Federal Rule 23, will recognize that the preceding provisions are found in some form or another in such mechanisms. The Report did address, briefly, the relationship between class actions and public interest cases. It distinguished them mainly on the basis that class actions are binding on class members whereas public interest proceedings are not.\(^\text{15}\) In reply, it can be asked whether such a distinction should exist. Why should the defendant be exposed to repeated suits by various members of the public in public interest proceedings—unlikely as such suits may be given the costs sanction—when he would not have such exposure in a class action?\(^\text{16}\) Moreover, such a distinction ignores the fact that the basic premise for bringing both of these kinds of suits is to vindicate alleged rights of a large number of people, the vast majority of whom will not be before the court. Expanded class actions face this fact directly and, accordingly, provide various means, many of which have been listed above, to protect the interest of absentees and to provide them opportunities to make representations regarding the litigation.

From what has just been said it does not follow inexorably that all public interest cases should automatically be treated as class actions. As a practical matter a wary view should be taken of class actions—there are hopeful signs on the horizon\(^\text{17}\)—but their status, now and in the near future, is uncertain. On the other hand, it is important—indeed fundamental—that there be a clear indication that the court is not to try to make public interest cases conform to the traditional mode of litigation and conversely that it should feel free to respond to the needs of absentees to protect their interests and to allow them to assert any particular points of view they may have.\(^\text{18}\) The blunt fact is that in “public” litigation the “public” will often not speak with one voice

\(^\text{15}\) P. 8.

\(^\text{16}\) This point would be even stronger if non-mutuality of collateral estoppel were to apply in which case members of the public might be able to take advantage of a successful suit against the defendant but the defendant would not be able to stop members of the public from bringing suits which raise the same issues as the initial unsuccessful suit against the defendant. For an explanation of non-mutuality of collateral estoppel see, for example, the following cases: Parklane Hosiery Co. Inc. v. Shore (1979), 99 S. Ct. 645 (U.S.S.C.); McIlkenny v. Chief Constable of the West Midlands and Another, [1980] 2 W.L.R. 689 (C.A.); Nigro v. The Agnew-Surpass Shoe Stores Ltd. (1977), 18 O.R. (2d) 215 (H.C.), aff’d (1977), 18 O.R. (2d) 714 (C.A.).

\(^\text{17}\) Quebec has recently passed a class action statute: An Act Respecting the Class Action, S.Q., 1978, c. 8. The British Columbia, Ontario, and Australian Law Reform Commission have projects on class actions. The Ontario Court of Appeal has also contributed thoughtfully to the discussion: see, Naken v. General Motors of Canada Ltd. (1979), 21 O.R. (2d) 780.

\(^\text{18}\) This suggestion might be implemented by amending the proposed s. 51(5) roughly as follows:
in respect of how the litigation should be conducted, what remedy should be sought, or even whether the suit should be brought at all. Unquestionably, it is important to deal with the restrictive rules of standing but there are other issues relating to such litigation which should not be ignored. To address such issues is to increase the likelihood that the court will arrive at a decision which reflects sound judgment about all the aspects and interests involved in the issues caught up in the litigation.

The third main criticism of the Report is that it is silent with regard to the issue of costs. There is no space here to discuss in detail the case for some adjustment in the cost rules regarding suits where one individual is suing to vindicate the rights of many. Nevertheless, is it realistic to expect one individual with relatively little or no financial stake in the litigation to take on corporate or governmental interests with large resources and greater sophistication in litigation without some recognition in the cost rules of this imbalance of power in those cases where such imbalance exists? One way cost rules, incentive fees, recovery of fees from damages recovered, and creation of a fund to finance litigation are just some of the alternatives that the Commission could have considered. Its failure to do so—even if in the end it had rejected any modification—indicates further its hesitancy to view this kind of litigation in a broader context than deciding who will have status to prosecute such litigation. Yet the issue of costs is intimately connected. Such suits will be infrequent so long as individuals face the chilling effect created by the present system of costs.

Reading the Commission’s Report one is left dissatisfied. The Commission addressed the obvious problem of standing in a reasonably thorough way and its recommendations are heartening for those who believe the present rules are too restrictive. However, the Re-

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"(a) The Supreme Court shall give its consent unless it considers there is not a justiciable issue to be tried. The Court shall give its consent on such conditions it considers appropriate including the following:

(i) the plaintiff satisfies and continues to satisfy the Court throughout the litigation that he will adequately represent those individuals not before the Court that will be affected by the litigation.

(ii) that notice be given, by advertisement or otherwise, to those on whose behalf the suit is brought that litigation which affects their interests is proceeding.

(iii) that the suit not be settled or discontinued without the Court’s permission.

(b) The Court shall allow individuals who are not parties but who will be affected by the suit to intervene in the litigation to make representations of law or fact or both on any aspect of the litigation, whether pertaining to liability or remedies, on such terms as it stipulates unless it is satisfied that the reason for which the intervention is sought is being satisfied by one of the original parties to the litigation."
port’s failure to pursue issues that will arise from these more liberal rules leaves one wondering about what notions the Commission had about the nature of ‘‘public interest proceedings’’. Fortunately others who believe in the importance of this kind of litigation can carry on the discussion.

W. A. Bogart*

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Canadian lawyers since Ontario’s Securities Act of 19661 have been accustomed to a comprehensive scheme of regulation of the markets for corporate and more exotic securities.2 This scheme features, inter alia, requirements for the qualification of new issues of securities and for disclosure of material information by issuers to the markets for their previously issued securities. As well, persons with particular institutional connections with an issuer which are considered likely to give them access to confidential price-sensitive information are required to report their trading in the issuer’s securities; while a somewhat broader class of persons who might actually make use of any such information in their trading are given a number of other disincentives to do so. Securities holders whose holdings are the object of a bid for control of the issuer are provided with a number of protections against having to make an ill-informed, unduly pressured decision. And all of this is watched over by an administrative agency with considerable discretionary powers to respond to the protean character of the securities markets and securities market fraud. Most Canadian lawyers would know that there are similar schemes of regulation in the United States, from which has traditionally come much of the inspiration for the Canadian schemes. Increasingly, as Canadians make direct or portfolio investments outside North America, and as in-

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2 The principal Canadian texts are D. L. Johnston, Canadian Securities Regulation (1977), now somewhat out-of-date (an updating supplement is understood to be in preparation for publication in December 1981); V. P. Alboini, Ontario Securities Law (1980); and, although not a text in the conventional manner, Consumer and Corporate Affairs Canada, Proposals for a Securities Market Law for Canada (3 vols., 1979) hereinafter cited as Proposals.
vestors outside North America invest in Canada, Canadian lawyers are likely to be confronted with jurisdictions with sophisticated capital markets for whose regulation such lawyers lack any corresponding "feel". Mr. Robinson's book, viewed from a Canadian perspective, is an admirable way of getting just this "feel" for the jurisdictions it covers.

The book is not, and does not purport to be, a comparative law treatise. Rather it is a collection of reports from each of fourteen countries: Australia, Brazil, Canada, the Federal Republic of Germany, France, Italy, The Netherlands, New Zealand, the Philippines, Singapore, Sweden, Switzerland, the United Kingdom, and the United States of America. There is no attempt by the editor (who is a Canadian lawyer based in Toronto) at a synthesis of these reports; and there is no index to the book. In fact, as each report is written by a practitioner or practitioners from the relevant jurisdiction, the result might, if matters had rested there, have been either uninformative or indigestible. However, Mr. Robinson had his rapporteurs use a common report format, based on an outline of topics to be touched on, an outline reproduced at the beginning of the book. The result is a collection of material which goes a long way to meeting the apparent needs of international legal practice in this area. That is, it provides assistance in preparing useful responses to foreigners' inquiries, to making useful foreign inquiries oneself and to effectively evaluating the answers.

The list of topics each rapporteur is asked to comment on covers most of the range which in North America now is considered comprised by Professor Louis Loss' term, "securities regulation". The term is hardly in common use in all the jurisdictions the book covers, however, and so the topics are presented in the outline from a functional perspective, rather in the way this review began. This manner of presentation does not entirely escape the North American legalistic bias in this area. However, the topic outline does manage to offer ample scope to rapporteurs from jurisdictions which rely more heavily on self-regulation, and moral suasion, than Canada does. The reports from Germany and Sweden are particularly notable, and interesting, in this respect.

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3 It is Mr. Robinson's main objective for his book that it do this for all internationally minded lawyers, not just Canadian ones: p. xi. The book itself was sponsored by the Section on Business Law of the International Bar Association: pp. x-xii.

4 There does not appear to be a comprehensive (by jurisdiction and topic) one devoted to Comparative Survey's subject area as yet. One is believed to be in course of preparation, however, as Vol. XIII, ch. 10, of the International Encyclopaedia of Comparative Law.
However, a report restricted to the mechanics of regulation would not be adequate to provide the sort of "feel" for the jurisdiction involved which Mr. Robinson wants his book to afford. So his topic outline also calls for details of local controls over foreign direct investment, and also (although, regrettably, less clearly) over portfolio investment; of the relationships between the public and the private regulatory "sectors"; of the role of local lawyers in securities work; and of the character of local securities markets. As the reports from a number of jurisdictions, particularly Germany's, make plain, developed western capital markets (and taxation systems) can spawn exotic investment vehicles indeed, like feature films, research projects and commodities trading accounts. The engaging term used for these in the German report, the "grey capital markets", serves both neatly to differentiate them from the more conventional ones, and to hint at the compelling case for special regulation they might be seen to make. Unfortunately, the outline does not encourage the reporters to consider the special regulatory schemes created to answer that "need" for controls.

Overall, there is not much to quarrel with in the outline. The only major complaint is that it would have been useful to have had a topic heading for local securities holdings and transfer systems. The use, especially for foreigners, of investment holding companies and of other local nominees appears to vary from country to country, as the report from Brazil tantalizingly suggests. And securities transfer systems also exhibit considerable international variety, as the recent Proposals for a Securities Market Law for Canada indicates. Both matters seem of considerable significance to both the foreign direct and the foreign portfolio investor.

It should be said that the reports which the topic outline report format elicited do differ significantly in the detail and intelligibility of their responses. France (at eight pages) and Canada (at forty-four) are at opposite extremes on the first score. As an example on the second, Brazil's report suffers from a lack of clarification of some of the terms important to regulation in that country, as well as from some rather hard to follow prose. In these respects, the book is not one, but fourteen. Some of this flows from the book's objective and from the resources the editor apparently had to hand. But perhaps things would have been improved without undue effort by a greater collegial exchange among the reporters and the editor than appears to have taken place.

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5 P. 83.
6 But see the report for Germany.
7 P. 19.
For all of this, *Comparative Survey of Securities Laws* is an excellent book for Canadian lawyers which achieves its basic objectives well. Mr. Robinson has assembled a knowledgeable and internationally sophisticated group of rapporteurs to interpret their regulatory systems to foreign lawyers. In Mr. Robinson those rapporteurs have an imaginative and able editor. One matter this collaboration has made clear is that the prospect of rapid change in regulation in this area is not confined to Canada. Accordingly, it is to be hoped that a book this useful to Canadian lawyers will not be allowed to remain at just one edition.

R. L. SIMMONDS

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The papers presented in this fascinating, timely, and extremely valuable book originated in a seminar held at the Law and Economics Center of the University of Miami School of Law in October 1979. It may perhaps be relevant to the political-economic perspective of the organizers, if not of the participants, to note that the seminar was part of the programme of Liberty Fund Inc., "a foundation established to encourage study of the idea of a society of free and responsible individuals".¹

The book is divided into three parts. First, there is the "Principal Paper" by William F. Baxter, formerly a professor at Stanford Law School. Next, there are four "Commentaries", by Harlan M. Blake of the Columbia University School of Law, Yale Brozen of the University of Chicago School of Business, Kenneth W. Dam of the University of Chicago Law School, and Oliver Williamson, professor of economics and law at the University of Pennsylvania. Finally, there is a transcription of a discussion between all of those giving papers plus the other eighteen participants in the seminar, including almost equal numbers of economists and law professors.

One of the fortuitously timely features of the *Political Economy of Antitrust* is that the presenter of the principal paper, William F. Baxter, is the newly appointed chief of the Antitrust Division of the United States Department of Justice. Practitioners and theorists who may be concerned about the future policy development of American anti-trust enforcement will therefore be glad of the opportunity to read

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¹ P. iv.
about Mr. Baxter's views on the subject, both in the paper and throughout the ensuing discussion. Likewise, they will study with great care the criticisms of his legal and economic colleagues.

In this context, it is interesting to note that in anticipation of Mr. Baxter's appointment, there had been some speculation that during his administration anti-trust efforts would be "reined in" because of his general reputation for being critical of the current law, and because of his testimony opposing two recent Senate antimerger bills. Nevertheless, once appointed, Mr. Baxter's first move was to reject the Carter Administration's tentative settlement of an important prosecution of the communications giant American Telegraph & Telephone. Over the objections of the Defense Department, he surprised everyone by declaring that "he would litigate it to the eyeballs." On the other hand, in a recent interview, he stated that through lawsuits, he would like to reverse precedents prohibiting some "vertical" arrangements between non-competing companies, and that he would like to repeal the Robinson-Patman Act barring companies from giving lower prices to larger customers.

A second reason why this book is particularly useful and timely is its recently increased relevance in the Canadian context. There are two aspects of this Canadian connection, one domestic and the other international.

First, for the past several years, the Canadian government has been on the verge of strengthening our own anti-trust laws, while various complaints by the business community have been effective in preventing any legislative action. Instead, we have experienced a study of Canadian corporate concentration, possible evidence of the importance of anti-monopoly laws in the Redpath Sugar and Irving newspaper cases, and cries of alarm at the number of mergers and acquisitions in the department store industry. Furthermore, increasing anxieties about actions by newspaper chains have led to the Royal Commission inquiry, and on May 1st, 1981 the Southam and Thomp-
son newspaper companies were charged with conspiring to unduly lessen competition as well as with unlawfully merging and monopolizing the production and sale of major daily English language newspapers in four Canadian cities. Last, but not least, only two months previously, Robert Bertrand, the former director of investigation and research under the Anti-Combines Act released an explosive exposé of allegedly anti-competitive activities by large multi-national oil companies in Canada. Because the anti-combines legislation was perceived to be ineffective, instead of pressing criminal charges, Mr. Bertrand has referred the case to The Restrictive Trade Practices Commission for public hearings. At the same time, Consumer and Corporate Affairs Minister André Ouellet has announced once again that revisions to our anti-combines legislation are imminent and has distributed a discussion paper to businesses for comment.

It is to be hoped that in preparation for these new Canadian proposals, careful consideration be given to the complex problems which have arisen in American anti-trust enforcement, problems which are addressed in the book under review. Lack of space precludes a detailed analysis of the broad range of issues explored and the variety of opinions expressed. However, it should be stated that both the theories underlying anti-trust policies and the practice of enforcement have never been more controversial. Furthermore, as several of the participants in the seminar have pointed out, the law in this area is highly uncertain, largely because of considerable changes which have taken place in the wake of recent academic debate.

Following the great new upsurge of interest in economics and in the application of economic theory to legal relations, lawyers and economists alike have examined anti-trust law from the point of view of economic efficiency. It is claimed by some of these "experts" that often the application of competition laws are counter-productive because they do not promote efficiency in business operations, and interfere with market processes, thereby preventing the optimum allocation of scarce resources. In response to problems encountered by judges with little economic experience, special courses have been designed to introduce them to the mysteries of The Chicago School of micro-economic theory. Thus indoctrinated with price theory and

9 In May 1981, Mr. Bertrand was moved to a new position as chairman of the Anti-Dumping Tribunal. A number of people have claimed that he was "fired" because of his strong stand against restrictive business practices. See newspaper reports of May 20th and several days following.

10 The State of Competition in the Canadian Petroleum Industry, Department of Consumer and Corporate Affairs (1978).

11 Globe & Mail, May 16th, 1981.

12 P. 111.
arguments of economic efficiency, judges are now using these concepts in their decisions. Adding to the importance of the economic factor in anti-trust law enforcement, have been increases in the size and quality of economic staff in the Antitrust Division of the Department of Justice, as well as in The Federal Trade Commission.

Generally, this new economic consciousness has led to more sophisticated analyses of the advantages and disadvantages of applying competition laws to a particular case. Increasingly, American judges seem reluctant to decide against a defendant where certain benefits are considered to result from a situation which would otherwise be prohibited by legislation. For those who do not believe in the current conventional economic wisdom, such developments are profoundly distressing. Fortunately for the reader, several differing points of view are available for his consideration in the papers and discussion of The Political Economy of Antitrust.

Professor Baxter's paper raises the basic question of the constituency for the anti-trust laws. Why do these laws exist? Who promoted their adoption? Who stands to gain from either their promulgation or their enforcement? Are they effective? Unfortunately, the greater part of Professor Baxter's exposition demonstrates the extreme difficulty, if not impossibility, of answering these questions by using the types of limited statistical data which he has considered.

Some of the commentators suggest that their colleague has come to a dead end because the issues in anti-trust law cannot be analyzed in quantifiable terms. Moreover, the problems are perhaps more political than economic in the first place. After almost a century of anti-trust activity, it is still not clear whether the purpose of the law is to foster competition at any cost as a kind of ideological principle, or to benefit the public by protecting it from exploitation by monopolies or oligopolies which may produce a limited range of shoddy goods or services at criminally inflated prices. Neither the legislators nor the courts have yet come down unequivocally on the side of one theory or the other.13

Following naturally from the fundamental issue of why one should have an anti-trust law, are many related questions on both theory and practice; such as, are the laws enforced in a manner consistent with their purpose (whatever that may be), how should they be enforced? Is there a more efficient means of achieving the same end? Are the anti-trust laws merely symbolic, designed to persuade the public that it is being protected, or as a kind of signal that the government is concerned about competition? All these matters and

many more are touched upon in the papers and in the discussion presented in *The Political Economy of Antitrust*. For readers interested in specific issues, the final part of the book is divided into conveniently labelled separate topics, including: Economic Aspects of Antitrust, Public-Choice Aspects of Antitrust, Antitrust as a substitute for Socialism, The Private Bar and Antitrust Policy, and so forth.

The second way in which American anti-trust laws are important to Canadians is in their extraterritorial application. The transnational reach of domestic American law has quite often affected business activities in this country. In a wide variety of cases such as the notorious Uranium Cartel litigation,14 American entities or persons situated abroad are subject to United States anti-trust laws (as well as to other domestic law), where their "foreign" activities have an effect or impact upon American commerce.15 As a result of this "overreaching", Canadian individuals and companies having some connection with the United States market must not fall afoul of American competition laws.

Unfortunately, neither the papers nor the discussion expressly address the subject of extraterritorial jurisdiction. Furthermore, the international aspects of the problem of controlling restrictive business practices are barely mentioned. Even the discussion of "Comparisons with Other Countries" is only one page and one half long. This brevity is particularly surprising, since one of the commentators, Harlan M. Blake, was for five years director of the European Common Market anti-trust project. Many other states such as Japan, Australia and West Germany all have their own antitrust legislation. In the Treaty of Rome, the "Constitution" of the European Economic Community, there are several articles which deal with the problems of monopolization and anticompetitive activities of European corporations. To date, a considerable body of regulations, administrative practices, and jurisprudence has developed and refined the basic provisions of the Treaty. Perhaps if Americans examined closely the experience of other jurisdictions with their wide variety of policies and practices, they might find different or even better answers to questions about their own laws.

As for the problem of extraterritoriality, in a world of ever multiplying transnational corporations and always increasing int-

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15 For a Canadian political science point of view, see David Leyton-Brown, Extraterritoriality in Canadian-American Relations, in The Canada-United States relationship (1980-81), 36 Int. J. 185. For the opinion of the former chief of the Foreign Commerce Section of the Antitrust Division of the Department of Justice, see Mr. D. Rosenthal's testimony before the Senate Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce on June 26th, 1980.
international trade, it is inevitable that jurisdiction over restrictive business practices should overlap between host and home countries.

As claims of governments attempting to control these corporations continue to collide, some states have taken drastic legislative action to protect companies operating within their territory from outside interference. In Canada, for example, a bill has been introduced into Parliament descriptively titled,

An Act to authorize the making of orders relating to the production of records and the giving of information for the purposes of proceedings in foreign tribunals and in respect of the recognition and enforcement in Canada of certain foreign judgments obtained in antitrust proceedings.16

It would seem that building legislative barriers to the American antitrust onslaught is a band-aid type solution to a complex problem of international magnitude. However, there is an alternative. In various international bodies within the United Nations and among the highly developed nations which are members of the O.E.C.D., studies have been done on restrictive business practices and on ways to control them.17 In mentioning the international aspects of the anti-trust problem, I am exposing a certain narrow-mindedness in the book under review. Instead of merely focussing on their domestic situation, the participants in the seminar should have considered the international scope of their subject.

Before rushing into a new competition law, let us learn a few lessons from the American experience. Let us place the problem in a dynamic international setting, and let us consider all its complexities with the understanding that there are no easy answers to multi-faceted problems. The Political Economy of Antitrust is a thought-provoking book which should help us in our quest.

L. de La Fayette*

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In my review of the first two volumes of Wetter's International Arbitral Process I pointed out that this work promised to be "one of the most useful and comprehensive works on every aspect of arbitration that has ever been published", and the three volumes that have recently become available justify that prognosis. More than half of volume 3 is devoted to an account of the 1899 Venezuela Boundary Arbitration between Venezuela and the United Kingdom affecting Guyana. In addition to the account of the proceedings and the relevant documents, the learned editor has provided an assessment of the significance of the hearing for the development of international arbitration, emphasizing its characteristics in the light of the general comments made in the chapters to be found in the first two volumes. The remainder of this volume is directed to an account of the standards of independence and impartiality of arbitral tribunals, using as an instance of disruptive conduct the 1955 Buraimi Oasis case between the United Kingdom and Saudi Arabia, appending an extract from a paper in the Annuaire Français on the legality of being judge in one's own cause, which was the position of the Saudi member of the tribunal and which led to the withdrawal of the British member and the breakdown of the proceedings. This report should be read in the light of the statement on "Setting Aside Arbitration Award on Ground of Interest or Bias of Arbitrators", reprinted from volume 56 of American Law Reports; Cases and Annotations. The final chapter in the volume is concerned with arbitration between East and West and consists of part of an address delivered by the author in 1978 concerning the U.S.-U.S.S.R. Optional Clause Agreement, the execution of which is under the supervision of the Stockholm Chamber of Commerce, while the second part of the chapter reproduces the text of the agreement.

Volume 4 is concerned with autonomy and subordination as between arbitral tribunals and the courts, using the situation in Sweden and England to explain the difference and citing the Canadian decision in The Angelos Raphael as an instance of the application of the English approach by a non-United Kingdom court. This is followed by a chapter devoted to an analysis of cases decided between 1967 and 1978 by the Federal Court of Switzerland and in Zurich under the 1976 Zurich Arbitration Law. Perhaps logically, this account of Swiss practice is followed by chapters analysing the posi-

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tion under the United States, English, Swedish and Swiss law, together with the European Convention providing a Uniform Law on Arbitration, 1966. The final chapter of volume 4 runs into volume 5 and concerns international arbitration rules as exemplified by, for example, the rules adopted by the United Nations Commission on International Trade Law (UNCI TRAL) in 1976, the rules of the World Bank's Centre for Settlement of International Investment Disputes, the Permanent Court of Arbitration, the American Arbitration Association, the International Chamber of Commerce, the London Arbitration Chamber and others, including the Statute on the Foreign Trade Arbitration Commission at the U.S.S.R. Chamber of Commerce and Industry and Rules of Procedure, 1975. Perhaps here one might give expression to a minor regret concerning the omission of any discussion of the Lena Goldfields arbitration, 1930.


At the beginning of this review attention was drawn to the promise held out when volume 1 of The International Arbitral Process was published. Now that the whole work is available, one can say with safety that practitioners faced with any issue of arbitration across national legal frontiers will ignore Wetter solely at their own risk.

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