Book Reviews

Chronique bibliographique

The Law of Banking. Third Edition. By IAN F. G. BAXTER. Toronto: The Carswell Co. Ltd. 1981. Pp. xi, 568. ($67.50)

The first edition of the book was published in 1956. It was "intended to be a text on the law of banking written around the Canadian Bank Act".[1] The second edition came out in 1968 and expanded the coverage of the book to include chapters on the law of negotiable instruments and recent developments in provincial law governing secured transactions. The third edition, the subject matter of this review, is designed "to give greater emphasis to international banking and to introduce material on the 1980 Bank Act".[2] It does not include materials on provincial law governing secured transactions.

The book consists of 236 pages of text, and a 332 page statutory appendix. The text is divided into five parts. Part A deals with private law aspects of bank-customer relations. It discusses the contractual and quasi-contractual elements of this relationship and the general nature of bank accounts. Part B, titled "Negotiable Instruments", outlines the law under the Bills of Exchange Act.[3] It first deals with the historical origins and modern functions of commercial paper, as well as with commercial paper's essential elements and the fundamental rules applicable to it. Subsequently, the author discusses the specific rules applicable to cheques, promissory notes, and bills of exchange. Part C deals with international transactions. It discusses conflict of laws questions under the Bills of Exchange Act, outlines major private law aspects pertaining to the financing and payment of export-import transactions, and concludes with an account of eurocurrency transactions.

The last two parts of the text are centered around some aspects of the new Bank Act.[4] Part D, is titled "Banks and Banking Law Revision Act, 1980". It outlines the components of this omnibus

[1] The Law of Banking and the Canadian Bank Act (1956), preface.

[2] See preface to the third edition.

[3] R.S.C., 1970, c. B-5 (as am.).

[4] Part I of Banks and Banking Law Revision Act, S.C., 1980, c. C-40.

statute, of which the Bank Act is Part I, and then gives an overview of the Bank Act. Subsequently, it deals with the licensing of foreign banks in Canada, in conjunction with extensive comparative comments on foreign banks in the United States, the United Kingdom, Japan, Hong Kong, West Germany and the Netherlands. Finally the author deals with the business powers of a bank. He first singles out the more contentious issues of financing leases and accounts factoring, and then deals with banking business in general, with particular emphasis on powers in relation to opening branches, dealing with negotiable instruments and documents of title, giving unsecured loans, dealing with capital stock, providing data processing services, giving inside loans, and dealing with investments and securities. Part E discusses securities for advances. Specifically it is concerned with the provisions of the Bank Act relating to the use of property as collateral security for advances, and with the law relating to personal securities or guarantees.

The text is followed by a lengthy appendix containing the Bank Act (but not the entire Banks and Banking Law Revision Act, 1980 as may be inferred from the Contents), The Bills of Exchange Act, the International Chamber of Commerce Uniform Customs and Practice for Documentary Credits, and the International Chamber of Commerce Rules for Collections.

The book covers much the same material as current editions of classic United Kingdom banking law textbooks.[5] As claimed by the author, "[t]he purpose of this book . . . is to provide a text dealing with important typical operations in the conduct of retail and wholesale banking".[6] Accordingly, the author found it to be inappropriate "to include an analysis of all the law relating to the internal corporate management and governmental regulation of banks".[7] However, some aspects of this excluded category are discussed. There is a substantial discussion on foreign banks in Canada[8] as well as some reference to the conversion of financial institutions and the establishment of the Canadian Payments Association.[9] The book does not discuss constitutional issues relating to the regulation of banking transactions.

Some aspects of "retail and wholesale banking" have been left out. The book does not cover provincial legislation applicable to transactions carried on by banks, as for example statutes governing

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[5] See *e.g.*, Paget's Law of Banking (8th ed. 1972, by Megrah and Ryder); Lord Chorley, Law of Banking (6th ed., 1972, assisted by J.M. Holden).

[6] P. 170.

[7] *Ibid.*

[8] Ch. 10, Part I.

[9] Both topics are dealt with at pp. 173-174.

secured transactions. Nor does the author deal with the interaction between provincial law applicable to banking transactions and the Bank Act.[10] Likewise, the book does not deal with credit cards, electronic funds transfers, or in general with issues raised by recent technological developments or the "electronic revolution" in payment mechanisms. Nor does the author discuss the validity or usefulness of the concept of "banking" in an era of emerging wide range "financial services" provided by non-banks. Coverage is thus limited to common law principles governing bank-customer relationship and federal legislation. However, some relevant aspects of federal legislation are not dealt with. For example, the author does not discuss provisions governing interest and charges included in the Bank Act[11] and other statutes.[12]

To sum up: the book deals with major aspects of the common law and federal legislation governing banking transactions in Canada. Since "banking law" is too vast an area to be covered in a short textbook, it is understandable that the author had to be selective in picking up the various topics. As demonstrated, his choice is underlined by a common theme and as such is basically defensible.

Generally speaking, the book is not written from a critical or even analytical standpoint. Purporting to state, describe, and explain the law,[13] the author seems to put greater emphasis on rules than on principles. Perhaps he is too faithful to this approach, as he frequently avoids extrapolations or abstractions. For example, he outlines the rules governing the rights of parties to a letter of credit,[14] but does not introduce the concept of "the autonomy of the letter of credit". He deals with rights under guarantee arrangements,[15] but does not discuss the basic relationship between the guarantor's undertaking and that of the principal debtor. Such an analysis could provide an answer to the question of whether the principal debtor's defences benefit the

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[10] See *e.g.*, *Rogerson Lumber Co. Ltd* v. *Four Seasons Chalet Ltd* (1981), 29 O.R. (2d) 193 (C.A.), dealing with the interaction between the Bank Act and the Ontario Personal Property Security Act, R.S.O., 1980, c. 375.

[11] Ss 201-204.

[12] See *e.g.*, Interest Act, R.S.C., 1970, c. I-18.

[13] Occasionally this approach might not be entirely helpful. See *e.g.*, the analysis of s. 165(3) of the Bills of Exchange Act, p. 77. While the author's reading of the provision is consistent with its literal meaning, such reading disregards the historical background for enacting of the section, and the function it was designed to fulfil, as explained by Falconbridge, On Banking and Bills of Exchange (7th ed., 1969, by Rogers), p. 860. See also the detailed account of Scott, The Bank is Always Right: Section 165(3) of the Bills of Exchange Act and its Curious Parliamentary History (1973), 19 McGill L.J. 78.

[14] In Ch. 7.

[15] In Ch. 14.

guarantor. It could also explain the difference between a letter of credit and a guarantee.

Occasionally the author introduces a functional analysis into the discussion. For example, he explains the different functions of various negotiable instruments[16] or the use of a financing lease as a credit extention device.[17] Also, on some points the author adopts a critical attitude. For example, there is a subtle criticism of the rules pertaining to the fictitious payee under section 21(5) of the Bills of Exchange Act.[18] The author is also dissatisfied with transporting the "arms length" test into Part V of the Bills of Exchange Act.[19] He is also critical of the lack of a theoretical basis for the liability of an issuer of a letter of credit.[20] He further criticizes the treatment of foreign banks under the Bank Act,[21] and persists with his criticism on the allocation of forgery losses under the Bills of Exchange Act.[22] These examples and others are exceptions to the basic presentation which is a concise account of the principal legal features of the subjects presented.

The organization of the book is coherent and logical, but unfortunately not without problems. For example, it is logical to separate the bank-customer relations materials from the negotiable instruments chapters, and to insert the former prior to the latter, as was done by the author. Yet many of the issues raised in conjunction with the bank-customer relations subject, arise in situations involving the use of cheques. This applies to topics like certification of cheques, the bank's duty to honour cheques, payment of money by mistake, and estoppel in relation to payment by mistake. All these topics are presented in Chapter 1, before the discussion on negotiable instruments. This seems to be a premature presentation of such topics.

The book is not detailed enough to be a treatise. Nor is it an introductory text on the subject matter. Its language is terse, to the point of being not infrequently cryptic. Beginners might find the discussion somewhat difficult to follow. An obvious exception is Chapter 8 dealing with eurotransactions. This is an excellent descriptive chapter giving the essentials of a subject entirely unknown to most lawyers. The emphasis of this chapter is however on the mechanism of the market and not on the legal questions arising in the course of the market's operation.

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[16] Pp. 61, 104.

[17] P. 187.

[18] See his reference to the "metaphysical learning" on the subject at p. 70.

[19] P. 109.

[20] P. 152.

[21] P. 177.

[22] Pp. 76-78.

In the final analysis the book serves as: (a) an introductory text on major aspects of the Bank Act, a lengthy and intimidating piece of legislation; (b) a concise account of principal features of common law and federal statutes governing basic banking transactions; and (c) a reference book containing leads and directions for further and deeper research. In these three respects the book is a contribution to practitioners' libraries.

BENJAMIN GEVA*

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Contracts. By WARREN H. O. MUELLER. Toronto: Carswell. 1981. Pp. 483. ($55.00)

Notwithstanding its declaratory title *Contracts*, this book is not a new study of that subject. It is in fact a bound edition of the contracts title of the *Canadian Encyclopedic Digest*. In publishing a separate volume, Mr. Mueller has set himself two objectives. First, the text is "specifically designed to capsulize and integrate all the available decisions of any given area so as to provide a basic statement of governing legal principles".[1] Second, to "reference almost all Canadian contract cases, both old and recent, as well as many English and some Commonwealth and other decisions".[2] In pursuing these objectives the author hopes to fulfil the needs of busy practitioners and memorandum writers who require "a quick appreciation of general principles" and "a compendious listing of all cases that may be available on any given topic".[3]

The text's listing of cases is certainly large. The table of cases runs to one hundred and two pages occupying over one fifth of the book's size. Each case is clearly entered with all relevant, including alternative citations. The hierarchy of the court from which the decision emanated is also normally given. In the body of the text the cases accompanied by keywords highlighting the factual issues disclosed by the case are footnoted at the conclusion of each paragraph. While one cannot fault the treatment of Canadian cases there are a number of Commonwealth authorities whose omission goes beyond what I believe to be editorially required. For instance, the treatment on classification of contractual terms makes no mention of *Hongkong Fir*

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[1] Preface.

[2] *Ibid.*

[3] *Ibid.*

Shipping Co. Ltd v. *Kawasaki Kisen Kaisha Ltd.*[4] Under mutual mistake there is no reference to *McRae* v. *Commonwealth Disposal Commission.*[5] Under the title "Time of Performance", *United Scientific Holdings Ltd* v. *Burnley Borough Council*[6] has not been indexed, and under "Damages and Equitable Remedies" the omission of *Johnson* v. *Agnew*[7] has led the author into stating a substantive error of law.

If this text was exclusively a compendium of cases one would have to question the suitability of this format to that task. Most practitioners find readily accessible case material through one of the encyclopedic digest or abridgment services. Those services provide both up to date reporting as well as the precedent weight to be accorded to each case. This text would then appear to be duplicating those services through a medium, that is, a textbook, which without constant revision will quickly go out of date. One concludes with respect to Mr. Mueller's second objective that the book will be of limited value.

However, the primary objective is to provide a basic statement of governing principles. At the outset one must admire Mr. Mueller for undertaking such a courageous task in an area where there are a number of competing texts, albeit that their focus may be directed to an academic audience rather than practitioner orientated. The book's structure is similar to others in this area, commencing with offer and acceptance, consideration, working through to performance, discharge and concluding with assignment and novation. The information is conveyed in a comprehensive, although at times truncated, manner. Each paragraph introduces a separate legal proposition supported by detailed footnotes. Unfortunately, there are brief moments when clarity is supplanted by obscurity. For instance, paragraph 216 devoted to "Promises forming part of the consideration for comprehensive contracts" states:

> It is often a difficult question of construction to determine whether an ancillary promise or commitment contained in a comprehensive contractual document is part of the total consideration being given in exchange for the opposite party's undertaking or whether the additional promise is so unconnected with the basic transaction as to require additional consideration to support it.

What exactly is defined by the terms "commitment" and "comprehensive contracts" in orthodox contract terminology? The cases footnoted to support this wide proposition really only raise the question whether an option, which is collateral to a contract, is supported

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[4] [1962] 2 Q.B. 26 (C.A.).

[5] (1950), 84 C.L.R. 377 (Aust. H.C.).

[6] [1978] A.C. 904 (H.L.).

[7] [1980] A.C. 367 (H.L.) and see discussion *infra*.

by the same consideration such that it is irrevocable, or does it require independent consideration which, if absent results in the option remaining revocable.

In other parts of the book minor errors have crept into the text. For example, in paragraph 53, footnote 25, *Jackson* v. *Horizon Holidays*[8] is cited concerning the right to recover damages suffered by third parties to a contract. That authority for this particular proposition has been disapproved by the House of Lords in *Woodar Investment Development Ltd* v. *Wimpey Construction (UK) Ltd.*[9]

An error of a more serious nature arises in paragraph 784 concerning damages and equitable remedies. There it is stated: "once an election has been made for specific performance, the plaintiff cannot re-elect for damages if the opposite party fails to comply with the court's initial order." Authority for the statement cited is *Capital and Suburban Properties Ltd* v. *Swycher.*[10] However, that authority has been overruled by the House of Lords in *Johnson* v. *Agnew*[11] as adopted in *Ontario Ltd* v. *Rimes.*[12] The essence of the availability of specific performance lies in the fact that the plaintiff by seeking specific enforcement of the contract is refusing to accept the defendant's repudiation. The contract remains on foot until such time as it is impossible for the plaintiff to gain specific performance, that is third party rights may have intervened, or where the plaintiff accepts the defendant's continued failure to perform in violation of a specific performance decree as a repudiation of the contract and requests the court to bring the contract to an end.[13] At either stage an action for damages will arise. For similar reasons paragraph 749 contains an error.

In his preface, Mr. Mueller specifically identifies the "circumscribing of the doctrine of fundamental breach" and its effects on exclusion clauses as being one of the principal developments in recent years. However, the discussion of this area in the text, at paragraphs 771-776, largely avoids the issues. *Suisse Atlantique Société D'Armement Maritime S.A.* v. *N. V. Rotterdamsche Kolen Centrale,*[14] *Photo Production Ltd* v. *Securicor Transport Ltd*[15] and

[8] [1975] 3 All E.R. 92 (C.A.).

[9] [1980] 1 W.L.R. 277.

[10] [1976] 1 All E.R. 881 (C.A.).

[11] *Supra,* footnote 7.

[12] (1979), 25 O.R. (2d) 79.

[13] See M. Hetherington: Keeping the Plaintiff Out of His Contractual Remedies, the Heresies that Survive *Johnson* v. *Agnew* (1980), 96 L.Q. Rev. 403 who questions whether it is necessary for the plaintiff to seek the court's assistance to discharge the contract when a specific performance decree has been unsuccessful.

[14] [1967] 1 A.C. 361 (H.L.).

[15] [1980] A.C. 827 (H.L.).

Chomedy Aluminum Co. v. *Belcourt Construction (Ottawa) Ltd*[16] (decision affirmed in the Supreme Court of Canada[17] applying *Photo Production*[18]), all support a "rule of construction" approach to exculpatory clauses whereby the clause operates to qualify the parties respective primary and secondary obligations.[19] The concept that the effect of exculpatory clauses turns upon "rules of construction" rather than designating a breach as being "fundamental" appears to be lost in the text.

These criticisms may appear unduly critical and harsh. However, they are motivated by a belief that a book which purports to present "basic statements of governing legal principles" cannot sacrifice accuracy if it is at all to be authoritatively relied upon by those who use it. One concludes with respect to Mr. Mueller's first objective that it is not totally fulfilled.

Mr. Mueller is to be commended for his work in compiling the "Contracts" section of the *Canadian Encyclopedic Digest*. The transition to a text of the same material may not have been a happy one when considering the objectives Mr. Mueller set himself. When contemplating the purchase of this book practitioners will need to seriously consider whether it will assist them to a greater degree than other recognized Canadian contract texts.

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Interprovincial Product Liability Litigation: Jurisdiction Enforcement and Choice of Law. By ROBERT J. SHARPE. Ottawa: Consumer Research and Evaluation Branch, Consumer and Corporate Affairs Canada. 1981. Pp. 236. (No Price Given)

Perhaps the first thing to strike one about this study is that while it delves into products liability, an area of provincial jurisdiction, it was commissioned by Consumer and Corporate Affairs Canada. The national perspective is clearly called for.

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[16] (1979), 24 O.R. (2d) 1 (C.A.).

[17] (1980), 33 N.R. 460 (S.C.C.).

[18] *Supra*, footnote 15.

[19] It may still be debatable whether there is a residual ground for the operation of a rule of law approach. See Wilson J.A. in *Chomedy Aluminum Co.* v. *Belcourt Construction Ltd, supra*, footnote 16, at p. 7.

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"In the context of products liability litigation there can be little doubt that the policy of the substantive law over the past 50 to 60 years has moved steadily and unrelentingly in the direction of greater protection for consumers."[1] In this work Professor Sharpe clearly reveals that this progress can be undermined by jurisdictional issues that arise in our federal system. In a probing analysis the author examines the various provincial rules relating to service *ex juris*, recognition of extra-provincial judgments and choice of law in both tort and contract. The external perspective provided by the national study serves to demonstrate that the present habit that provinces have of claiming wider jurisdiction than they are prepared to accord to their sister provinces is destructive of their mutual goal of increasing consumer protection.

Confirming that interprovincial conflicts rules are inadequate and accounting for the cause of that inadequacy does not however constitute a major contribution to the field. This study's contribution lies in the fact that it is a concise, ambitious and imaginative treatment of a procedural area that is failing to serve substantive policies.

The importance of the work is primarily in the persuasive recommendations made. The author's suggestions concerning choice of law rules in products liability cases are particularly strong and lucidly presented.

In tort actions the suggestion is made that the plaintiff be given the right to select the governing law. To avoid unfairness to the defendant, the selection could be challenged if the jurisdiction chosen is not one that the defendant should have foreseen as a legal system of potential liability.[2]

Standing in isolation the rule looks unsatisfactory. It contravenes our usual notion that a particular legal system can be objectively determined as the appropriate one. When read in the context of Professor Sharpe's presentation however, the suggestion is convincing and appealing. He demonstrates how such a rule would reflect provincial interests and policies. When seen against the backdrop of the pro-plaintiff direction that the substantive law is taking the logic in the suggestion becomes apparent.

Professor Sharpe also makes the same suggestion with respect to certain contract actions.[3] He advocates that "consumer purchases" and "commercial transactions" should be treated differently. In consumer transactions the prospect of a true negotiation of terms is somewhat fanciful. Standard forms and inequality of bargaining make

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[1] P. 5.

[2] Pp. 157-160.

[3] Pp. 170-171.

it fair to ignore the proper law of the contract and to permit the plaintiff to choose the governing law.

He offers the "consumer purchase" definition employed in the United Kingdom Supply of Goods (Implied Terms) Act 1973[4] as a possible criteria for identifying such transactions. That choice may however, leave some plaintiffs, who we might wish to see covered, without the advantage of the rule. An example of an excluded plaintiff would be a carpenter who purchases an electric drill to be used in connection with his business.

According to the proposal, the present rule of the "proper law of the contract" could govern "commercial transactions". The author suggests that it operates satisfactorily in commercial situations.[5] He indicates that a strong argument can be made to demonstrate that the proper law of the contract should be the rules of the purchaser's province.[6] Unfortunately we are not told what that argument is.

The author advocates that one overriding principle be employed to cover both service out of jurisdiction rules and recognition of foreign judgment issues. If in light of all the circumstances it is more reasonable to require the plaintiff to go to the defendant's province to prosecute, jurisdiction should be claimed by the plaintiff's province and the defendant's province should, in turn, recognize the judgment.[7]

The principle does not seem to give rise to a functional test. We are however given specific criteria for evaluating reasonableness. The criteria is admitted by the author to be pro-plaintiff but this accommodates the movement towards making manufacturers bear the loss. At all times the rationales underlying the criteria are clear and defensible.

Professor Sharpe's work is highly successful in its description of the present law. Although the author's commission was to examine the area to detect specific problems and to make recommendations, the thoroughness of the work comes very close to making it a useful general guide to the present law in the area. This is particularly so in the areas of jurisdiction and recognition of judgments. Specific difficulties in the work are so few that they can be easily listed.

The author frequently refers to the doctrine of *forum non conveniens*. It is not adequately discussed. What factors will be taken into

[4] C. 13.

[5] P. 171.

[6] P. 169. Professor Sharpe actually uses the term "consumer" rather than the term "purchaser". I have taken license to redescribe the "consumer" to prevent confusion with the particularized "consumer" definition employed to distinguish commercial and consumer transactions.

[7] Pp. 123-124.

account by a court that is faced with this plea? Precisely what is the present role of the doctrine in Canadian law? Under existing provincial legislation there are situations where "leave" is not required to serve out of the jurisdiction. The issue of *forum non conveniens* will only be raised when a defendant attempts to "stay" proceedings. In *The Atlantic Star*,[8] the House of Lords denied that the doctrine was part of the English common law with respect to the staying of actions. While we are told of a reluctance by Justice Jones in the case of *Benedict et al.* v. *Anterofermo*[9] to consider a *forum non conveniens* argument,[10] the case is not discussed nor does the author mention *The Atlantic Star* and its impact on Canadian law.

A more detailed discussion of the process of characterizing actions would have added to the piece.

One of the most encouraging aspects of the work is that the law reform efforts are not directed solely at legislators. Professor Sharpe, undoubtedly appreciative of the slow process of legislative change and of his added handicap, namely that legislative change would be required by governments other than the one which commissioned the study, seems to direct much of his work at the courts. His analysis of *Moran* v. *Pyle*[11] paints the decision as an enthusiastic one ripe for judicial extension. He suggests that *Henry* v. *Geoprosco International Limited*,[12] could be utilized to increase the jurisdiction of the plaintiff's chosen court.[13] The entire work seems to appreciate that judges might well need a "leg up" to mount the unruly horse of judicial reform and he provides persuasive arguments for their use.

It is unfortunate that the same approach was not taken with respect to *Boys* v. *Chaplin*.[14] Much of the uncertainty with the tort choice of law rule in *Phillips* v. *Eyre*[15] that Professor Sharpe refers to[16] is caused by *Boys* v. *Chaplin*. The author does not explore the judgments although the case can be given a pro-plaintiff interpretation which may assist the courts in increasing manufacturer's liability.

Professor Sharpe gives the case its most narrow interpretation. He concludes that "three of the five members of the Lords expressly

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[8] [1974] A.C. 346 (H.L.).

[9] (1975), 60 D.L.R. (3d) 469 (N.S.S.C.T.D.).

[10] P. 15.

[11] Pp. 30-32.

[12] [1976] Q.B. 726 (C.A.).

[13] Pp. 87-90.

[14] [1971] A.C. 356 (H.L.).

[15] (1870), L.R. 6 Q.B. 1 (Ex. Ch.).

[16] P. 137.

overruled *Machado* v. *Fontes*[17] and interpreted the *Phillips* v. *Eyre* rule to require double actionability''.[18] He interprets that double actionability to mean that the plaintiff can only succeed insofar as both the forum and the place of the tort grant concurrent or mutual relief.[19] In fact, only two of the Lords took that approach. Lord Guest does employ ''double actionability'' but only as a jurisdictional rule. Once actionability in the forum is established the entire law of the place of the tort would be applied. So understood, only two of the Lords endorse the pro-defendant interpretation that Professor Sharpe gives to the case.

Arguably, three members of the court endorsed a variant of the more flexible doctrine of the proper law of the tort. Lord Wilberforce and Lord Hodson each see a role for the doctrine. Lord Pearson also conceded a role for the doctrine however he did so only if *Machado* v. *Fontes* would not be followed. It was overruled. Hence, he can be counted as a proper law advocate.[20]

There are of course, serious problems in arguing that the proper law of the tort was adopted in as much as the three Lords perceived that doctrine quite differently. The analysis does however, provide room to argue for its continued viability, a fact that may work to the advantage of plaintiffs pending legislative reform.[21]

The copy of the work reviewed was a cardboard covered government style ''booklet'' printed by the Ministry of Supply and Services

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[17] [1897] 2 Q.B. 331 (C.A.). It was held in that case that to satisfy the double actionability test adopted in *Phillips* v. *Eyre*, it was only necessary that the cause be civilly actionable by the law of the forum and not ''justifiable'' by the law of the place of the tort. Any illegality in the *lex loci delicti*, whether it be civil, criminal or quasi criminal would satisfy the test and the law of the forum would be applied. The case represents the law in Canada: *McLean* v. *Pettigrew*, [1945] 2 D.L.R. 65 (S.C.C.).

Boys v. *Chaplin* did, as Professor Sharpe indicates, overrule *Machado* v. *Fontes* but only two of the Lords did so expressly. Lord Guest does so only implicitly as his judgment is entirely inconsistent with its perpetuation.

[18] P. 135.

[19] P. 137.

[20] It should be appreciated that Lord Pearson saw the proper law as a tool to limit forum shopping. He would only employ it to prevent a plaintiff from applying the law of the forum when some other law was more closely connected to the tort. Lord Wilberforce and Lord Hodson both saw the proper law as a tool to increase the jurisdiction of the forum. Thus the unity in the three judgments is quite sparse.

[21] Two English decisions have, to varying degrees, interpreted *Boys* v. *Chaplin* as a proper law of the tort case; Denning, L.J. in *Sayers* v. *International Drilling*, [1971] 1 W.L.R. 1176 (C.A.) and the decision of the *Church of Scientology of California* v. *Commissioner of Police for the Metropolis* (1976), 120 Sol. J. 690 (C.A.). See also, Collins, Comment (1977), 26 Int. Comp. L.Q. 480. In the latter case the doctrine was used as a subsidiary basis for refusing an order to strike a statement of claim as disclosing no cause of action on the ground that the suit was allegedly not actionable in the *lex loci delicti*.

Canada. While it is generally pedantic to point to specific typographical or printing errors, at one point such an error detracted from the clarity that characterized the work. The author attempted to criticize the habit of provinces claiming more jurisdiction than they recognized in others. The printed version of that sentiment reads as follows: "While it is argued that such self-regarding conduct should be condoned, as a practical matter, it must be recognized and dealt with."[22] It is only hoped that the issued edition of the work is free of such errors.

By way of further pedantry the work would have been more persuasive had we been consistently advised of the level of court that the author was citing.

In a foreword to the work Geoffrey A. Hiscocks, the Director of the Consumer Research Branch of Consumer and Corporate Affairs Canada, commented on the selection of Professor Sharpe and the mandate that he was given. He concluded that: "The result is a worthwhile and timely contribution to the continuing product liability law reform debate." I can only agree.

D. M. PACIOCCO*

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Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights. By W. R. CORNISH. London: Sweet & Maxwell. 1981. Pp. lxi, 630. ($82.25)

Professor Cornish describes his book as being for the "relative novice"[1]—not the complete newcomer to these legal areas, but not the expert either.

He brings to his task of presenting the law of intellectual property in only one volume an immense and detailed knowledge of all the areas of intellectual property but does not seem to discard any of it in the interests of streamlining. Rather, this learning is presented in the form of thickets of footnotes, many of the "omnibus" variety. Also, the format requires countless cross-references forward and back to parts of the book, since there is not space to develop over-lapping thoughts each time they apply. Finally, we do not get very much of

[22] P. 119.

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[1] P. ix.

Professor Cornish's own views since he is forced to refer briefly to the background, socio-economic policy, reasons for and attempts at reform, various views of other writers, as well as, of course, explaining the law itself.

The book is divided into five parts, a part each on "Common Ground", Patents, Confidence, Copyright and Trade Marks and Names. The Common Ground part considers the themes running through the areas of intellectual property and then the remedies available. Right away, the author makes it clear that he will be spending considerable time in placing the British law in the context of the European Economic Community, and states that a knowledge of European Economic Community structure is assumed.[2] For the Canadian reader the warning is clear. Parts of the book will be of no interest. This section though, is valuable for the explanation of why the Anglo-Canadian system has not developed an umbrella concept of unfair competition such as is found in other jurisdictions,[3] and the pros and cons of legal protection for intellectual property.[4]

The Part on Patents would, I think, be of least use to a Canadian. The new United Kingdom Patents Act 1977[5] renders patent law in the United Kingdom and Canada quite different. The United Kingdom law was passed with a view to European Economic Community interests. Practitioners might find value in Cornish's explanation of the European Patent office and the Patent Co-operation Treaty 1970, but for the more general reader, the mysteries remain. I can only add my endorsement to his final remark in Chapter 6 that the patent system ". . . is a game that only the highly professional can hope to play with much success."[6]

In contrast, Part III on Confidence, one of the allied rights, is a concise, readable explanation of this developing area.

I liked Part IV best, but then I have always found Copyright to be the most fun of all the subjects in intellectual property. Cornish's discussion of types of copyright works and their infringement is both lively and thorough. There is much here to attract the Canadian reader since our law remains close to that of Britain. Chapter 13 "Copyright: Particular Cases" is of great interest, dealing as it does with emerging problems such as those caused by the mushrooming home-recording device business, easy access to rapid and cheap photocopying and demands for a public lending right. This part also contains an explana-

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[2] P. 6.

[3] Pp. 8-13.

[4] Pp. 17-18.

[5] C. 37.

[6] P. 212.

tion of the British approach to industrial designs. I would advise a Canadian reader to skip this section. While Canadian industrial design law is far from perfect, understanding of it would only be further muddied by studying this section because the English have chosen to follow a different pathway.

The last Part, on Trade Marks and Names, is certainly not the least in the author's opinion. He says, "Trade marks and names have become nothing more nor less than the fundament of most marketplace competition".[7] He deals with the common law actions applicable to these aspects of intellectual property, namely passing-off and injurious falsehood. Cornish is marvellously clear in explaining passing-off. It is here that he addresses two questions of considerable interest: the recent House of Lords decision in the "*Advocaat*" case[8] and the law of misappropriation of personality.

As to the registered trade marks scheme in the United Kingdom, Canadians should approach it with caution. The Trade Marks Act[9] there is divided, peculiarly, into Part A and Part B trade marks with lesser protection being available to those in Part B. Our legislation does not contain this division, nor does it exclude service marks or distinguishing guise marks ("get-up") neither of which can be registered in Britain. Finally, Chapter 17, the last in the book on "Trade Marks and the EEC" would not interest the Canadian relative novice.

Professor Cornish has made a valiant and, I think, largely successful attempt to contain the law of intellectual property in one reasonably sized volume. He has done so at the cost of weighting the text with masses of footnotes and having little space for anything like an expansive explanation of what are, in places, difficult ideas. I am afraid I cannot recommend the book either to law students or general practitioners. There would be too much danger of a Canadian relative novice being misled. For Canadian experts (law teachers or specialist practitioners) however, the book would be a treat.

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[7] P. 460.

[8] *Erven Warnink* v. *Townend*, [1979] A.C. 731.

[9] 1938, c. 22.

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