

*Duff: A Life in the Law.* By DAVID RICARDO WILLIAMS. Vancouver: University of British Columbia Press, in association with the Osgoode Society. 1984. Pp. xii, 311. (\$34.95)

Sir Lyman Poore Duff was a judge of the Supreme Court of British Columbia for two years (1904-1906), and then of the Supreme Court of Canada for almost forty years (1906-1944), during the last eleven years of which he was the Chief Justice of Canada. It is surprising that a further forty years should have passed before the first biography of Duff was published. Finally, though, this has now been done by David Ricardo Williams, Q.C. of Duncan, British Columbia, a practicing lawyer of wide experience who now reveals himself to a national audience as a very fine research scholar and as a distinguished and lucid writer. This is an outstanding biography of an outstanding Canadian.

In his preface, Williams sets the stage for what is to come:<sup>1</sup>

Judges make law, and decisions handed down by the high courts often touch those who may be unaware of the process or its effects. Canadians need an understanding of how the court system operates in this country and how judges do their work. With that understanding, they can recognize the system's strengths and weaknesses, but above all, they will have seen that the law is close to the heart of any orderly society.

This is the theme of my book as it was the theme of Duff's life.

Accordingly, while not neglecting other sources, Williams examined all of the decisions in the almost two thousand law suits in which Duff participated as a judge, and in some of which of course he wrote the judgment. The truly important ones have found their way into the book, demonstrating how *this* judge did *his* work. It is not the function of a book review to rehearse all the details of the book. Suffice it is to say that, on the whole, this biography is carefully complete and chronological from the earliest years to the final days, with suitable pauses when the author gives his own perceptions and judgments on Duff's qualities and character, and on his accomplishments and shortcomings, both on and off the bench. One thing a reviewer should add, though, is a few glimpses and samples of what those who read the whole book for themselves will find.

<sup>1</sup> P. xi.

Among his judgments, perhaps Duff's constitutional decisions are of the greatest interest. In his day, this referred to the federal division of legislative powers in the British North America Act of 1867. By the time Duff joined the Supreme Court of Canada in 1906, the main lines of interpretation had been set in the Judicial Committee of the Privy Council by Sir Montague Smith and Lord Watson, to be elaborated later by Viscount Haldane. They emphasized the autonomy of the provinces and the careful limitation of the Federal Parliament's general and residual powers. Duff adopted the Privy Council line, but not simply because of a mechanical following of precedent. He was genuinely in sympathy with the Law Lords — he believed them to be right about this. Duff's history in his earlier years had made him very conscious of the vastness and the regionalism of Canada. He was born in small-town Ontario, the son of a Congregational minister, and moved with the family to Liverpool, Nova Scotia at the age of two, when his father responded to a call to the church there. Seven years later, the family returned to Ontario, but young Lyman never forgot those years by the sea. Back in Ontario, in due course he studied at the University of Toronto and Osgoode Hall, and was called to the Bar of Ontario on November 20, 1893. But the summer of 1894 found him on the Canadian Pacific Railway train for the Pacific Coast, where he successfully entered the practice of law in Victoria. Ten years later he was appointed by Sir Wilfred Laurier to the Supreme Court of British Columbia.

Not only had Duff travelled the country from coast to coast, but he was also fluent in French, and, after joining the Supreme Court of Canada in 1906, he made a careful study of the Civil Code of Quebec and sat on most appeals from that province. But there is more than this indirect evidence that Duff would not likely be Ottawa-centred in his constitutional outlook. The biographer discovered a handful of private letters from Duff to W.F. MacLean, a personal friend and Conservative Member of Parliament, and to Viscount Haldane, written in early 1925 and never before published. These letters were prompted by a debate in the Canadian House of Commons at the time of proposals for the abolition of appeals to the Judicial Committee of the Privy Council and the patriation of the Canadian constitution; and on the question of a Bill of Rights for Canada. As in 1980 and 1981, the necessity for provincial consents to patriation or a Bill of Rights, by virtue of constitutional law or convention, was hotly debated. In his letters to MacLean and Haldane, Duff clearly affirmed that in his view provincial consents were definitely required. Williams comments that Duff's position stemmed from inner belief, rather than from strict interpretation of the British North America Act. As Duff himself put it in one of his letters to MacLean, his own belief was in constitutional interpretation "in accordance with traditional British judicial methods that is, by really giving effect in a reasonable way to the intention of the constitutional instrument as manifested by the

language of it . . . ”.<sup>2</sup> Clearly that phrase “the intention of the constitutional instrument” let in Canada’s history and regionalism as influences on what was “manifested by the language of it”.

In this connection, two critical judgments by Duff late in his career might be mentioned. In *Reference Re Adoption Act*<sup>3</sup> in 1938, he affirmed the power of the provinces to establish specialized courts headed by provincially appointed judges or magistrates to try such things as certain family law matters and lesser criminal offences. On the other hand, he could and did uphold the powers of the Federal Parliament when he thought this was the proper meaning of the constitution. In 1939, in the *Privy Council Appeals Case*<sup>4</sup> in his court, he upheld the power of the Parliament of Canada, acting alone, to abolish appeals to the Judicial Committee without provincial consents. He did this by a liberal interpretation of section 101 of the British North America Act. Williams comments:<sup>5</sup>

For Duff, finally, Canadian sovereignty was incomplete if courts outside the country could make final rulings on national issues. As an act of patriotism, he would bring home the court of last resort. He knew what the decision ought to be; he set out to achieve it.

The war delayed consideration of the issue by the Judicial Committee itself, but in 1947 they affirmed the Supreme Court decision for the reasons Duff had given. This was three years after his retirement as Chief Justice of Canada. During the whole of Duff’s long tenure on the Supreme Court, that court had lived always in the shadow of the Judicial Committee of the Privy Council. But he did lay the foundation for this to be ended, which was done by amendments to the Supreme Court Act in the Parliament of Canada in 1949.

Nevertheless, for Duff the shadow of the Judicial Committee had not been all that heavy. The British Law Lords came to regard him highly, and for many years Duff sat regularly in London as a member of the Judicial Committee, in addition to his judicial duties in Canada. Occasionally, he sat on Canadian appeals that had reached the Judicial Committee directly from provincial Courts of Appeal in Canada. For example, Duff wrote the Privy Council judgment in the *Reciprocal Insurance Case*<sup>6</sup> in 1923. In all, the author tells us that, between 1919 and 1946, Duff sat on some eighty appeals to the Judicial Committee from all parts of the British Commonwealth and Empire, writing the judgments in about twelve of them. He knew and was respected by the leading British judges of this long period. He held his own among them.

One question about Duff as a judge begs for an answer. He was appointed to the Supreme Court of Canada in 1906, he was not made

<sup>2</sup> Pp. 126-127.

<sup>3</sup> [1938] S.C.R. 938, [1938] 3 D.L.R. 497, (1938), 71 C.C.C. 10.

<sup>4</sup> [1940] S.C.R. 49, [1940] 1 D.L.R. 289.

<sup>5</sup> P. 214.

<sup>6</sup> [1924] A.C. 328 (P.C.).

Chief Justice until 1933. Why did he not become Chief Justice sooner? David Williams gives the answers in full detail. Very briefly, in 1918, Sir Louis Davies, who was senior to Duff on the court, was appointed Chief Justice, though Duff thought he himself had some claim on the position. Prime Minister Borden heard of his disappointment, and, to give Duff some special recognition, had him appointed as an Imperial Privy Councillor. This opened the way for Duff to sit as a member of the Judicial Committee of that Council in London. Thereafter, he was the Right Honourable Lyman Poore Duff.

Sir Louis Davies died in 1924, so again the position was vacant. This time Duff was the senior judge available who was also young enough for the demands of the position. But Prime Minister King appointed Anglin J. instead. Mr. King recorded in his diary that this was because Duff was too heavy a drinker, which disqualified him for the top position. Duff did indeed have a bad problem of this kind, but Williams concludes that this was not King's real reason — that he had not told the truth to his diary. The real reason was that, at this time, Duff was *persona non grata* in Quebec. This was because, in 1917 and 1918, he had served as central appeal judge for the whole country under the Military Service Act of 1917, which provided for conscription for military service. In the course of these duties, Duff made some rulings, denying exemptions from military service, that were much resented in Quebec. 1924 was too close to 1918, Prime Minister King headed a minority government at the time and was not willing to risk his Quebec political support by appointing Duff as Chief Justice of Canada in these circumstances.

Chief Justice Anglin resigned for reasons of ill health in February 1933, and this time Duff was indeed the obvious choice as successor. 1918 was fading into the past. But his drinking problem had become worse. Duff's wife, to whom he was devoted, had died in 1926. To his disappointment at having missed the Chief Justiceship, loneliness was now added, and periodic excess drinking continued. To make a long story short, Duff's two spinster sisters, Emma and Annie, school teachers in Toronto, took him in hand. By 1932, Annie had moved into his Ottawa house and devoted herself entirely to her brother. He was terrible about personal finances and she was very good, so she took over that side of things. She banned liquor from the house and went everywhere with him socially. Prime Minister R.B. Bennett considered the appointment of Duff as Chief Justice to be obvious, provided his drinking was really under control. Bennett was well informed through mutual friends of Annie's heroic efforts, which had proven effective. Bennett thereupon appointed Duff as Chief Justice; but, as Williams remarks, it had been a near-run thing.

Not all of Duff's public service to Canada was performed as a judge. Several times he headed important Royal Commissions on critical issues. In 1916, in partnership with Chief Justice Meredith of Ontario, he investi-

gated certain munitions manufacturing scandals. In 1931, he was the chairman of a blue ribbon Royal Commission on Railways and Transportation in Canada. In 1942, Duff was appointed by MacKenzie King to conduct an enquiry into the Hong Kong affair, apparently well-founded allegations having been made that, before the Pearl Harbour disaster in 1941, untrained Canadian troops had been sent to Hong Kong, and, to make matters worse, sent without equipment they should have had. Duff did not distinguish himself as a Royal Commissioner to the same high degree that he achieved as a judge, especially in his Hong Kong report. Readers will find that David Williams covers all this with great care, assessing the evidence with the sure sense of an experienced barrister.

The book is written in a clear and lucid style, in spite of the difficulty of many of the issues being explained. In particular, readers without legal training need not fear that they will have trouble understanding. Williams avoids legal jargon and his story flows easily. We should appreciate, though, that this sort of writing is never attained without long and painstaking effort running through many drafts of the text. As a famous author has put it: "The more easily anything reads, the harder it has been to write. There is no such thing as light-hearted spontaneous creation, save in the mind, before it is set down on paper".

The biographer gives us his conclusion in a carefully crafted paragraph:<sup>7</sup> Because Duff was surrounded by mediocrity for most of his time on the court, it may be thought that he himself was not the dominating figure he is commonly believed to be, and that although he stood above his fellows, his own stature must be measured by the small scale of theirs. To put it another way, it may be argued that he was a small hill on a level plain. His judgements, however, belie this notion. More cogently, perhaps, his international reputation belies it: Lord Haldane, Lord Hailsham, Lord Simon, Lord Atkin, Roscoe Pound, and Felix Frankfurter all spoke of Duff as one whose learning was equal, if not superior, to theirs. The collective opinion of these judicial giants is unarguable: Duff did stand apart from his contemporaries, a colossus by comparison.

W.R. LEDERMAN\*

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*Construction of Statutes. Second Edition.* By E.A. DRIEDGER. Toronto: Butterworths. 1983. Pp. xvi, 385. (\$60.00). *Statute Law.* By Francis Bennion. London: Oyez. 1983. Pp. xxii, 276. (£10.00)

The dichotomous state of the literature on statutory interpretation provides an accurate assessment of the health of that branch of legal learning. Those who claim to have the potions to nurse the legislative patient back to health do not seem to have a very clear idea of the disease. The other side claims to understand the disease but they offer no remedies. On the

<sup>7</sup> P. 275.

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one hand, we have the text books used by practitioners and courts; Maxwell<sup>1</sup> is the most comprehensive but it is a mass of contradictions and, as is the case with a book of proverbs, any user can find some maxim or Latin tag to suit his or her purpose. On the other hand, there is a very large periodical literature; every student of the law seems convinced that he or she has the definitive word on the subject. The text book approach is an application of black letter law in the system of case precedent. The writers of learned articles are talking about jurisprudence or judicial process. The two groups do not seem to communicate.

Driedger certainly falls into the black letter text book class. The author is very respected both in this country and overseas. A reading of his useful book does not reward us with a sense of purpose or the presence of a cohesive philosophy of statutory interpretation. The book is a useful source for "proverbs" of statutory interpretation and although Driedger attempts more than that, he fails to convince. When compared with Dickerson,<sup>2</sup> Driedger's book seems rather lacking in cohesion in the sense that there is little attempt to tackle the problem of a systematic interpretation. I mean no disrespect to Driedger who has laboured for years as the solitary prophet of statute law (at least since Read, Willis and Corry Canadians have paid less attention to the subject).<sup>3</sup> I also know that in teaching statutory interpretation, it is very seductive to spend most of the classroom time on interesting cases and on the maxims because by those means the teacher and students can play lawyers' games with words, fine distinctions and nit-picking. I think Dickerson has moved from there and has started to ask questions about the meaning of meaning and about the paucity of lawyers' knowledge about Language, their stock-in-trade. Bennion also points out that case law precedent is an inductive process while the "processing" of statutes is a deductive one. Of course, it is impossible to avoid discussions about the difference between "may" or "shall", "means" and "includes", and "and" and "or", but we must move on from there. Driedger (and Bennion) both point out the three basic "rules"—Literal, Golden and Mischief—are no longer viable and we are now merely looking at the intention of the legislator. This is not very useful if all that is achieved is an attempt to reconcile case law because reconciliation of case law is irrelevant.

What are the courts or the lawyers doing when they are faced with a problem of interpretation? Of course, part of the problem is that eighty or ninety *per cent* of lawyers or judges in this country have never studied statutory interpretation in a formal way. When they switch from the

<sup>1</sup> P.B. Maxwell, *The Interpretation of Statutes* (12th ed., 1969).

<sup>2</sup> F.R. Dickerson, *The Interpretation of and Application of Statutes* (1975).

<sup>3</sup> John Willis, *Statute Interpretation In a Nutshell* (1938), 16 *Can. Bar Rev.* 1; J.A. Corry, *Administrative Law and the Interpretation of Statutes* (1935), 1 *Univ. of Tor. L.J.* 286; H.E. Read, J.W. MacDonald, *Cases and Other Materials on Legislation* (1948).

familiar law reports and have to read statutory language, their eyes glaze over in rather the same way that an avid reader of prose has great difficulty switching to poetry.

In the past decade or so, there has been a change in judicial style. This may have been caused by an improvement in judicial appointments, more adept or ardent advocacy, increase in legal aid or improvements in legal education. One sees less of the scissors-and-paste style of judgment. The courts are less slavish in their exaggerated respect for the House of Lords. They are more willing to quote the documents of the law reform commissions and the learned works of living authors, including Canadian authors. The judges are more open in their discussion of policy. While these changes may have resulted in an enriched Canadian legal culture, it does not appear to have affected many cases of statutory interpretation. The most obvious example is the judicial approach to the Literal Rule. This alleged rule of interpretation is meaningless *in vacuo*. If a section or a phrase in a statute is in dispute, it should be obvious that the literal or ordinary meaning does not exist in the minds of the parties for the simple reason they are now arguing over the meaning of the same words. Of course the words cannot be read in a vacuum. They must be read in the context whether that means one applies *ejusdem generis*, or *noscitur a sociis*, the mischief rule or examines legislative history. Any of these approaches would be an improvement on a mindless resort to some dictionary, whether non-descript or authoritative.

What do our two authors say about the Literal Rule? In his first edition in 1974, Driedger had said that there was now only one approach: "the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament".<sup>4</sup> Bennion is not very impressed; he described that statement from Driedger as saying everything and saying nothing.<sup>5</sup> In the new edition, Driedger says "[t]oday's doctrine is therefore still a doctrine of "literal" construction but literal in total context and not, as formerly, literal in partial context only".<sup>6</sup> This is not really very helpful.

Does Bennion offer us anything better? He suggests that we must develop new methods of interpretation and suggests a Processing Act which would include the following provisions:<sup>7</sup>

- 5.(2) the intention is primarily to be derived from the legislative text itself (including any source referred to in the text).
- (3) the court may refer to any other source in addition if it thinks fit to do so having regard to the requirements of justice, including —

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<sup>4</sup> E.A. Driedger, *Construction of Statutes* (1st ed., 1974), p. 67.

<sup>5</sup> Bennion, p. 94.

<sup>6</sup> Driedger (2nd ed., 1983), p. 87.

<sup>7</sup> Bennion, p. 305.

- (a) the desirability of persons being able to rely on the meaning conveyed by the text itself, and
- (b) the need to avoid prolonging legal proceedings without compensating advantage.
- (4) The court shall have regard, so far as may be relevant, to the procedures by which, in accordance with constitutional practice, the text may be taken to have been created and validated as law.

Bennion argues quite rightly that the judges do make the law. It is simply a legal fiction to think otherwise but he is suggesting that we should try to regularise this process. I do not gain much solace from Bennion's model Processing Act. Driedger does not pay much attention to this question. Dickerson is emphatic in saying that he wants judges to solve interpretative problems by cognition before they resort to creation. Dickerson does pay some attention to the problems of language and communication and I find that lacking in Driedger and, to a large extent, in Bennion despite his elaborate process of "processing".

At the very least we should be able to develop some fairly straightforward rules about the use and meaning of such words as "shall" and "may", "and" and "or", etc. Would it be very difficult to formulate a protocol for the use (or prohibition) of dictionaries, law or otherwise? Is it beyond our ken to draft rules for the proper and improper use of judicial notice, previous versions of statutory language, Hansard and royal commission reports? In other words, we should fight problems of statute law with statute law. Bennion makes some tentative steps in that direction. He is aiming at some kind of synthesis. While Driedger gives us much valuable information, his book lacks this vision.

GRAHAM PARKER\*

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*A Century of Criminal Justice*. By MARTIN L. FRIEDLAND. Calgary: Carswell Legal Publications. 1984. Pp. xxii, 245. (\$32.50)

This book contains a smorgasbord of intellectual delights served up by one of Canada's master chefs, Professor Martin L. Friedland, sometime Dean of the Faculty of Law, University of Toronto and sometime member of the Law Reform Commission of Canada. Included in this feast is something for all tastes — bread and butter items for the practitioner, meat and potato courses for judges, and exotic dishes for the real aficionados of the criminal law.

Professor Friedland has produced some superb scholarship. His *Double Jeopardy*,<sup>1</sup> which was based on his doctoral thesis at Cambridge

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<sup>1</sup> (1969).



University, has become a classic work on the subject. *Detention Before Trial*,<sup>2</sup> an empirical study of the bail system's operation, had a major impact on the reform of Canada's bail laws in the late 1960's. Another of his major contributions, which has not received sufficient attention, is his *Access to the Law*,<sup>3</sup> an empirical study done for the Law Reform Commission of Canada, in which he urged the preparation of a Canadian encyclopaedia of law for ordinary people who have such difficulty finding out about the law.

Professor Friedland has also published a fine casebook on *Criminal Law and Procedure*,<sup>4</sup> used in many law schools, and which I adopted myself during the years I taught criminal law at Osgoode Hall Law School in the early 1970's. He has edited a fascinating book containing several interdisciplinary essays on the subject of *Courts and Trials*.<sup>5</sup> Just last year, Professor Friedland produced a remarkable book about a murder trial in Victorian England, *The Trials of Israel Lipski*,<sup>6</sup> which demonstrated his prowess as an historian and master story-teller.

In addition to these books, Professor Friedland has written over two dozen articles dealing with various aspects of criminal law, criminal procedure, legal institutions and law reform generally. These articles are always lucidly written, profoundly researched, eminently practical and never pretentious, as so much academic writing tends to be these days.

The book under review contains eight of Professor Friedland's articles (seven of which have been previously published, but in journals not easily accessible to most members of the legal community). Among them are practical pieces which will be of special assistance to practicing lawyers and judges, material which will be of particular interest to legal academics and subject matter that will benefit mainly government lawyers and law reformers.

Two of the articles which I would classify as "bread and butter" pieces deal with constitutional questions. Chapter 2, *Criminal Justice and the Constitutional Division of Power in Canada*, explains the history of the area and outlines, as well as has been done anywhere, the complex inter-relationships between federal and provincial authority over the administration of criminal justice in Canada, a subject which has grown in significance in recent years. He summarizes and explains briefly and accurately the present position concerning the right to prosecute criminal offences under the *Criminal Code*<sup>7</sup> and those based on other legislation,<sup>8</sup>

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<sup>2</sup> (1965).

<sup>3</sup> (1975).

<sup>4</sup> (5th ed., 1978)

<sup>5</sup> (1975).

<sup>6</sup> (1984).

<sup>7</sup> R.S.C. 1970, c.C-34.

<sup>8</sup> P. 59.

calling for a sensible compromise solution which would maintain the provinces' role in the prosecution of Code offences, but allow the federal government to prosecute non-Code crimes.

In Chapter 7, *Criminal Justice and the Charter*, Professor Friedland traces the impact of the *Charter of Rights and Freedoms*<sup>9</sup> in criminal cases in the first eighteen months following its coming into force. He found 125 cases that had already been reported up to that time, far more than the number decided in a similar period following the enactment of the *Bill of Rights* in 1960.<sup>10</sup> He furnishes a detailed analysis of all these cases, noting the increased reliance on United States cases — something that is to be expected, given that country's long history with these issues. He concludes, (correctly, I believe), that a "broad, but careful, approach"<sup>11</sup> has been taken by our courts so far.

Two of the chapters which I would describe as "meat and potatoes" material are chapters 5 and 6. Chapter 5, *National Security: Some Canadian Legal Perspectives*, is a fine exploration of the law concerning several key areas, such as the *Official Secrets Act*,<sup>12</sup> wiretapping and emergency powers. Among his wise and helpful suggestions are that legislation should "spell out ...whether or not surreptitious entry is permitted"<sup>13</sup> in wiretap cases (something the *Law Reform Commission* is currently about to suggest as well), and that we should prepare some new emergency power laws, in draft form, which could be debated in Parliament and then later enacted swiftly if the need arose.

Chapter 6, *Controlling Entrapment*, is an excellent summary of the case law on this difficult area in the United States, the United Kingdom and in Canada. He finds the law in need of repair and suggests that "a legislative solution would, however, be able to shape the defence better than a judicial one".<sup>14</sup> The *Law Reform Commission of Canada* has taken his advice to heart and is in the process of preparing a working paper on the subject.

The more exotic fare in this cerebral banquet prepared by Professor Friedland includes Chapter 3, *Pressure Groups and the Development of the Criminal Law*, and Chapter 4, *Gun Control in Canada: Politics and Impact*. These two chapters are the most original in the book, and perhaps the most valuable, written as they are by an astute observer who was involved in the preparation of the gun control legislation. They contain a wealth of statistics, history and insight into the influence of pressure groups and public opinion on law reform generally, and on the reform of

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<sup>9</sup> Part 1, *Constitution Act*, 1982.

<sup>10</sup> R.S.C. 1970, App. III.

<sup>11</sup> P. 231.

<sup>12</sup> P. 143.

<sup>13</sup> P. 161.

<sup>14</sup> P. 201.

our gun control laws in particular. Professor Friedland explains the "constant interplay between public opinion, pressure groups and influential individuals".<sup>15</sup> He discusses how pressure groups seek to influence the judiciary to generate favourable decisions through private prosecutions, *amicus curiae* briefs, defending accused persons, launching civil proceedings and the like. He treats briefly the role of royal commissions and law reform agencies in all of this. He then focusses on the Canadian gun control laws, which were revised in 1977, describing the background forces in the movement to reform the law. He draws together some fascinating data which shows how in Canada only sixty homicides were committed in 1979 with handguns, while in the United States the number was 10,000 — more than twenty times our per capita rate. Friedland, relying on the history and the statistics, explains the stark contrast in terms of the differences in our culture and law. He also tries to explain why the gun lobby was less successful in blocking reform in Canada than in the United States.<sup>16</sup> He concludes that Canadian laws over the years have helped us to keep to a minimum the use of handguns in criminal activity, and that "[it] may be that the United States has something to learn from Canada on this issue".<sup>17</sup>

Perhaps the tastiest dish in the collection, and hence my favourite, is Chapter 1, R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of Criminal Law. In it, Professor Friedland rescues from near oblivion the work of a great codifier, R.S. Wright of Oriel College, Oxford, who later became a High Court judge. He tells a story which is particularly instructive for those of us involved in redrafting the Criminal Code of Canada. He reminds us of the influence on law reform of politics, pressure groups and, above all, people.

In 1870, R.S. Wright, when he was only thirty-one years old, was retained to draft a penal code for Jamaica. He completed his work in 1874, having taken considerably longer than he had expected (a problem quite familiar to law reformers). The government then asked James Fitzjames Stephen, who was a well-respected, more senior person, to revise the Wright Code, which he did. R.S. Wright also produced a Code of Criminal Procedure for the government in 1876. Both of these Codes were presented to Parliament in 1878, but neither was passed at that time.

In 1878, Stephen produced his own Code, which formed the basis for the Royal Commissioners' Report of 1879, on which Stephen served as a member. Stephen's Code was never enacted in the United Kingdom because of criticism of the work and because of a change in government in 1880, but it did form the basis of Canada's Criminal Code in 1892, as well as the codes of several other colonies.

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<sup>15</sup> P. 74.

<sup>16</sup> P. 137.

<sup>17</sup> P. 139.

Wright's Code, according to Friedland, was "a better code" than Stephen's. It was "sound", "imaginative" and "interesting"; even quite "radical" in some respects, while Stephen's was more conservative.<sup>18</sup> Wright attempted to be exhaustive in enumerating all offences and defences, eliminating common law offences and defences. He sought to eliminate reliance on pre-Code cases. Wright, who adopted the deterrence theory of criminal law, inserted liberal provisions in relation to suicide, buggery and abortion. This deterrence theory, however, led him to treat attempts in the same way as the completed offence. He viewed offences against the person as more serious than offences against property. His views on insanity were progressive. Conspiracy was limited. As for murder, Wright had no constructive felony-murder rule, defining murder simply as "intentionally causing the death of another person by any unlawful harm". He was very tough on drunkards, though, deeming an intoxicated offender to have intended the natural and probable consequences of his act. In short, Wright produced a modern, principled, comprehensive code, which continues to be of value to codifiers to this day.

Not only was Wright's Code not adopted, but his place in the history of codification has been unfairly considered to be a minor one, despite his elevation to the bench in 1890. In part, this is because of the lack of recognition of his work by James Fitzjames Stephen, who never mentioned it in any of his books or reports,<sup>19</sup> even though he was much influenced by it. To add insult to injury, James Fitzjames Stephen's son, Henry Lushington Stephen, convinced the British government to retain him to re-draft the Wright code, which he did in 1900, producing a "second-rate piece of work",<sup>20</sup> which only muddied the codification waters. James Fitzjames Stephen's brother, Leslie Stephen, who was the editor of the Dictionary of National Biography, chose as the biographer of R.S. Wright another son of James Fitzjames Stephen, Herbert, who, naturally, did a poor job, inexplicably failing to even mention Wright's Code, which was probably the main achievement of his working life.

According to Professor Friedland, "it almost seems as if the Stephen family tried to eliminate Wright from the history of codification of criminal law".<sup>21</sup> Fortunately, thanks to Professor Friedland, this has not occurred, despite the apparent unkindness of the Stephen family toward Wright.

This book, then, is a marvellous repast of mixed delights — a treat for anyone interested in the future of Canadian criminal law. If we are to have a new Criminal Code, made in Canada, by Canadians, for Canadi-

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<sup>18</sup> Pp. 1, 31, 26.

<sup>19</sup> P. 44.

<sup>20</sup> P. 40.

<sup>21</sup> P. 45.

ans, reflecting our modern values, the work of scholars like Professor Friedland contained in this book will have contributed mightily to that noble cause.

ALLEN M. LINDEN\*

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*World Law of Competition*. Edited by JULIAN O. VON KALINOWSKI. United States, Vols. A1, A2. By Julian O. von Kalinowski. Canada, Vol. A3. By Gordon Kaiser. New York: Mathew Bender. 1984. Vol. A1 looseleaf; Vol. A2 looseleaf; Vol. A3 looseleaf. (\$100 US each volume)

The World Law of Competition is a series of twelve volumes which has the objective of being "an exhaustive authoritative treatise on the competition laws of every major country in the free world".<sup>1</sup> Each volume is written by experts in the competition laws of their respective countries. Unit A surveys North America, Unit B, Western Europe, and Unit C, South America. The editor of the series and author of the first two volumes, Julian O. von Kalinowski, envisages an increasing regulation of the conduct of businesses in international markets and a corresponding need for "businesses competing in the world markets. . . [to] be made aware of the legal rules under which they compete. . .".<sup>2</sup> In the past few years, attention has been focussed on European Competition law,<sup>3</sup> but this series is unusual in devoting a volume to Canadian competition law. This review will examine the three volumes on North America, two on the United States and one on Canada.

The objective of the series of providing ready access to caselaw and legislation is partly defeated by the organization of the two volumes on United States competition law. Antitrust legislation, including The Sherman Act, The Clayton Act, and The Robinson-Patman Act, is analyzed section by section with the types of regulated conduct listed as subheadings under each section. As a result the page headings set out the title of the legislation, rather than the type of conduct such as monopolization or conspiracy and thus fail to provide a quick guide to the contents. Organization by statute also first directs the reader's attention to the details of the legislation rather than general principles.<sup>4</sup> For instance there is no general

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\* The Honourable Mr. Justice Allen M. Linden, President, Law Reform Commission of Canada, Ottawa, Ontario.

<sup>1</sup> Vol. A1, p. xxii.

<sup>2</sup> *Ibid.*

<sup>3</sup> See B.E. Hawk, *United States Common Market and International Antitrust: A Comparative Approach* (1981).

<sup>4</sup> The approach may be contrasted with that of L.A. Sullivan, *Antitrust Law* (1977).

discussion of market power. Rather, market power is discussed as an element of the various offences, with the principal analysis under section 2 of the Sherman Act, which deals with monopolization. Putting aside the organizational problems, the volumes do provide a concise statement of the legislation and caselaw. The appendices which include the 1968, 1982, and 1984 Merger Guidelines, the forms for merger notification, and Department of Commerce Guidelines on export trade certificates are also a useful compilation of information. In addition, World Competition Law has the advantage of being periodically updated, the latest United States update being October 1984.

In contrast to the section by section approach in the United States volumes, Gordon Kaiser, in the volume on Canada, classifies the problem by types of anti-competitive behaviour. Thus he discusses pricing practices, distribution practices, unfair sales practices, provincial marketing legislation, agreements to restrict competition, monopoly, and mergers and acquisitions. Under each heading he gathers together the relevant legislation and caselaw, including decisions of the Restrictive Trade Practices Commission. In addition to the Combines Investigation Act,<sup>5</sup> Kaiser refers to other Federal legislation.<sup>6</sup> The Chapter on Enforcement examines criminal and civil remedies, providing a survey of penalties including prohibition orders and sentencing. Evidentiary problems are discussed, such as corporate documents and witnesses.

The Kaiser volume also contains chapters on regulated industries, patents, trademarks and copyrights. A chapter on international aspects provides a concise account of the liability of a Canadian firm or individual under foreign law and describes the defensive measures taken by the Federal and Provincial governments against extraterritorial enforcement of foreign antitrust laws. There is also a review of provincial restrictions on foreign investment, including legislation relating to land, trust companies, publishing and mining.

There is a useful set of appendices, including the Combines Investigation Act which is indexed, Bill C-29,<sup>7</sup> which died on the Order Paper when the Liberal government was defeated in September, 1984, a table of cases under the Combines Investigation Act to 1981, re-sale price maintenance fines to 1981, reports of the Restrictive Trade Practices Commission, selected prohibition orders, consent orders and undertakings, and related legislation.

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<sup>5</sup> R.S.C. 1970, c.C-23.

<sup>6</sup> For example, The Bank Act S.C. 1980-81-82-83, c. 40; The Trade Marks Act R.S.C. 1970, c. T-10, as amended, and the Broadcasting Act R.S.C. 1970, c. B-11, as amended.

<sup>7</sup> An Act to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof. Second Session, Thirty-second Parliament, 32-33 Eliz. II, 1983-84.

The text of the Kaiser volume was updated in October 1984. Among the many changes is the insertion of discussions of the proposed amendments to the Combines Investigation Act at the relevant points in the text.<sup>8</sup> There are discussions of the most recent Court and Commission decisions and inquiries by the Director.<sup>9</sup> A new section on the Charter of Rights and Freedoms<sup>10</sup> discusses search and seizure and the presumption of innocence.

Kaiser's survey of Canadian competition law should be on the book shelf of anyone advising Canadian businesses. There is no comparable volume which provides such a clear and comprehensive survey of the legislation and caselaw.

Having acknowledged Kaiser's volume is very good at what it sets out to do, that is to supply a statement of the black-letter law, it is necessary to note that it provides only a beginning to an analysis of an antitrust problem. There is an increasing recognition that interpretation and enforcement of competition laws must be made in the light of economic principles. In the United States, this recognition has resulted in a new form of legal treatise exemplified by Areeda and Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*,<sup>11</sup> which does not merely set out the black letter law, but relates the law to economic principles. As a consequence, readers of Areeda and Turner see underlying concepts that permit them not only to understand the cases analysed, but to extrapolate from those cases to new situations. It provides both Canadian and United States lawyers a more accessible statement of United States antitrust law than the traditional legal treatise.

There is, however, a role for both the economic treatise and the encyclopaedic survey of caselaw and legislation. The question to be asked is how World Law of Competition compares to similar surveys. Kaiser's volume stands by itself. There is no comparable Canadian survey. The principal advantages of the von Kalinowski volumes over the more comprehensive encyclopaedia of United States antitrust law, *The Trade Regulation Reporter*,<sup>12</sup> is that while it is not updated as frequently, it is less expensive, more concise in its statements of the law, and is part of a series on world competition law.

<sup>8</sup> Bill C-29 is reproduced in Appendix I.

<sup>9</sup> *BBM Bureau of Measurement v. Director of Investigation and Research* (1981), 60 C.P.R. (2d) 26 (R.T.P.C.); (1982), 63 C.P.R. (2d) 63 (F.C.A.); (1984), 52 N.R. 137 (F.C.A.); *Attorney General of Canada et al. v. Law Society of British Columbia et al. Jabour v. Law Society of British Columbia et al.*, [1982] 2 S.C.R. 307, (1982), 137 D.L.R. (3d) 1, [1982] 5 W.W.R. 289; *Movie Distribution (Cineplex) case*, Annual Report Director of Investigation and Research, Combines Investigation Act, 1983, p. 51.

<sup>10</sup> Constitution Act, 1982, Part 1, enacted by Canada Act, 1982, c.11 (U.K.).

<sup>11</sup> Vols. 1,2,3 (1978); Vols. 4,5, (1980); Vols. 6,7 (forthcoming); Vol. 8 (1982); See B.A. Ackerman, *Reconstructing American Law* (1984), p. 60.

<sup>12</sup> *Trade Regulation Reporter* (12th ed., 1982).

It has been said that there "is a close relation between the forms of legal literature and lawyers' ideas of what they are doing, and of the appropriate way for jurists to behave".<sup>13</sup> Canadian readers should keep in mind the two distinct types of competition law treatises. The economic treatise has had an impact on United States enforcement of antitrust laws, with the result that economic principles cannot be ignored in addressing American antitrust problems.<sup>14</sup> The von Kalinowski volumes provide only part of the answer. In Canada, it is true that judges and lawyers take a more traditional perspective, but as judges and lawyers become more familiar with economic concepts and legal texts expound these principles, judicial techniques will change. Even when that time arrives, an updated version of Kaiser's volume on Canada will be an informative resource for lawyers. Perhaps his survey will provide the preliminary ground work for a definitive treatise setting out an economic approach to Canadian competition law.

M. T. MACCRIMMON\*

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*Legal Problems of Credit and Security.* By R. M. GOODE. London: Sweet & Maxwell. 1982. Pp. xviii, 133. (£10)

The law of security over personal property or moveables in Canada is an extraordinary hotchpotch. There are four distinct systems. There are title-based common law regimes in British Columbia, Alberta, Prince Edward Island, Nova Scotia, New Brunswick and Newfoundland.<sup>1</sup> There are personal property security regimes in Manitoba, Saskatchewan and Ontario.<sup>2</sup> There is Quebec's mixture of title-based codal devices on which are engrafted various statutory types.<sup>3</sup> And running throughout the country is the federal security regime under the Bank Act.<sup>4</sup> If there is to be anything like a unified Canadian law, it has been suggested that the Personal

<sup>13</sup> A. W. B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature* (1981), 48 U. Chi. L. Rev. 632, at p. 633.

<sup>14</sup> See H. Easterbrook, *The Supreme Court—Foreword* (1984), 98 Harv. L. Rev. 4, at p. 9, footnote 8, who makes reference to the conclusion of Herbert Packer in 1960 "that teaching of this subject (antitrust law) was informed by no theory at all".

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<sup>1</sup> Which are extensively overlaid by statutory registration systems. At present there is no modern text on all of this law: see generally J. S. Ziegel, *Canadian Chattel Security Law: Past Experience and Current Developments*, in J. G. Sauveplanne (ed.), *Security over Corporeal Movables* (1974), c. 5.

<sup>2</sup> The text here is R. H. McLaren, *Secured Transactions in Personal Property in Canada*, 2 vols. (1979-1980).

<sup>3</sup> The closest thing to a modern text here is P. Ciotola, *Droit des sûretés* (1984).

<sup>4</sup> See on this, I. F. G. Baxter, *The Law of Banking* (3rd ed., 1981), c. 13.



Property Security Acts provide the likeliest model.<sup>5</sup> The closest thing Canada has at present to a text in the area, Professor McLaren's *Secured Transactions in Personal Property in Canada*,<sup>6</sup> is in fact an analysis of the Personal Property Security Acts only.

Professor Goode's book, on some selected intriguing problems arising under the unitary English title-based system, would seem to have little to say to a Canadian audience. Such a view would be mistaken. Professor Goode, in the lucid way that has come to be associated with his work, most notably his large treatise, *Commercial Law*,<sup>7</sup> provides in this little book a crisp analysis of a number of problems which have vexed Canadians. He states his aim to be "to explore some of the fundamental legal conceptions underlying the more important types of commercial security [in England] and to suggest that a number of conventional propositions relied on in everyday practice are conceptually unsound".<sup>8</sup> The first half of the book is of greatest interest in Canada. It is devoted to putting fixed and floating charges in the context of the common law scheme for chattel security, and then to educing solutions to puzzles such as the effectiveness of automatic crystallization and negative pledge clauses, and the conflict between the after-acquired property clause and the purchase money security interest. The remainder of the book is perhaps only slightly less useful. It is devoted to the creditor's rights on the insolvency of the surety's debtor, security over book debts and other receivables, and rights of set-off before and upon insolvency. This review concentrates upon the first half of the book. This is perhaps the easiest part of the book for a Canadian to follow, it appears to be least overlaid by distinctive English statutory law, and it best illustrates the strengths and the limitations of this little book's type of commercial law scholarship.

One of the reasons the discussion is relatively easy to follow, at least for a common law trained Canadian, is that the author presents his analysis in a felicitous blend of the traditional common law terminology and the newer Personal Property Security Act language of attachment, perfection and priority.<sup>9</sup> Professor Goode has covered much of this ground before, in much the same way and in some respects more elaborately, in his text *Commercial Law*. A commercial law neophyte will find the latter treatment rather more satisfying because even less knowledge of the common law on secured transactions is taken for granted. The general virtue of the book under review is in fact to concentrate the analysis in the larger work on some particular problems arising under certain types of

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<sup>5</sup> See J.S. Ziegel, *Recent and Prospective Developments in the Personal Property Security Law Area* (1985), 10 C.B.L.J. 131, at p. 136.

<sup>6</sup> *Supra*, footnote 2.

<sup>7</sup> R.M. Goode, *Commercial Law* (1982).

<sup>8</sup> P. v.

<sup>9</sup> Which in turn derives from the parent Uniform Commercial Code, Article 9.

security arrangement (floating charges, guarantees, accounts receivable financing arrangements) and under the head of set off, which did not receive such treatment, or any treatment at all, in the larger work.<sup>10</sup> This concentration produces some illuminating discussion of some knotty problems, as well as some useful practical advice.

Nowhere is this better illustrated than in the author's discussion of clauses in floating charge instruments providing for the automatic crystallization of such charges. In *The Queen in Right of British Columbia v. Consolidated Churchill Copper Corp. Ltd.*,<sup>11</sup> Berger J. confronted the issue, and concluded that for crystallization to occur, the floating chargee must intervene, taking positive steps to enforce his security. This is in line with the prevailing view in Canada, which is that crystallization requires either a cessation of the company's business or the debenture holder to take steps to enforce his security.<sup>12</sup>

Professor Goode's view is that this is mistaken.<sup>13</sup> He distinguishes attachment ("crystallization") of the charge, and priorities, a distinction he acknowledges the material in the area tends not to draw. The key to attachment is termination of the authority of the debtor to dispose of charged assets, which authority is of course said to be central to the floating charge.<sup>14</sup> In accordance with agency law, actual authority is terminable by the parties' prior agreement, without the knowledge of or notice to the agent. But post-crystallization parties may be able to invoke the doctrine of apparent authority, and thereby acquire priority over the chargee. If however such a third party has notice of termination of the authority—as where a receiver is appointed and he moves in—then apparent authority is unavailable. Professor Goode rightly points out that the contrary analysis of automatic crystallization in fact rests on slender authoritative support.

There are some technical problems with Goode's argument. The most serious in Canada is that if apparent authority is crucial to post-crystallization priorities, this would seem to require that the third party be

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<sup>10</sup> See Goode, *op. cit.*, footnote 7, chaps. 25-29, 32-33 (principal coverage *inter alia* of floating charges, security over accounts receivable, and guarantees) and pp. 719-721 and 908 (principal coverage of set-off).

<sup>11</sup> (1978), 90 D.L.R. (3d) 357, [1978] 5 W.W.R. 652 (B.C.S.C.); see also *Re Caroma Enterprises Ltd.* (1979), 108 D.L.R. (3d) 412, (1979), 23 A.R. 541 (Alta. Q.B.).

<sup>12</sup> See e.g., P.D. Maddaugh, *Security on Personal Property in the 1980's*, in *Law Society of Upp. Can. Special Lectures, Corporate Law in the 80's* (1982), 349, at p. 358.

<sup>13</sup> See *Legal Problems of Credit and Security*, pp. 33 ff.

<sup>14</sup> This centrality is not as clear in Canada: see M.G. Bridge, F.H. Buckley, *Sales and Sales Financing in Canada* (1981), pp. 528-529 (decisions conceding possibility of fixed charge with licence to deal); and ss. 178 ff of the Bank Act, enacted by s.2 of the Banks and Banking Law Revision Act, 1980, S.C. 1980, c.40 (statutory fixed charge of that nature).

aware of the floating charge at the time he dealt. This is unless the doctrine in *Watteau v. Fenwick*<sup>15</sup> is being relied upon, which is not strong authority in England<sup>16</sup> and is even weaker in Canada.<sup>17</sup> There are some less technical concerns too, the most notable of which is how Goode's view strengthens the powerful position of the whole undertaking financier in relation to unsecured creditors, who cannot invoke apparent authority.<sup>18</sup>

Professor Goode's book has material for a response to this last point. He points out that a charge instrument simply making any breach of the agreement or any other security agreement to which the debtor is a party a crystallizing event is not very realistic.<sup>19</sup> The possibility exists that the chargee, in sensibly deciding not to intervene and shut the debtor down for a mere technical breach, may provide ground for a conclusion that the automatic crystallization clause is in effect not a part of the parties' real agreement. From this reminder Goode provides sensible drafting advice: automatic crystallization should be reserved for serious events; otherwise, the chargee should be given only the right to intervene.

Professor Goode's account of the scope and limitations on the floating charge is of interest for questions it raises about how the legal system is to deal with whole undertaking secured financiers. All four of Canada's secured financing systems go at least some way towards facilitating such financing; all four fail to give such financing complete sway.<sup>20</sup> Goode's book is not, and was not intended to be, a direct contribution to the wider debate about the merits and demerits of secured financing in general, or of whole undertaking financing in particular.<sup>21</sup> But his practical analysis helps with clarifying some of the technical issues directly involved.

There is much else of general interest in this book. For example its discussion of notice of security agreements simply by virtue of their having been registered under a statutory disclosure scheme<sup>22</sup> makes the

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<sup>15</sup> [1893] 1 Q.B. 346 (Q.B.D.).

<sup>16</sup> See Bowstead on Agency (14th ed., 1976), pp. 258-259.

<sup>17</sup> See *McLaughlin v. Gentles* (1919), 46 O.L.R. 477 (Ont. C.A.); and see also D.H. Hetherington, *Trends in Enterprise Liability: Law and the Unauthorized Agent* (1966-67), 19 *Stanf. L. Rev.* 76, at pp. 110-112.

<sup>18</sup> This position has recently been discussed by Professor Goode more generally: see R.M. Goode, *Is the Law Too Favourable to Secured Creditors?* (1983-84), 8 *C.B.L.J.* 53.

<sup>19</sup> Pp. 40-41.

<sup>20</sup> On the "common law" and Personal Property Act systems in Canada, see J.S. Ziegel, R.C.C. Cuming, *The Modernization of Canadian Personal Property Security Law* (1980-81), 31 *U.T.L.J.* 219, at pp. 272-277; on the Quebec system, see R.A. Macdonald, *Modernization of Personal Property Security: A Quebec Perspective* (1985), 10 *C.B.L.J.* 182; for the Bank Act, *supra*, footnote 14, see s.178(6) (priority over bank holding security of certain claims of certain unsecured creditors).

<sup>21</sup> See on the current debate A. Schwartz, *The Continuing Puzzle of Secured Financing* (1984), 37 *Vand. L. Rev.* 1051.

<sup>22</sup> Pp. 23 ff.

useful point that one must distinguish between what notice is so provided, and to whom it is provided. The first compels one in turn to determine how much material must be placed in the public register—simply particulars of the transaction, or the security agreement itself? The second asks one to distinguish between those who can be expected to search the public register and those who cannot be expected to do so. All of this sensibly suggests that an all or nothing approach to questions of registration-as-notice is not a necessary one.<sup>23</sup> Personal Property Security Acts, which have priority schemes in large part based on a race to the register principle, in fact recognize this.<sup>24</sup>

Professor Goode's little book is then a useful work for imaginative Canadian commercial lawyers. It is of greatest direct use for those working under common law-derived commercial law. But it is of interest to others also. Professor Goode has set a high standard for lucid, concise, practically useful exposition of difficult law, in this work and his *Commercial Law*. Canadian users, expositors, and reformers of their own law have something to learn from both books.

R.L. SIMMONDS\*

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*Family Law: Dimensions of Justice*. Edited by ROSALIE S. ABELLA and CLAIRE L'HEUREUX-DUBÉ. Toronto: Butterworths. 1984. Pp. 368. (\$75.00)

Tous ceux qui s'intéressent aux questions touchant au droit de la famille au Canada auront accueilli avec enthousiasme, la publication signée les juges Rosalie S. Abella et Claire L'Heureux-Dubé; notons cependant que ce n'est pas à titre d'auteurs, mais à celui d'éditeurs que les juges Abella et L'Heureux-Dubé signent cet ouvrage.

Le volume présente le texte des conférences prononcées au mois d'août 1981 à un colloque organisé sous l'égide de l'Institut canadien pour l'administration de la justice et qui portait sur le droit de la famille. Ces textes ont des auteurs prestigieux et leur contenu est en général intéressant, bien que plusieurs des problèmes traités aient trouvé aujourd'hui une solution. En effet, peut-on reprocher à des conférenciers de se pencher sur des problèmes d'actualité immédiate? Cela a cependant pour effet de produire un ouvrage dont la vie est éphémère.

<sup>23</sup> On constructive notice in a Canadian setting, see J.S. Ziegel, *G.M.A.C. v. Hubbard: Statutory Conflict, Conditional Sales and Public Policy* (1978-79), 3 C.B.L.J. 329, at pp. 331-332 and cases there referred to; *Acmetrack Ltd. v. Bank Canadian National* (1984), 48 O.R. (2d) 49 (C.A.); leave to appeal to S.C.C. refused, *ibid.*; and a comment on the latter case by J.S. Ziegel, *supra*, p. . However, the Canadian case-law holding for constructive notice has so far not made the distinction Goode calls for.

<sup>24</sup> See e.g. McLaren, *op. cit.*, footnote 2, vol. 1, sec. 10.02 [4].

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Le volume se divise en cinq parties. La première traite des aspects économiques du contentieux familial; ici les auteurs s'intéressent davantage aux ajustements économiques internes de la famille et traitent des questions traditionnelles de pension alimentaire et de partage d'intérêts financiers. Gail C.A. Cook fait exception en s'interrogeant sur l'effet social et économique de l'éclatement de la famille. Malheureusement l'auteur se contente d'énoncer, sans les analyser, ces faits économiques et sociaux. Il faudra pourtant un jour, en faire l'analyse, car l'importance du taux annuel de séparation et de divorce entraîne, sur le plan social, une restructuration des rapports humains et sur le plan économique l'apparition de nouveaux réseaux de relations et de nouvelles situations de dépendance dont on devra un jour tenir compte.

La seconde partie de l'ouvrage nous présente comme solution de conflits familiaux le point de vue de deux juges sur le forum judiciaire. Dans un premier temps, le juge Victor J. Baum nous présente six services rattachés au tribunal de la famille du Michigan afin d'illustrer certaines façons de remplacer le forum judiciaire; puis le juge R.J.R. Walmsley, dans une très courte réponse, rappelle que les litiges familiaux ne peuvent pas tous être résolus par l'intervention de tels services et que certains litiges doivent être arbitrés.

La troisième partie de l'ouvrage porte sur la place qui doit être faite aux enfants dans le forum judiciaire et sur la difficulté d'assurer la protection de leurs droits, tant dans les litiges familiaux que dans les cas de protection de la jeunesse. Cette partie occupe une place importante dans l'ouvrage, ce qui illustre bien l'intérêt que porte le monde judiciaire à la protection des droits de l'enfance. C'est là une question complexe qui pour la plupart des auteurs, ne peut être convenablement traitée ni par le seul processus contradictoire caractérisant l'enquête judiciaire, ni par le seul jugement du président du tribunal s'appuyant sur son expérience de la vie et sur son bon sens. La plupart des auteurs font une place importante à la participation des experts qui, pour leur enquête, leur évaluation et leurs commentaires, viennent éclairer le processus judiciaire et préparer la décision du juge.<sup>1</sup> Ces auteurs soulignent aussi l'importance de donner une voix et une place aux enfants à l'intérieur du processus judiciaire. Les dix textes regroupés dans cette troisième partie de l'ouvrage montrent comment il est difficile de rendre une justice équitable, sans tomber dans l'arbitraire. Le tribunal considérant résolument l'avenir des parties et de leurs enfants plutôt que la seule difficulté matrimoniale rencontrée, est appelé à rendre une décision qui s'écarte du processus d'adjudication et se rapproche du processus législatif. Les décisions en matière familiale consistent moins en l'affirmation autoritaire des droits et obligations des parties qu'en la prévision de ce qui leur est nécessaire pour leur assurer un avenir aussi harmonieux que possible. Il n'est donc pas surprenant de voir

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<sup>1</sup> Voir par exemple l'excellent texte du juge George M. Thomson, *Judging Judicially in Child Protection Cases*, p. 213 et ss.

plusieurs des auteurs de la troisième partie du volume faire l'apologie de l'utilisation d'experts. Puisque le tribunal cherche autant à évaluer les faits qu'à déterminer ceux que l'on peut tenir pour certains, on a tendance à recourir à un système plus inquisitoire et à l'opinion de spécialistes comme on le fait pour une décision politique; mais comme se le demandait si justement l'honorable juge George M. Thomson, qui sont les experts de la prospective?<sup>2</sup>

Within this inexact science of prediction, no one profession seems to have claim to any superiority.

Les parties quatre et cinq de l'ouvrage en constituent une double conclusion. Dans un premier temps le professeur H.R. Hahlo nous brosse, sur les plans historique et juridique, une très belle fresque de l'évolution du mariage et du divorce; puis l'honorable juge L'Heureux-Dubé, nous dit comment, selon elle, le contentieux familial et le tribunal de la famille évolueront au cours des prochaines années.

Au total les juges Abella et L'Heureux-Dubé ont réuni dans cet ouvrage des textes qui, pour la plupart, sont d'une excellente qualité juridique et intellectuelle. On remarquera cependant que plusieurs de juristes canadiens semble mal connaître la loi et la jurisprudence québécoise. Mais les textes présentés permettent au lecteur de réfléchir avec profit sur les différents aspects du contentieux familial et sur les difficultés conjugales qu'éprouvent toujours le Droit et l'Équité.

ANDRÉ CLOUTIER\*

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*Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles.* By MOFFATT HANCOCK. Foreword by Bora Laskin and Introduction by David F. Cavers. Buffalo: William S. Hein Company. 1984. Pp. xviii, 446. (\$45.00).

In 1942 Professor Hancock published *Torts in the Conflicts of Laws* which at that time was hailed as one of the most progressive monographs ever published in the field of the conflict of laws. By recognizing the role of social policy in solving cases that involve at least one relevant foreign element he anticipated the new methodologies proposed by Currie,<sup>1</sup> Cavers<sup>2</sup> and the Restatement of the Law Second, Conflict of Laws 2d.<sup>3</sup> During the next forty years, Professor Hancock continued his search for a satisfactory new methodology of his own. The thirteen articles reproduced in the book under review represent the product of his inquiring mind. In these articles he rejected the traditional classificatory approach with its many

<sup>2</sup> *Idem*, pp. 220, 221.

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<sup>1</sup> *Selected Essays on the Conflict of Laws* (1963).

<sup>2</sup> *The Choice of Law Process* (1965).

<sup>3</sup> (1971).

escape devices and its ignorance of the policies of particular domestic rules and proposed a policy controlled methodology which, in fact, amounts to a "better law approach".<sup>4</sup>

From a Canadian point of view, chapters 7<sup>5</sup> and 8<sup>6</sup> are among the most interesting ones as they enable the readers to understand the "American Revolution" in the conflict of laws, which resulted in the liberation from the shackles of tradition, and to see what are the alternatives to the rule in *Phillips v. Eyre*,<sup>7</sup> as interpreted by *Machado v. Fontes*,<sup>8</sup> which is still followed by our courts.<sup>9</sup> Fearing that the state policy and interest analysis adopted in the United States might be considered too radical by most Canadian lawyers, and in this he has been proven right,<sup>10</sup> he argued that, in cases where the potentially relevant domestic rule of foreign law had been embodied in a statute, the choice issue presents nothing more radical than a question of statutory construction.<sup>11</sup>

In a purely domestic case, where a statute is relied upon, the judge must determine to what extent the policy of the statute requires that it override the policies of existing decisional rules or statutes. In a choice case he must determine to what extent the policy of the forum statute (relied upon by one party) conflicts with the policy of another state's decisional rule or statute.

Re-reading Professor Hancock's articles are of great value at a time when the Law Commission and the Scottish Law Commission have just published their proposals on choice of law in tort and delict.<sup>12</sup> The Commissioners are in favour of the abolition of the traditional common law rule and propose that it be replaced by one or another of two alternatives. The first alternative is to apply the law of the country where the tort or delict occurred, subject to a single general exception in favour of the law of the country with which the occurrence and the parties had at the time of the occurrence the closest and most real connection if the occurrence and the parties had an insignificant connection with the country where the tort or delict occurred.<sup>13</sup> This, in my opinion, is an excellent proposal. It

<sup>4</sup> See Prologue, p.xiii, and Chapter 1, Three Approaches to the Choice-of-Law Problem, p. 1.

<sup>5</sup> Canadian-American Torts in Conflicts of Laws: The Revival of Policy-Determined Construction Analysis, p. 179.

<sup>6</sup> Torts Problems in Conflict of Laws Resolved by Statutory Construction: The Halley and Other Older Cases Revisited, p. 205.

<sup>7</sup> (1870), L.R. 6 Q.B. 1 (Exch. Ch.).

<sup>8</sup> [1897] 2 Q.B. 231 (C.A.).

<sup>9</sup> See J.-G. Castel, *Canadian Conflict of Laws* (2nd ed., 1985), paras. 470-472.

<sup>10</sup> The Tentative First Draft of a Foreign Torts Act prepared by Dr. H.E. Read for the Uniform Law Conference of Canada was never adopted by that body. See 1966 Proceedings, p. 58.

<sup>11</sup> P. xvi.

<sup>12</sup> The Law Commission Working Paper No. 87 and the Scottish Law Commission, Consultative Memorandum No. 62, *Private International Law, Choice of Law in Tort and Delict* (1984).

<sup>13</sup> Para. 7.2.

would achieve certainty and predictability and at the same time overcome the criticism addressed to the exclusive application of the law of the place of tort or the existing double actionability rule. The second alternative is to apply the law of the country with which the occurrence and the parties had, at the time of the occurrence, the closest and most real connection. In order to facilitate the search for this country, rebuttable presumptions are established in the case of personal injury and damage to property, death and defamation.<sup>14</sup> It seems to me that this model would create great uncertainty, even with the help of presumptions, as too much freedom is given to the judge hearing the case.

The Commissioners also propose that the parties be allowed, before or after a tort or delict has occurred, to agree by means of contract what law should govern the parties' mutual liability in tort or delict subject to a reservation in favour of public policy.<sup>15</sup> This proposal is long overdue. However, in practice, it may be difficult to reach such an agreement after a tort or delict has occurred. I doubt that Union Carbide would agree to have the law of Connecticut apply to the Bhopal disaster. Except in certain cases, it is also most unlikely that the parties to a tort or delict could agree as to the applicable law *before* its occurrence. Where such a choice takes place, it alleviates the shortcomings of the judicial search for the law of the country that has the closest and most real connection with the occurrence and the parties. One may ask whether the parties should be free to choose any law?

Professor Hancock's book is attractively bound and clearly printed. Its value is enhanced by the existence of a table of cases, a bibliography and a short subject index. It is a fitting tribute to a great scholar.

J.-G. CASTEL\*

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*Advocacy: Views from the Bench.* By R. REID and R. HOLLAND. AGINCOURT: Canada Law Books. 1984. Pp. xxii, 164. (\$25.00)

Since advocates and would-be advocates pretend to be swamped with work, a tendency has arisen to treat books on advocacy as matters for reference, rather than for entertainment. If there is one quality of this book that will appeal immensely to lawyers it is the quality of entertainment it supplies. It is not a pretentious book. It does not attempt to be a treatise on the art of advocacy and in some ways the sections by Mr. Justice Holland that deal with methods of handling examination and cross-examination are tantalizing in that they do not pretend to be complete. One would hope that that author at some stage would, from his

<sup>14</sup> *Ibid.*

<sup>15</sup> Para. 7.3.

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experience, write a true treatise on those arts as they are applied in Canada.

What makes the book somewhat unique and valuable is that it deals with advocacy and the traditions and trappings in a Canadian courtroom. We are too much used to relying on the learned works that deal with advocacy in the English and in the American courts. The Canadian courts are neither, and have developed their own methods, their own traditions, and their own art of advocacy, which, while similar to, are not the same as advocacy as practiced in other jurisdictions.

The second special value in this book is that it is written by judges rather than by lawyers. All too often counsel ignore the real purpose of their advocacy, which is to "sell" the judge or the jury. The great victory on the point of evidence is so often totally meaningless in the broader view of the lawsuit. If there is one thing that is revealed from this book, it is that lawyers should never lose sight of the woods for the trees. Advocacy for the sake of advocacy is as useless as bad advocacy.

The first section of the book is of great interest because it sets out as a separate entity the tradition of advocacy in Ontario. It provides to not only young counsel, but old counsel who have forgotten, so many tips about dress and conduct and the importance of proprieties at the trial setting, that I have never previously seen collated. I would suspect that there will be in that section of the book at least two or three or four matters which will not have been before realized by even highly experienced counsel.

In many ways, the book is as valuable for what it advises counsel not to do as it is on what counsel should do. It unquestionably contains advice useful to counsel in the handling of the trial judge. The authors were accomplished trial advocates before their appointments to the Bench, and so are more able than most to draw on their own experiences as both advocates and trial judges in speaking on the art of advocacy.

Finally, the book is appealing because it is written in a form that is not judges instructing lawyers. Rather, in many ways, I suspect, it represents a genuine appeal to the Bar to improve the level of advocacy in this country from those who must on occasion suffer from its absence.

KENNETH E. HOWIE\*

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*Introductory Essays on Scots Law. Second Edition.* By W.A. WILSON. Edinburgh: W. Green & Sons Ltd. 1984. Pp. x, 156. (£6.50)

Introductory student law texts, no matter what jurisdiction they purport to introduce, are much of a muchness—some legal history, some description of the court structure, of what lawyers do, what judges do and what legislatures do, and some law reform. Sometimes there is a glossary, and

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if you are lucky an appendix instructing the unwashed how to join the in-crowd and become a lawyer. Some texts discuss these matters with an air of complacent approval. More recently, a few discuss them from a ferocious Marxist ideological perspective.

Introductory Essays on Scots Law is different. It includes chapters on some of the usual topics. But it also contains chapters which are sufficiently unusual in a book of this genre that one has to label their inclusion whimsical and eccentric. This book does not contain a comprehensive, synthetic and systematic introduction to Scots law. Indeed, the chapters are simply a series of essays which logically mesh in the vaguest manner. The first four essays, Law and Language, Measures and Standards, Legal Geography, and Nothing But a Border address some topics of general relevance to law which are often overlooked. The next six essays, Truth Finding, Civil Procedure, Appeals, Dealing with Decisions, Reading Statutes and Interpreting Statutes discuss the usual issues in relation to procedure, case law and legislation, while the next essay, Community Law in Scotland, relates Scots law to the Common Market, and the last two, Intestate Succession and The Analysis of Negligence, give a brief introduction to two areas of substantive law. It is not clear that one can say more about the organizational structure on the basis of the sequence of unnumbered chapters. Clearly, there are numerous obvious topics normally found in introductory books which are missing, such as a brief history of Scots law, legal education, the legal profession, as well as greater consideration of substantive law.

Of the two essays on substantive law, presumably intestate succession was chosen because it differs more markedly from the common law than other aspects of Scots private law and negligence was chosen because virtually all of the significant negligence cases from *Donoghue v. Stevenson*<sup>1</sup> onward have been Scottish appeals to the House of Lords so that it could be said that this is an important example of how Scots law "impacts" on the common law. However, it must be confessed that while the essay, as an exercise in doctrinal law is sound, it is unoriginal and old hat to the common law reader.

The middle set of essays is perhaps the least interesting to the common law reader since much of the procedures, presumptions and techniques of law-making differ little from those of the common law once the Scots law nomenclature is penetrated, and no matter how vehemently Scots lawyers defend their system as different (superior?). Since 1707 Scots law has been quietly and unrelentingly inundated by the common law so that for the most part the distinctions are ephemeral rather than substantial. While these chapters are clearly written and the material carefully and logically set out, nevertheless their interest for the common law reader resides less in their profundity or originality than in the numer-

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<sup>1</sup> [1932] A.C. 562 (H.L.).

ous Scots law examples which import a certain novelty, romance and charm into the text.

Most interesting are the first four chapters. To the non-Scots lawyer they contain much that is new and interesting in its own right. The main reason for this is undoubtedly the rich historical texture of Scots law which even today is still very much more a working archaeological dig than is the common law. These chapters are larded with delightful examples ranging over the past five hundred years or so, thereby adding an antiquarian flavour to discussions which are at the same time entirely contemporary in their relevance. Moreover, some of the material is useful and illuminating in the context of any legal system, especially the chapter on Law and Language which deals with the inherent features of language which produce difficulties in the law such as syntactic ambiguity, semantic ambiguity, vagueness and generality. Again, some of the information about Scots law jargon and concepts, often omitted from standard legal dictionaries, is useful to the Canadian common lawyer faced with persuasive House of Lords decisions on Scots law appeals.

However, it has to be said that, as a book which purports to introduce students to Scots law, *Introductory Essays on Scots Law* fails in that the nuts and bolts are not set out in a comprehensive and systematic way. Scots law students and interested comparative lawyers would be better advised to consult *General Principles of Scots Law*<sup>2</sup> or *The Scottish Legal System, An Introduction to the Study of Scots Law*.<sup>3</sup> Nor is there much here for the sophisticated comparative lawyer who should consult the specialized texts. Nor can this book be recommended as an exemplar for introductory law texts generally.

Yet one of the fundamental concepts underlying the first four chapters, at any rate, cannot be faulted. A set of essays on certain aspects of the legal system not normally treated in a banal introductory text would undoubtedly provide much fun for their author and for the general reader, legal or otherwise. It would have been easy for Professor Wilson to extend the style of the first four essays with additional essays on law and Scottish literature, law and the Scottish Enlightenment, legal Edinburgh, law and the Church or the Scottish legal profession with its advocates, Aberdeen advocates, Writers to the Signet and sundry other societies. There is a rich and unique legal heritage on which to draw and which would provide interesting Sunday afternoon reading even for the odd intellectually curious common lawyer.

M.H. OGILVIE\*

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<sup>2</sup> Enid A. Marshall, *General Principles of Scots Law* (1982).

<sup>3</sup> David M. Walker, *The Scottish Legal System, An Introduction to the Study of Scots Law* (1976).

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