BOOK REVIEWS
LIVRES NOUVEAUX

Access to the Law, by M.L. Friedland, in collaboration with Peter E.S. Jewett and Linda J. Jewett, Toronto: Carswell/Methuen, 1975. Pp.ix. 99, appendices 97 ($10.95).

This study, conducted for the Law Reform Commission of Canada, rests on the assumption that, "The state has an obligation to insure that its laws are available in an understandable fashion to laymen".[1] Whereas during the past decade legal aid schemes have made the *courts* reasonably accessible, little has been done to make the *law* accessible. This stimulating and readable book is addressed to the latter problem.

It is pleasing to note that the authors were aided by a number of non-lawyers, notably a psychologist, linguists, librarians and many others. A major feature of the study was its clear and uncomplex presentation of empirical data. The reader is left to explore much of the data in greater depth in the appendices, without the imposition of statistical tests. The authors also make no pretence at being "scientific" nor do they claim that their social enquiries are exhaustive.

In the first survey sixty members of the public in Toronto, twenty in Kitchener and twenty in Lindsay were approached with a series of ten relatively simple legal questions, for example; "What would you do if your landlord refused to fix the leaking roof of your rented house?". We are not told how the subjects in the sample were chosen, except that it is admitted that two-thirds of the total sample were women. Clearly it was by no means a random sample in the statistical sense. The percentage of respondents who would seek information or help from various sources differs markedly from question to question. Fascinatingly enough, government sources were indicated in about half the cases, and lawyers were usually avoided. There was only one instance (involving a deserted wife) in which more than a quarter of the respondents who sought information would have contacted a lawyer. In most other cases the percentage who would have approached lawyers was minimal. In the next stage of the investigation, two researchers, taking the Toronto data, telephoned on separate occasions the information source indicated,

[1] M. L. Friedland, *Access to the Law*, 1.

and evaluated the adequacy of the response. It was found that an average of more than 25% of the sources called gave an incorrect answer or made a referral which led to an incorrect answer. Some mistakes were flagrant. For example, the Metropolitan Toronto Police Department failed to provide a correct recital of section 195.1 of the *Criminal Code* dealing with soliciting for the purposes of prostitution, while the Better Business Bureau wrongly advised that nothing could be done to compel a car repair shop to properly finish a job, on one occasion abusing the female researcher and suggesting that she should have her husband or boyfriend look after the car!

Two further research exercises were undertaken. In one, lawyers in private practice, public libraries, neighbourhood information centres and government and legal aid agencies were consulted on two matters, a simple landlord and tenant problem and the expunging of a criminal record obtained after an absolute discharge. It was found that the groups, lawyers and non-lawyers alike, were generally equally successful in solving the landlord and tenant question, but gave equally unreliable advice as to the criminal record problem. In the other, volunteers among visitors to the Ontario Science Centre, including a high percentage of students, were requested, after a brief explanation of how to look up statutes and regulations, to answer simple problems involving recent statutes and regulations of Ontario and Canada. The relevant statute books were provided. Of the thirty-five subjects who participated, only five found a correct answer to a question.

The reseachers then studied various information sources to find out the reasons for the difficulties experienced in handling legal questions and problems. Legal aid offices and assistance clinics, government information services, community information centres, police departments and various forms of libraries were visited in twenty-one cities across Canada. An impressive number of interviews were conducted and questionnaires mailed out and analyzed.

The most provocative part of the study presents the authors' suggestions for a variety of measures to provide better access to the law in Canada. Most lawyers who have to grapple with such excessively complicated drafting as that contained in the Bail Reform[2] and Income Tax Act[3] would have a great deal of sympathy with the authors' pleas that statutes must be made less technical and convoluted, better indexed, less complex and with a much improved

[2] *Bail Reform Act*, S.C. 1970-71-72, c.37.
[3] *Income Tax Act*, R.S. 1970, c.148, s.1.

continuous up-dating service. The obvious danger of over-simplification in a statute is that the complexity is simply transferred from the legislative to the much less accessible court process. But it is clear that the balance requires redress.

The author, however, devoted little time to suggestions of how to improve other traditional legal research tools such as case reports, legal textbooks, and encyclopedias. Surely too, computer storage and retrieval of legal information required at least some comment.

Recognising the need for a basic education of the public about law the authors support the introduction of law courses in the schools and adult education centres. Their caveat is that law courses aimed at non-lawyers must stress the recognition of situations involving the law and methods for discovering the law rather than attempts at statements of the law at any particular moment. Lawyers have for years striven to develop the mystique of the law, primarily, some contend, in their own self-interest, but there is probably some truth in the view that a smattering of knowledge about law might be dangerous. The authors point to two practical difficulties at the moment: the lack of suitable teachers and the lack of texts. The trouble is, of course, that training and writing will take time.

Underlining the many suggestions made for improving delivery systems is the need for more organized procedures for dealing with questions from the public concerning legal matters and for training the staff concerned. It really seems to be a problem of personnel management. Clearly if the police are inundated with questions involving the law they must, as the City of Calgary Police Department did, set up a special service of experienced police officers. There is nothing to be gained by the label "para-legal" in this context unless it is simply a shorthand for a properly informed non-lawyer.

Certainly their most provocative suggestion is that we need an encyclopedia of law for non-lawyers. They envisage a, "set of binders occupying perhaps five or six feet of shelf space",[4] that would be comprehensive, covering all areas of law in detail and requiring few references to other legal sources. The classifications would be in subject categories easily recognizable to the ordinary citizen, constantly up-dated, well indexed and comparatively cheap — about $300,000 for the initial costs of producing materials for the first province. Illustrative sample model entries are included in the appendices. The discussion of this ambitious venture, promised earlier in the book, leaves unanswered such connundrums as who is to

[4] *Supra*, note 1, 92.

write this huge work; how primarily case law areas are to be covered and at what point the reader should be warned that the area is complex and a lawyer should be consulted. My own reaction is that these difficulties and the especially grave one of simplifying laws without distortion make the idea, however noble, a pipe-dream. However, if the public is as misinformed about the law at present as the study so clearly indicates, any effort to overcome the practical problems of compiling a major work for non-lawyers is worthwhile and overdue.

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Obligations, Book 2, by Saúl Litvinoff, West Publishing Company, 1975. Pp.xxiv, 618 ($39.00).

The traditional matrix of consensual arrangements is the abstract notion of correlative rights and duties. It is the mortar of civil code[1] articles on conventional obligations which in turn support the titles concerning contracts[2] gratuitous and onerous, unilateral and bilateral. Perhaps it is the pervasiveness of this duty-right notion which makes the obligations course among the most difficult and challenging in the curriculum. Mastery of this abstraction comes slowly.

Professor Litvinoff's latest treatise, the sixth in the series *Louisiana Civil Law Treatise*[3] sponsored by the Louisiana State Law Institute, illuminates many of the problems confronting the student of obligations. Written in the classical style of doctrinal writers such as Planiol and Puig-Brutau, this volume and its companion first volume form the single most comprehensive contribution to Louisiana scholarship on obligations. Equally important, the two volumes are major English contributions to the general comparative literature on the subject of obligations.

The volume under review is divided into fifteen chapters. In traditional fashion, it opens with a chapter on general principles. Chapters 2, 3, 4, 5 and 7 treat obligations to give and the transfer of ownership. Chapter 6 focuses on the *bona fide* purchaser doctrine, chapter 8 deals with transfer of risk, chapter 9 deals with obligations to do or not to do, and chapters 10 through 15 constitute an exposition of putting in default. The volume ends with several tables of case citations and statutory materials and an impressive bibliography of general works on obligations and legal theory.

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[1] This statement applies equally to the Louisiana Civil Code and civil codes of nations and provinces that received and codified the Roman law.

[2] I limit the scope of the duty-right concept to contracts to avoid hazy problem areas such as statutory duties of filial devotion. But a strict positivist, invoking the maxim *ubi ius ibi remedium,* could regard the entire fabric of law as no more than correlative rights and duties.

[3] The other volumes are: Volume 2, Yiannopoulos, *Civil Law of Property: Things, Real Rights, Real Actions* (1966); Volume 3, Yiannopoulos, *Personal Servitudes: Usufruct, Use, Habitation* (1968); Volume 6, Litvinoff, *Obligations, Book I: General Theory, Classification of Contracts, Formation of Contracts* (1969); Volume 10, Oppenheim, *Successions and Donations* and Volume 10, part 6, Nathan, *Louisiana Inheritance, Estate Transfer and Gift Taxes* (1973). An excellent discussion of the Law Institute's publications appears in Dainow, *Civil Law Translations and Treatises Sponsored in Louisiana* (1975) 23 Am.J. Comp.Law 521.

The volume is an important contribution to general comparative literature principally because of the analytical framework within which the author presents his topic. For example, he opens the discussion of the suspensive condition with a general presentation of the problems it presents and then refines his analysis by moving serially to the positions of Louisiana jurisprudence, French jurisprudence, the jurisprudence of other civilian jurisdictions, and the common law (§§64-67). For the English-speaking lawyer needing a comparative overview of special topics but unschooled in the requisite foreign languages and literature, Professor Litvinoff's work is a natural research tool.

For all its erudition and lucidity, however, the book leaves me with a disquieting sense of the opaqueness of this imporant legal subject and of its distance from ordinary human experience. This sense, I suggest, results from the author's typically modern oscillation between two poles of argumentation: formal rule exegesis, which interprets the code articles quite literally (tacitly assuming their beneficence and neutrality) and value judgments which make no such assumption.[4] These judgments are instead based upon a subjective balancing of competing interests and suggest an enlarged scope of social cooperation beyond the radius envisioned by the codifiers. The word "subjective" as used here is not pejorative; it merely suggests that these judgments derive their force more from an intuitive sense of fairness than from specific enactments.

Given the combination of intellectual gymnastics and subjective value judgments needed to explain certain institutions and doctrines, one wonders if an intelligent, well-intentioned person would behave according to the prescribed legal norms even if he knew them and wanted to follow them. This is not a criticism directed particularly at Professor Litvinoff's work, but rather, an indictment of legal technicality. The law cannot lose its intelligibility and keep its legitimacy in the layman's eyes. The remainder of this review illustrates the oscillation described and offers some tentative explanations for it. I do not suggest any escape from the oscillation, which seems a permanent feature of contemporary legal experience.

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[4] This is the classical philosophical distinction between deontological and teleological reasoning. In the former, the legitimacy of a command, such as a biblical commandment, is assumed *a priori* without regard for the consequences of its execution. In the latter, the legitimacy of a command hinges upon its consequences.

The instability of subjective moral assertions

Subjective moral prescriptions abound in the sections treating notions central to the theory of obligations: good faith and abuse of right. A shift away from the classical creditor-debtor antagonism and toward increased cooperation is notable in the sections which follow.[5]

Section 4. GOOD FAITH

According to traditional doctrine, as a contract engenders a credit-right in favor of one or both of the parties, this right will automatically produce consequences through the operation of such additional rights as the right to demand performance and the right to recover damages. A contract, however, not only ought to be but actually is performed otherwise. In modern times, the emphasis once placed upon the individual end pursued by each of the parties has been shifted to the end pursued in common by all the parties, as if every contract were a joint venture — almost a partnership — where the idea of opposed interests dividing the parties yields to the idea of a certain union of interests among them. Thus, insofar as the expected performance is concerned, the creditor is no longer a creditor without more; he also becomes a debtor with a duty of collaboration, an obligation to cooperate in the attainment of the mutual ends, which need no longer be accomplished solely through the means originally conceived by the parties but may be achieved by other means supplied by the will of the parties or by judicial fiat. The door is thus opened for the modification of contracts.

The principle of good faith, so broadened in this modern approach, may serve to remove harshness sometimes implicit in the obligor's necessity to perform. The question will be: should the obligor be held to perform exactly what he has promised or only what is necessary for the attainment of contemplated mutual ends? The answer is clear once it is accepted that obligations do not exist for their own sake but for the accomplishment of societal ends which are focused, mainly, on the usefulness of results (pp.6-7).

Section 5. CREDITOR'S DUTIES

It is the creditor's obligation not to overburden his debtor but to facilitate his performance through positive action. Moreover, he must do whatever is required of him, in order to enable the debtor to perform; hence the doctrine that the creditor's default releases the debtor from liability to damages (p.9).

The creditor owes a duty not to abuse his right; prerogatives arising out of contracts should not be exercised in an unrestrained fashion. ... Where the creditor is a professional man, he owes his debtor the benefit of his superior knowledge and experience, and therefore he ought loyally to warn the other about conditions or consequences of the contemplated performance (p.10).

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[5] I quote at length to give readers a sense of Litvinoff's style and to allay concerns that his arguments are out of context.

In these passages the subjectivity of Professor Litvinoff's value choices is apparent. One wonders if a hardbargaining professional would necessarily subscribe to Professor Litvinoff's suggested duty of disclosure to his debtor. Is the notion of a contract as a "joint venture" to achieve societal ends clear? What is clear is that the quoted passages rest upon a modernized vision of increased social responsibility in a market place in which the strict exercise of absolute rights is tempered by social needs.

The frustrations of technical analysis

To glimpse Professor Litvinoff's analytical prowess at its best, consider his explanation of the lay-away sale, a modern security device designed to promote credit transactions.

> The conventional "lay-away sale" is an agreement between the buyer and seller looking toward a transfer of ownership in property. The parties usually agree as to some specific thing, which is laid aside by the seller, until the buyer pays the price. However, it sometimes happens that only a class of thing is agreed upon, with no specific thing being appropriated until the time of delivery. Because of the buyer's inability to pay the full price in cash, the seller extends a period of credit, but retains possession of the thing until the price is paid in full. Most lay-away agreements provide for a fixed amount to be paid in regular installments. It is sometimes provided that if the buyer defaults in payment, the amount paid toward the price will be forfeited, and the thing returned to stock for resale. It is the custom of seller, however, to give notice of default to the buyer before such action is taken (p.111).

In such a sale, a major question is when title and risk of loss pass to the buyer.

"To find a right approach to this problem", argues Professor Litvinoff, "it becomes necessary to determine the type of agreement the 'lay-away sale' purports to be. He continues:

> If it is intended as a sale in which the buyer becomes bound to pay the entire price while the seller retains possession of the goods, then it would seem that ... title should pass immediately to the vendee. If on the other hand, the agreement contemplates merely that the prospective purchaser will put some money down on the object he wants to buy, and the owner will hold the object aside so that the former can acquire the thing — possession and title — later if he so desires, then the agreement resembles an option and the prospective purchaser, quite clearly, will not become owner until he exercises the option.
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> ... While the purchaser can be regarded as entering into a contract with a store to purchase the thing that is "laid away" it is not entirely clear that he ever becomes bound to pay the total price; it would seem that he does not. Usually it is understood that if the purchaser should decide not to buy the thing, he can simply forfeit what he has already paid. In such an approach, the amounts paid by the prospective purchaser rather than

> "consideration" given for an option, would resemble a deposit of earnest money in a contract to sell. Considering the marked dislike of Louisiana courts for "lopsided" agreements, they would probably regard such a version of a "lay-away sale" as a sale with reservation of title, and hold that ownership is transferred to the vendee upon the making of the deposit. It is not difficult to see that such a solution is *highly undesirable* with respect to risk of loss. It does not seem that in transactions of this kind the parties intend that any loss occasioned by a fortuitous event should be borne by the purchaser. The selling store usually carries adequate insurance to cover such losses, and if the "laid-away" goods are reflected in the premiums paid by the seller, the insurer would receive an *unjustifiable advantage* if the loss was placed upon the buyer and the insurer was thus relieved of any obligation to pay (p.112) (emphasis added).

Here Professor Litvinoff's subjective interest balancing and rule exegesis collide head-on. Certainly he is uncomfortable with literal interpretation of the code. So he moves to arguments of fairness. Nevertheless, it is unclear why the insurer's advantage would be unjustifiable if the insurer cut the retailer's premiums in recognition of real savings which he could then pass to the consuming public in the form of lower prices.

Professor Litvinoff's conclusion frustrates the reader and suggests the author's own consternation:

> In sum, although no "lay-away sale" has yet been analyzed by a Louisiana court, ... the prior jurisprudence concerning sales with reservation of of title give strong reason to believe that, in Louisiana, title would be held to pass to the vendee in transactions of this kind. Neither proper reasoning nor sound public policy, however, lends support to such a solution (p.113).

A tentative diagnosis

The oscillation between argument based on classical exegesis and argument derived from subjective value choices is an inevitable consequence of the quest for two opposing ideals in rulemaking: formal symmetry of results in all cases of a certain class and substantive fairness (however intuitive and amorphous the term seems) in any particular case of the class. According to traditional civil law doctrine, a set of formally precise rules should yield predictable results in a given class of cases. But the search for fairness subverts an absolute commitment to formal symmetry. For example, a judge may realize that a case of a certain class presents mitigating factors, *e.g.*, the buyer in the lay-away case may have paid installments faithfully, the destruction of the object was not attributable to the seller's neglect, the insurer has been unjustifiably enriched. In such a case, the harsh result dictated by mechanical application of the maxim *res perit domino* cries out for tempering and modification.

And to promote the lay-away sale as a device for encouraging the extension of credit, a judge could easily rationalize such modification under the special circumstances I have suggested.

Legal formality[6] and the supreme legislator

In contemporary civil law jurisdictions, the quest for formal symmetry in adjudication and legislation is associated with the eighteenth century rationalist view that human beings could write down and codify an entire scheme of laws to govern all their relationships. At a deeper level, a coherent formal framework was seen as necessary because of a deeply pessimistic vision of men as highly individualistic, insatiable wills, randomly exchanging some objects for others.[7] These wills could be restrained by nothing less than a positivist state, represented by a superhuman impartial legislator, an evil necessary to fend off anarchy.[8]

To express the general will in positive enactments, this super-legislator theoretically must transcend the competing demand, of particular interests.[9] His neutrality was the source of public respect and hence of his apparent legitimacy.[10]

The binding effect of the supreme legislator's laws was predicated on their formality. In other words, the laws should be generally applicable to all citizens of the state (the notion of *erga omnes*);[11] autonomous and independent of socio-economic pressures and official caprice; publicly known or knowable, and positive, that is, enacted by a duly constituted body. This system of formal rules was designed to hedge in the actions of officials and to avoid their arbitrary behavior.

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[6] Provocative contemporary treatments of legal formality appear in Unger, *Law in Modern Society* (1976), 203-16 and Kennedy, *Legal Formality* (1974) 2 J. Legal Studies 351. This book review, in a sense, attempts to test certain of Unger's and Kennedy's arguments by placing them in a civil law setting.

[7] See *e.g.*, Hobbes, *Leviathan*, vol.1, ch.13-14, "Of the Natural Condition of Mankind as Concerning their Felicity and Misery", in Molesworth (ed.), 3 *The English Works of Thomas Hobbes* (1839), 110-17.

[8] Compare *e.g.*, Rousseau, *The Social Contract* (1964), ch.7, "The Legislator", 42-43 with Portalis's depiction of the legislator in Levasseur, *Code Napoleon or Code Portalis* (1969) 43 Tul.L.Rev. 762, 767. A concise treatment of legislation as an "embodiment of wills" appears in Herman, *Excerpts from a Discourse on the Code Napoleon by Portalis* (1972) 18 Loy.L.Rev. 23.

[9] See Rousseau, *supra*, note 8, 30-31.

[10] The following question shows the fictional nature of the legislator's neutrality: How can a "neutral" legislator, conscious of gross maldistributions of wealth, sanctify the institution of private property?

[11] A short English introduction to this notion appears in Merryman, *The Civil Law Tradition* (1969), 141-47. See also Rousseau, *supra*, note 8, 39-40.

The formality of the system permitted its interpreters, executive officers, judges and doctrinal writers alike, to justify their legal conclusions by reference to the hermeneutical interaction of the rules themselves[12] without regard for value choices involving fairness or utility. But purely formal exegesis, which assumes the moral rightness of a code, finds a natural antagonist in the intuitive sense of justice in a particular case. Because this sense of justice cannot be codified in a body of generally applicable rules, the formalist would regard it as dangerous and tyrannical. This antagonism pervades Litvinoff's treatments of good faith and abuse of rights, in which he sacrifices formal rules in favour of increased social cooperation reached by subjective interest balancing.

Unger has recently offered an explanation for this radical shift to moral assertion and value judgment in contemporary legal experience. In his view, the harshness of formal rule application generates "a greater willingness to regard as part of the law certain moral conceptions insusceptible of development and application consistent with ideals of generality and autonomy. For these conceptions cannot be reduced to rules or divorced from views of moral obligation".[13] In private law, Unger suggests, two such moral conceptions are good faith and abuse of rights. Both conceptions present an insoluble dilemma for they moderate the unrestrained opposition of the wills of the parties; in each case, they require the creditor and debtor to find "a mean between the principle that one party may disregard the interest of the other in the exercise of his own rights and the counter principle that he must treat those interests exactly as if they were his own".[14] Professor Litvinoff's discussions of good faith and abuse of right reflect his struggle toward that mean. They also signal an abrupt break from the uncontrolled wills of laissez-faire economics, and toward restraint upon individuals in the market place. In his quest for the ideals of formal symmetry and fairness, Professor Litvinoff has intertwined an innovative vision of social responsibility with lucid doctrinal writing. His latest treatise merits careful study.

Shael Herman*

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[12] This approach is evident in Kelsen, *Pure Theory of Law; its method and fundamental concepts* (1934) 50 L.Q.R. 474.

[13] Unger, *supra*, note 6, 210.

[14] *Ibid.*

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Mariage, séparation, divorce, l'état de droit au Québec, by Jean Pineault, Montreal: Les Presses de l'Université de Montréal, 1976, Pp.289 ($11.50).

Classical jurisprudential writing in the Province of Quebec has for a long time been pre-occupied with the exposition and detailed analysis of individual sections and articles of the Civil Code and related statutes. Now that Mignault, Langelier and Trudel have left behind a firm foundation for the basic understanding of the codified law, authors are becoming increasingly concerned with a conceptual or problematic approach to the law. It has been largely due to the university law faculties, such as Laval and the University of Montreal, that recent years have seen the emergence of several volumes dealing with specific aspects of the civil and administrative law of Quebec. Although some of these books have tended to be elementary and student-oriented in scope, they have nevertheless provided an up-to-date review of current problems facing both the practitioner and the academic.

Jean Pineault, author of *Traité élémentaire du droit civil, La famille,* has now published a new version (not a second edition) of his previous work, which probably represents a new departure in legal writing in this province. It appears that the author's intention is now to direct his new work toward the practising lawyer by discussing more jurisprudence and sharpening his focus on more current practical problems.

The book provides a fine overview of the social and juridical relevance of the family structure and analyzes a variety of questions including formalities of marriage, familial rights, statutory provisions for rupture of the family unit, as well as the rights of parent and child. The volume is very well indexed and touches on most of the basic court decisions in the area in a current fashion. The views expressed, for the most part, represent the present law as decided by appellate courts.

One of the more interesting points with which the author deals is the question of the validity and effect of a pre-separation or pre-divorce agreement which purports to provide for a complete settlement and a discharge of all alimentary obligations owing from one consort to the other. The author notes that the Quebec Court of Appeal[1] has held that such an agreement is not a transaction in the

[1] *Ménard* v. *Ricard* (1974) C.A. 157.

sense of article 1918 C.C., although some judges of the Superior Court have insisted on applying the term.[2]

If we look to the provisions on transactions, the Civil Code determines that such contracts generally terminate a lawsuit already begun or prevent future litigation by means of concessions or reservations made by one or both parties.[3] Although a transaction has, between the parties to it, the authority of a final judgment, such agreements may be nullified or modified in the light of the subsequent discovery of documents of which the parties were in ignorance if such documents have been deliberately concealed.[4] It is probably correct to reason that subsequent modifications of pre-divorce agreements, if classified as transactions, are impossible unless the very strict qualifications contained in the transaction provisions of the Civil Code are followed. These agreements may be most accurately described as transactions with an implied condition. The implied condition provides that the agreement continues only as long as the present financial situation of the parties remains the same. In a decision of the Court of Appeal reported after the publication of Pineault's book, the Court of Appeal reviewed a pre-divorce agreement providing for an annual alimentary payment by one consort to the other which stipulated:

> This Agreement shall persists so long as the present financial situation of both parties remains substantially the same.[5]

While the Court had previously considered such agreements simply as an important factor in determining the quantum of alimony,[6] Bélanger J. noted:

> Je suis d'accord que les deux contrats originaires ont consacré les droits des parties suivant les circonstances qui existaient au moment où ils furent consentis: ils doivent servir de point de départ fourni par les parties elles-mêmes pour les modifications futures devenues nécessaires à cause des changements survenus depuis dans leur état .... En somme, les deux parties avaient pris des positions incompatibles avec les deux contrats originaires, ce qui nécessitait l'intervention de la Cour.[7]

A recent decision of the Superior Court[8] continues to view pre-divorce agreements as legal transactions, but has adopted a greater flexibility in the interpretation of article 1921 C.C., which provides

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[2] *Dussault-Caron* v. *Caron* (1974) C.S. 45.
[3] Art.1918 C.C.
[4] Art.1925 C.C.
[5] *Stevens* v. *Stevens* (1975) C.A. 113.
[6] *Ménard* v. *Ricard, supra,* note 1, 159.
[7] *Stevens* v. *Stevens, supra,* note 5, 114.
[8] *Cyr* v. *Dionne* (1975) C.S. 940.

that the transactions may be annulled for the same cause as contracts generally.[9]

Although Pineault has addressed his forward primarily to students and not to practitioners, certain aspects of family law are neglected. One would have thought that a discussion of the legal problems of the present-day Quebec family would place some emphasis on religious matters. The book, however, limits itself to a general review of the effect of religious formalities prescribed by the Civil Code.[10] There is no exploration of the implications of a recent Court of Appeal judgment[11] in which the Court held that a father was not entitled to obtain the custody of his child for the sole reason that the mother had effected his conversion from one religion to another. The Court was of the view that notwithstanding the importance of religious instruction in our society, it is in the best interest of a child of tender age that daily physical needs be given utmost preference and attention. A more interesting question has arisen in Manitoba where one consort sought by way of injunction to force her husband to submit to a religious divorce, which was a prerequisite for religious remarriage.[12] While the Court of first instance agreed that such injunction should issue, the Manitoba Court of Appeal held otherwise on the grounds of separation of Church and State.[13]

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[9] But see *Létourneau* v. *Fortier* (1975) C.S. 308, 309: "Le droit aux aliments est certes primordial mais il revêt d'un caractère particulier puisqu'il se rattache à une obligation naturelle et à une institution qui, quoique de plus en plus disloquée, et peut-être même anachronique déborde encore les cadres du droit purement privé dans notre régime: c'est la famille. C'est pourquoi la Cour supérieure n'est pas en la matière liée par une entente entre les parties contrairement à la situation qui existerait dans le cas d'un contrat de transaction...."

[10] art.127 C.C. *et seq.*

[11] *Bockler* v. *Bockler* (1974) C.A. 41.

[12] *Re Morris and Morris* (1974) 42 D.L.R. (3d) 550 (Man.C.A.): Jones and Bissett-Johnson, *Re Morris and Morris: A Case Comment* (1977) 23 McGill L.J. 110.

[13] *Ibid.*, 568 *per* Guy J.A.: "I am of the view that the law relating to marriage and divorce in Canada is a Canadian civil matter and cannot be allowed to become uncertain or schismatic by reference to various sects or religions. I am aware that the Roman Catholic Church does not recognize divorce in any form. It appears that the law of Moses and Israel recognizes a Canadian divorce only as a reason for obtaining a rabbinical court bill of divorcement. In the United States of America, various States have varying rules or standards relating to grounds for divorce — from cruelty, and bestiality to adultery, or mere incompatibility. That is not the concern of a Canadian Court. We are bound to administer the law of Canada as it is written, and the power of the civil Courts of justice should not be extended to assist rabbinical courts or, indeed, any religious sects, to enforce their orders. The administration of

The question which remains, in Quebec at least, is whether or not the Courts will uphold the primacy of religious instruction or religious behaviour with respect to custody of children and other related matters, especially where the marriage contract or intervening covenant stipulates the submission of the parties to religious law.

Another aspect of current practice of great concern is the real import of the marriage contract in the light of a severe increase in the rate of divorce in the Province of Quebec. A topical issue, which receives little attention in the book, is the validity of a clause inserted by many notaries in modern marriage contracts, which stipulates:

> In the event of divorce, provisions of the present agreement providing for benefits accruing to the wife from the husband shall be deemed to be unwritten and non-existent.

Although the Courts have not yet decided the issue, it is probably fair to say that there is a certain amount of judicial hostility to any term or condition which abruptly deprives the wife of compensation for foregoing the benefits of community. The clause as drafted is especially objectionable since it sanctions the acts of a "guilty" husband who subsequently constitutes himself petitioner in divorce alleging such grounds as *de facto* seperation for a period of five years. Another objection to the clause is that it attempts to annul the marriage contract retroactively without altering the regime of the parties from separation of property to some form of community. If the Court does uphold the validity of the clause, we may very well see creative judicial pronouncements to the effect that the retroactivity of the annulment of the benefits of the marriage contract legally effects a change of regime to a form of community.[14]

In summary, the author has displayed an admirable competence in dealing with the subject matter presented. The book should both prove sufficiently popular with those practitioners who have been seeking a more detailed treatment of jurisprudence than that contained in the author's previous volume, and be adequately clear to students exposed for the first time to the complexities of family law.

Lazar Sarna*

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justice in Canada, in so far as it relates to divorce, should be concerned solely with civil law, both statute and common. The religious courts have their own rules and powers and they enforce them in their states, but they should not ask this country to depart from its own valid legislative enactments."

[14] See the wording of art.1260 C.C. although the formalities of the art.1266 C.C. *et seq.* might have to apply *mutatis mutandis.*

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A History of Contract at Common law, Canberra by S.J. Stoljar: Australian National University Press, 1975. Pp.xi, 221.

The call to "get back to basics" is often heard today. In the context of legal education this must entail, in large part, a return to the study of legal history, which at present receives scant attention in Canadian law schools.

A greater concentration on legal history can be viewed in two ways: as a background to the study of law in a general sense, and as an aid to understanding the development of specific law school subjects. It is in the context of the latter that Stoljar's book is of value. Coincidentally, A.W.B. Simpson's recently published book *A History Of The Common Law Of Contract: The Rise Of The Action of Assumpsit* on the same subject, is longer but covers a shorter time period - up to 1677, the date of the Statute of Frauds.

In the space of 220 pages Stoljar covers the development of the law of contract at common law through almost 700 years, up to 1875, from covenant to consideration. As a result, attention to detail and in-depth analysis are somewhat lacking, at least in comparison to Simpson's book, which allots 600 pages to some 500 years. Nevertheless, there is ample material from which the student of contract may benefit. The examination, discussion, and explanation of the development of the law of contract to the present time are of value to all serious students of contract.

The development of the promissory nature of contractual rights and liabilities, and the growth of the significance of consideration, are discussed in an informative and imaginative manner. Particular points of interest, the derivation of the "past consideration is no consideration" rule, privity, and aspects of quasi-contract are dealt with in a lucid and effective way, as are performance and the doctrines of substantial performance and frustration.

While this book will be of value and interest to lawyers, whether they be legal historians or not, it is perhaps unfortunate that there is not a greater emphasis on the importance of sociological, economic, and political considerations in the development of the law of contract. Only by seeing legal history in its social context can the institutions still with us today be fully understood within the mosaic of contemporary law. There can be no doubt that the book is scholarly, interesting, and valuable and compact enough for use by students as well as teachers.

Like Simpson's book, Stoljar's is doctrinal in nature, with consequent strengths and weaknesses. The particular weakness is a lack of attention to the extra-legal context within which the legal development occurs. The strength lies in the wealth of information in a readily available form.

If there is to be a return to basic issues in curricula and if the study of legal history is to regain at least some of its old pre-eminence Stoljar's book is assured of a place of importance. Even if the study of legal history is not to become more important, the book will still be valuable for its contribution to legal scholarship.

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Treaty Law in Canada, by A. Jacomy-Millette, Ottawa: University of Ottawa Press, 1975. Pp.xvii, 431 ($12.00).

Originally written in French in 1966 as a doctoral submission and published in 1971, Dr Annemarie Jacomy-Millette's work has been translated by Thomas V. Helwig, and after having undergone extensive revision and some updating has been published in paperback form by the University of Ottawa Press. The result is a well-organized and complete treatment of the Canadian law of negotiation, ratification and implementation of international treaties. The issues analyzed are placed in their proper historical context and discussed at each level of law making: the Executive branch of government and the formulation and conclusion of international treaties; the legislative functions of ratification and implementation; and the role of the judiciary in the application and interpretation of international agreements affecting Canadian domestic law. Each stage is examined in a comprehensive and systematic manner and lengthy illustrative appendices are included as examples of Canadian government in action in the international sphere.

There can be no criticism of the scholarly and valuable academic treatment which this subject matter is given by the author. The manuscript retains basically a thesis format and authority for most legal propositions is contained in extensive footnotes. For the serious researcher Dr Jacomy-Millette's book is essential as an authoritative statement of the law and a source of bibliographical material. However, the casual reader or interested observer might do well to consult Gottlieb, Castel, Bernier or the recent multitude of legal periodical articles on the subject. No major legal issue raised by Canada's activity in the international arena has been excluded from analysis.

After a short historical summary highlighting significant dates and events in the acquisition of the treaty-making power by a Canadian nation-state, separate and distinct from the British Foreign Office, the inevitable conclusion is reached that despite Canada's attainment of full international sovereignty the federal government has but limited power to implement treaty obligations. The *Statute of Westminster*[1] and the *Labour Conventions Case*[2] forced the federal government to limit the effect of international agreements on domestic law whenever the subject-matters of such agreements would

[1] *Statute of Westminster, 1931,* 22-23 Geo.V, c.4 (U.K.).
[2] *A.G.Can.* v. *A.G.Ont.* [1937] A.C. 326 (P.C.).

have entailed encroachment on the legislative sphere of the provinces. The making and implementing of treaties under the Canadian federal system requires cooperation from both levels of legislative government. This major current dilemma facing Canadian international policy-makers forms the basic theme of the book.

The problem of the divided treaty power has been an important political issue in federal-provincial relations during the last ten years. The book focuses on this particular dilemma directly by examining the legal and political reasons for the future contraction or expansion of provincial and federal jurisdiction in this area. Quebec's claims for expanded jurisdiction in international affairs has been frequently explored in recent times and the author's conclusions and proposed solutions are not innovative. The issue of international activity by individual provinces may assume a more prominent position in future discussions on Confederation in the light of recent political developments in Quebec. Dr Jacomy-Millette's treatment of this particular facet of treaty law is too theoretical to be considered a definitive prediction of the course of future events. Her conclusions are acceptable but her legalistic method of analysis may be unrealistic when viewed in an overall perspective. Legalism may well be obliged to play a secondary role to pragmatism and political expedience in the search for future solutions.

The author examines Parliament's role of supervision of the executive through its power of ratification of international agreements and, if necessary, actual enactment of appropriate statutory law. The nature and form of Parliamentary participation is discussed in relation to the various types of treaties affecting both the international political order and the international and national legal structures. The effect of treaties on Canadian law is analyzed in relation to specific subject areas; peace, boundaries, individual right, intellectual property, public finance and concerns of the native population. Principles and rules of law are formulated within each particular context.

While, judicial decisions on the major issues are analyzed throughout the book, the final sections attempt to place the issue of the judicial function in its overall perspective, including the conflict between treaties and Canadian law. Recognizing the traditional treatment given to international law in the domestic setting the author illustrates the judicial adherence to "dualistic" theory rather adequately while attempting to analyze the possible ramifications of decisions like the *Offshore Minerals Reference*[3] on this particular

[3] *Re: Offshore Mineral Rights of British Columbia* [1967] S.C.R. 792.

problem. Permanent cooperative federal-provincial machinery to monitor international activity and an expanded role for the Supreme Court of Canada are proposed.

On the whole this book is a well-developed, well-researched reference tool for anyone desiring a full understanding of the relationship of treaties to the various governmental functions in Canada. Organized in the form of numbered paragraphs with summaries interspersed throughout the various subdivisions of the subject matter, the book would be suitable as a supplementary teaching aid, although its wealth of detail makes it unsuitable as a basic teaching tool. The book suffers from repetitiveness, perhaps as a result of the paucity of legal decisions with direct implications for the law in this field. Some attention is given to a jurisprudential analysis of the important legal decisions, and the author appears to regret Canada's continuing acceptance of British theories concerning the relationship of international and domestic law. One should note that the closing date for research appears to be late 1974 and that recent events have the potential to modify much of the existing law. The "watertight compartments" of the *B.N.A. Act, 1867*[4] may soon give way to more fluid constitutional and international conceptions of the Canadian nation-state. A new constitution would most surely address the issue of treaty-making, and Dr Jacomy-Millette may feel confident that her research and analysis will contribute to the final determination of the question.

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[4] 30-31 Vict., c.3 (U.K.).

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