# BOOK REVIEWS
# COMPTES RENDUS

*Studies in Contract Law.* Edited by B. J. Reiter and J. Swan. Toronto: Butterworths, 1980. Pp. xx, 467.

*Sunt lacrymae rerum et mentalia mentem tangunt*: Virgil, *Aeneid*, Book 1, 462.

Contract has come in for a lot of attention recently. New books, new editions of old books and periodical literature on the subject abound in England, the United States and Canada. It is almost as though everyone was busily working to disprove what Professor Grant Gilmore called "the death of contract" several years ago. Professors Swan and Reiter of the University of Toronto have now edited another set of essays on various aspects of the subject. They have drawn their contributors from several universities, though most are from Toronto. And it seems that they have endeavoured, almost heavy-handedly, to attain some sort of internal consistency in these studies by ensuring that the contributors adhere to much the same sort of philosophy of law and legal analysis as they, with the result that there are no significant philosophical disparities among the ideas advanced. Even the style of the essays has a vague sameness.

Given this homogeneity among the authors, it is not surprising to find some overlapping of content and views. However, there is originality and some common sense in these essays. The well-informed reader, but not necessarily the beginner, may well derive profit and pleasure from reading some of these contributions to the theoretical development of the law of contract, while other readers may be irritated and antagonized. In some respects these essays look more like sermons to the converted than attempts to persuade unbelievers to accept and practise the new faith.

The influences that have brought about such perceptions can be identified. Much writing about contract has been critical of the past, and has attempted to provide new foundations for the future,[1] but leading writers in this vogue, notably Horwitz and Atiyah, have

[1] Especially Professor Morton J. Horwitz (Harvard University), *The Transformation of American Law* (1977), ch. 6 (being a revision of *The Historical Foundations of Modern Contract Law* (1974) 87 Harv. L. Rev. 917) and Professor P. S. Atiyah (Oxford University), *The Rise and Fall of Freedom of Contract* (1979).

also been subjected to challenging analysis.[2] In the same way, the contributors to *Studies in Contract Law* may find that the limbs on which they have extended their thoughts will one day be cut off from the tree, leaving them... who knows where? Some of them have firmly rejected what may be called, quoting Lewis Carroll, "Anglo-Saxon attitudes", in favour of Bostonian, Californian or middle-American ones. But one should say at the outset that any serious attempt to produce critical legal writing in Canada is welcome. The time has unquestionably arrived for Canadian legal scholars to do more than train future generations of lawyers and judges. Textbooks, essays and research papers for law reform commissions and other bodies have been playing their part recently in the development of the law in Canada. It is to be hoped that this trend will continue and flourish. No doubt the contributors to this book hope that their essays will also operate in this way, if not upon the judges, then at least upon the thoughts of those whose task it is to undertake revision of the law.

Study 1, "Contracts and the Protection of Reasonable Expectations", written by the two editors, is a rather pretentious introduction to the entire book, by which I mean that their avowed aims seem to be too grand and elaborate for a work of this nature. This particular study purports to lay the foundations for the other studies by identifying and describing the "basic assumption" that is said to be common to all the essays in this book:

> The assumption is that the fundamental purpose of contract law is the protection and promotion of expectations reasonably created by contract. We believe that the law should and does protect such reasonable expectations and that all 'contract rules' are merely specific illustrations of this guiding principle.[3]

The appropriateness of the "reasonable expectations" approach is illustrated by reference to two cases, in which, according to the authors, it was applied: *Hobbs* v. *E. & N. Railway*[4] and *Davidson* v. *Three Spruces Realty*.[5] To this reviewer, the authors' discussion of these cases indicates very much the complaint which they make themselves against judges at various points in this study, that reality has been distorted to produce the consequences sought by the particular interpreter. For example, the authors mention the treatment by Anderson J. in the *Davidson* case of the contract "rules"

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[2] See, *e.g.*, Simpson, *The Horwitz Thesis and the History of Contract* (1979) 46 U. Chi. L. Rev. 533, and Baker, Review of Atiyah's recent book (*supra*, note 1) in (1980) 43 M.L.R. 467.

[3] Reiter & Swan, *Studies in Contract Law* (1980), 6.

[4] (1899) 29 S.C.R. 450.

[5] (1977) 79 D.L.R. (3d) 481 (B.C.S.C.).

which applied to protect the plaintiff — strict construction, fundamental breach, innocent misrepresentation, and unconscionable or unreasonable attempts to apply the exemption clause in the circumstances in which the contracts between the parties had been made.[6] Then they say that "Anderson J.'s canvassing of several technical means of granting the protection is simply proof of the fortitude with which judges will pursue a conclusion dictated by 'horse sense' ".[7] The authors illustrate their criticisms of the failure of courts to adopt the "reasonable expectations" approach, and the benefits that would have followed from its adoption, by reference to the "waiver" cases from *Turney* v. *Zhilka*[8] on. They reserve especial disapprobation for the majority decision in *Barnett* v. *Harrison*.[9] In the authors' words, this line of cases illustrates unsuitable or unsuitably framed rules of contract law and the way courts forget or ignore the reasons for which the law intervenes in contract cases. Reiter and Swan are bold in saying that the role of contract law is "to enhance the institution of contract, to make it more stable and reliable, and thereby to increase the pervasiveness and efficiency of its use in society",[10] and while the authors' criticisms of the "waiver" cases may be justified, it is surely excessive to suggest that those cases have been condemned "universally".[11] And it is inaccurate to say that the dissent of Laskin C.J.C. in *Barnett* v. *Harrison* would have had the effect of reversing the "waiver" cases. The learned Chief Justice knew well the basis upon which the *Turney* case proceeded.[12] Further, the answer to the Chief Justice's judgment is contained in that of Dickson J.,[13] responding to the suggestion of counsel to reappraise the rule in the *Turney* case. The answer may not be to the liking of the authors of this study, but it is an answer nonetheless.

It is appropriate to dwell for a moment on the aims which the authors of this study suggest are common to all the essays in the book.[14] One is to develop useful and functional rules that should

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[6] *Supra,* note 3, 10.
[7] *Ibid.,* 11.
[8] [1959] S.C.R. 578.
[9] [1976] 2 S.C.R. 531.
[10] *Supra,* note 3, 7.
[11] *Ibid.,* 15. For support they cite Davies, *Conditional Contracts for the Sale of Land in Canada* (1977) 55 Can. Bar Rev. 289; Reiter & Risk, *Real Estate Law* (1979) 172-4; Barnett, *Barnett* v. *Harrison — Unilateral Waiver of Contractual Conditions Precedent* (1976) 3 Dal. L.J. 595.
[12] *Supra,* note 9, 541.
[13] *Ibid.,* 558-60.
[14] *Supra,* note 3, 4-6.

guide laymen, lawyers and judges. I do not think that these essays will do very much for the development of the law, and still less for the guidance of laymen, as even "lawyers and judges" may have difficulty accepting the "basic assumption" or the conclusions which the various authors mount on this postulate. The second purpose is the "consideration of the suitability of the institution of contract itself in many of the relationships that it governs now." But they really only deal with what may loosely be called "employment" law from this standpoint.[15] The third purpose is "to begin an investigation of the proper institutions for change within the law of contract." They mean, it would appear, whether change should be by judicial action, legislation, or "administrative processes", whatever this last category truly comprehends.

Consideration is the subject of the second study, or more exactly the extent to which consideration is not the real reason why some litigants win and others lose. The final conclusion of this essay by Professor Swan is that consideration is not the important issue, and that legislative reform of the law of consideration may not be the solution to the problem.[16] The "right answer", reached after this survey of some problems in the law of consideration, such as the promise to do what one is already bound to do, and firm but revocable offers, is to let the academics loose to make proposals for reform.[17] Academic lawyers have their uses, even in reform of the law, provided that they do not take themselves too seriously. If law is too serious to be left entirely to judges, as one distinguished English Law Lord has told us,[18] it is also too important to be left entirely to academics.

Study 3 is about foreseeability in relation to damages. Professor Swinton's aim is to identify the purposes which the courts seek to achieve by awarding damages. Four areas are chosen for investigation: loss of profits and collateral reliance costs, damage to reputation, mental distress, and physical injury. The identification of the key factors and a critical analysis of the way courts use such factors is intended to improve the predictability of damage awards and to allow for "more rational development of the bounda-

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[15] See *ibid.*, Studies 4, 9 & 10.

[16] *Ibid.*, 59. It is interesting to compare Professor Swan's essay with the elegant and succinct discussion of the problem of consideration by Professor John P. Dawson in *Gifts and Promises* (1980), 197-230.

[17] *Supra*, note 3, 59.

[18] See *Miliangos* v. *George Frank* (*Textiles*) *Ltd.* [1976] A.C. 443, 481 (H.L.) *per* Lord Simon of Glaisdale.

ries of contract damages".[19] It makes for interesting, if sometimes frustrating reading, but it also brings out fairly clearly some factors considered relevant by the courts. One is left at the end with the feeling that the author has endeavoured to make what is a reasonable analysis of some important issues conform to the contours of the editors' "basic assumption", the test of reasonable expectations.

A different aspect of remedies is discussed in Study 4, which is concerned with the way labour arbitration can point to a better handling of breaches of contract. The distinction is drawn between transactional and relational contracts.[20] The author concedes that the former, traditional type of contract, may appropriately be dealt with by actions for damages, although even here it is argued that specific performance may be a better method for ensuring a satisfactory result in the event of a breach.[21] Relational contracts (*e.g.*, collective agreements) do not lend themselves quite so easily to the invocation of the traditional common law remedy of damages. Nor does the concept of privity, so vital in transactional exchanges, sit well with the figure of a relational contract. Professor Brown's contention is that the law of contract does not cope adequately with such contracts, particularly collective agreements: "[t]he legal system plays a relatively minor role in relational arrangements because these exchanges generate their own socio-economic support."[22] What the author is indicating in this Study, as pointed out by the authors of Study 1, is that the law of contract is not the best medium for dealing with such important legal and economic relationships.

Employment is also taken up in Study 9 by Professor Beatty and Study 10 by Professor Swinton. In the former, with the intriguing title, culled from the Treaty of Versailles, "Labour is not a Commodity",[23] the author launches a further attack upon the relevance of modern contract law to the "institution of employment". He perceives[24] "a lack of coincidence between the law of contract and the general understanding of employment", described in the first part of the essay. This is a piece which considers many

[19] *Supra*, note 3, 69, 90-1. Hence, perhaps, the author's rejection of the views of Cooke J. of the New Zealand Supreme Court as set out in *Remoteness of Damages and Judicial Discretion* [1978] Camb. L.J. 288.

[20] *Supra*, note 3, 96. The author admits (p. 95, n. 3) that much of his study in this respect is drawn from MacNeil, *The Many Futures of Contract* (1974) 47 S. Cal. L. Rev. 691.

[21] *Ibid.*, 100-7.

[22] *Ibid.*, 119.

[23] See *ibid.*, 324, n. 21.

[24] *Ibid.*, 326.

different fields of thought, including economics, sociology, philosophy, morality and law. The whole is a melange of what must now be regarded as fashionable socio-economic comment upon law. The author's "simple" point, with which he concludes, is that "the commodification of labour that is the distinguishing characteristic of the contract model of employment is understood to have adverse consequences for both of the variables which define the focus of our social policy."[25] Those variables are the personal aspect and the personal interest. He appears to be intimating that an employer should not be allowed to terminate unilaterally an employment relationship without just cause or redundancy, unless the employee is placed in "another comparable employment relationship".[26] Therein lies the way to "industrial democracy". Therein may also lie the way to industrial ruin.

A more traditional, technical approach to much the same problem is contained in Study 10, which is an analysis of the law of wrongful dismissal. The *terminus ad quem* is much the same as in Study 9. But the start of the inquiry is, of course, the basic "assumption" from Study 1.

> What are the reasonable expectations with regard to termination of employment in unorganized workplaces? Probably the response of most employees would not even be that they expected reasonable notice prior to termination. Many would be surprised to know that they were not employed at the employer's discretion. The significance of this lack of information should not inevitably lead to reading out the reasonable notice term in the employment contract.[27]

Why not? Because the basic assumption may not apply to all contractual situations.[28] Reasonable expectation is a good standard to apply unless it does not achieve the end result desired by the authors of these studies. Then abandon it and find something more attuned to what is wanted. So here the author concludes that it might be aided by the invocation of other standards: "judicial creativity, in the form of protection against dismissal without cause, is necessary to bring the employment law regulating unorganized workers into harmony with community needs."[29]

It is pleasant to turn from these occasionally turgid discussions to the more elegant, and possibly more traditional contents of Study 5, which is about "Specific Relief for Contract Breach". The author, Professor Sharpe, is concerned with the way the law relating

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[25] *Ibid.*, 355.
[26] *Ibid.*
[27] *Ibid.*, 363.
[28] *Ibid.*
[29] *Ibid.*, 377.

to specific performance, injunctive relief, and "equitable" damages has been developing in recent years, and with the idea that such remedies should be more flexible and more concerned with the "interests involved" and "a sensitive appreciation of the policies at stake when remedial choices are made".[30] It may be queried whether the "basic common law policy" is "against wasting resources".[31] This suggests, as the author's study does generally, too great an emphasis upon economic arguments or reasons for granting certain remedies and choosing one over another. Admittedly the author belongs to what may be termed "la nouvelle vague" of legal authors, whose approach to law derives more from Posner and the Chicago school[32] than it does from Paley, for example, whose influence on English contract has been pointed out most recently by Professor Atiyah.[33] Granted such progenitors, however, this author and several others in this book may have taken their enthusiasms a little too far. Notwithstanding such criticism, this particular essay throws an interesting light upon an area of the law of contract that is not often subjected to sufficient analysis and discussion, even in books devoted to contract law.

Perhaps even more traditional in nature is Study 6, "Restitution for the Part Performer", by Professor Waddams. It analyzes the law, subjects it to critical comment, reveals its inconsistencies and gaps, and suggests new approaches, culled in part from the cases themselves, textbook writers, and general principle of law. It is clearly written in a style which enables the reader to grasp with ease the nature of the subject-matter, the author's train of thought, and what it is he is proposing. The author favours reform of the law so as to entitle a party who has not completed performance of his side of a contract to recover a benefit conferred by him upon the other party. In this respect much is made of the *Deglman* case.[34] But that was a very different type of situation. The author attempts to argue that even if the nephew in that case had been in breach of contract he ought not to have been deprived altogether of his right to restitution.[35] There is a source of difficulty here, I would

[30] *Ibid.*, 150.

[31] *Ibid.*, 141.

[32] Hence the general reliance upon, and manifold references to Kronman, *Specific Performance* (1978) 45 U. Chi. L. Rev. 351.

[33] See *The Rise and Fall of Freedom of Contract, supra,* note 1.

[34] *Deglman* v. *Guarantee Trust Co. of Canada* [1954] S.C.R. 725: see *supra,* note 3, 169-74.

[35] In this respect he appears to equate breach of contract with the situation which now obtains when a contract has been frustrated without any fault by either party, but surely there is a distinction that can and should be made.

suggest. Why should we accept that someone who, *ex hypothesi,* is at fault should be entitled to anything at all? To some extent the present law benefits certain kinds of such wrongdoers, in certain circumstances. Need we go further? To swallow the notion that we should is not easy.

The reader of Study 7, "The Allocation of Risk in the Analysis of Mistake and Frustration", by Professor Swan, can have little doubt, from the very first words onwards, that he is being presented with a radical outlook on the law. To Professor Swan, the issue of mistake in the law of contract is as much a question of "risks", how they should be analyzed and disposed of by courts, as it may well be an integral part of the law of frustration.[36] Undoubtedly mistake and frustration (or perhaps what is a better word in this connection "impossibility") have elements in common. The one relates to the situation as it was when the contract was made, the other to a subsequently developing or emergent situation. In both, the issue for a court is how to determine whether a purported contract is still binding upon the parties. Professor Swan prefers to regard this question in both situations as depending upon a further question: which party should bear the risk of the contract's enforcement or avoidance? He opts, in some circumstances, for the solution of "splitting the difference".[37] This approach, which has been suggested judicially and extra-judicially in this and other contexts, such as where stolen goods are sold by the thief to an innocent third party,[38] has been largely rejected. Some recent cases suggest the possibility of such "splitting" in some cases of contract by the invocation of the doctrine of contributory negligence and the statutory provisions relating to comparative fault or apportionment of liability or blame.[39] This a different thing, however. It is not blame or fault that is at stake, but "risk", and it is not a question of comparing the conduct of the parties, but deciding for

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[36] Professor Swan cites (p. 184, n. 12) a passage from the judgment of Buckley L.J. in *Amalgamated Investment and Property Co. Ltd* v. *John Walker & Sons Ltd* [1976] 3 All E.R. 509 (C.A.), seemingly to support his proposition with respect to *mistake.* But the passage cited deals with the situation in relation to *frustration.* Note also that the promised later analysis of this case in this study cannot be found, at least by this reviewer.

[37] *Supra,* note 3, 213-5.

[38] *E.g.,* Twelfth Report of English Law Reform Committee, Cmnd 2598 (1966).

[39] See and compare *Caine* v. *Bank of Nova Scotia* (1978) 90 D.L.R. (3d) 271 (N.B.S.C., App. Div.); *Husky Oil Operations Ltd* v. *Oster* (1978) 87 D.L.R. (3d) 86 (Sask. Q.B.); *Palermi* v. *Littleton* [1979] 4 W.W.R. 577 (B.C.S.C.); *Henuset Bros Ltd* v. *Pancan Petroleum Ltd* (1977) 82 D.L.R. (3d) 345 (Alta S.C., T.D.); *Giffels Associates Ltd* v. *Eastern Construction Ltd* [1978] 2 S.C.R. 1346; *Smith* v. *McInnis* [1978] 2 S.C.R. 1357.

the parties *ex post facto* what would be a reasonable solution that they *could* have agreed for themselves in advance had they given it any thought. Naturally, the "risk" approach is intimately involved with the editors' "basic assumption" that the law should give effect to the "reasonable expectations" of the parties. The one is as much an artificial construction or concept as the other. What the author has endeavoured to do is to subject some older mistake and frustration cases,[40] and some modern ones,[41] to an analysis and discussion that is designed to establish the desirability and utility of his approach. In the course of this, as one might expect, he rejects some well-established principles and ideas, such as Lord Atkin's "identity" test in *Bell* v. *Lever Bros.*[42] He appears to be calling for a very different type of approach by the courts, one that would invite and require counsel to introduce new kinds of evidence in some cases, if not all, to show what are "normal" business expectations and understandings. It is, implicitly, if not expressly, part of his case that the classical view of proving the content and meaning of a contract is a hindrance to a proper treatment of litigation.[43] One might agree with his strictures on the parol evidence rule, without necessarily going so far as to accept that his attitude towards mistake and frustration is a better one, more capable of solving problems. Whether or not it is may depend upon the eventual acceptance of the view that "the court must always put the contract into its context and attempt to forward the parties' intentions".[44] But, as Professor Swan goes on to admit, "if a dispute has arisen, it may be inevitable that one party's expectations will be defeated, but there is often no escape from that."[45] Agreed. What, then, becomes of the desire and purpose of effectuating the "parties" expectations?

The first thing that should be said about Study 8, "Contracts,

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[40] See *U.S.A.* v. *Motor Trucks Ltd* [1924] A.C. 196 (P.C.); *Norwich Union Fire Insurance Soc. Ltd* v. *W. H. Price Ltd* [1934] A.C. 455 (P.C.); *Sherwood* v. *Walker* 66 Mich. 586 (1887); *Krell* v. *Henry* [1903] 2 K.B. 740 (C.A.); *Bell* v. *Lever Bros* [1932] A.C. 161 (H.L.); *Smith* v. *Hughes* (1871) L.R. 6 Q.B. 597.

[41] See *Toronto-Dominion Bank* v. *Fortin (No. 2)* (1978) 88 D.L.R. 232 (B.C. S.C.); *Solle* v. *Butcher* [1950] 1 K.B. 671 (C.A.); *Magee* v. *Pennine Ins. Co. Ltd* [1969] 2 Q.B. 507 (C.A.) (on which see also Marsh, *Mistake in Contract. A Comparative Approach to an English Decision* Miscellanea W. J. Ganshof Van der Meersch (1972), 855); *Capital Quality Homes Ltd* v. *Colwyn Construction Ltd* (1975) 9 O.R. (2d) 617 (C.A.); *Victoria Wood Development Corp. Inc.* v. *Ondrey* (1978) 22 O.R. (2d) 1 (C.A.); *McMaster University* v. *Wilchar Construction Ltd* [1971] 3 O.R. 801 (H.C.); *Imperial Glass Co. Ltd* v. *Consolidated Supplies Ltd* (1960) 22 D.L.R. (2d) 359 (B.C.C.A.).

[42] *Supra*, note 40, 217; see also *supra*, note 3, 212, n. 126.

[43] *Supra*, note 3, 197, n. 71.

[44] *Ibid.*, 232.

[45] *Ibid.*

Torts, Relations and Reliance", is that it is far too long. Professor Reiter has magnified the subject-matter beyond its natural proportions, and he has indulged in analysis and criticism of certain cases as though they were of world-shattering importance, capable of altering the entire concept of the law, when in fact they are only stepping-stones on the path of legal development. Much of it seems to be unnecessary. For example, do we still have a problem of what the author terms " 'pre-contract' torts"?[46] Or of "concurrent liability in Contact and Tort"?[47] I suggest that a careful reading of recent authorities in several jurisdictions (*e.g.*, the Alberta case of *Canadian Western Gas Co. Ltd* v. *Pathfinder Surveys Ltd*[48]) will reveal that the author has to a large extent set up straw men to be knocked down in order to prove his point. His "principle of liability in Contract and Tort"[49] is stated as involving two propositions: (1) when the defendant ought reasonably to appreciate that a person such as the plaintiff might reasonably rely to his detriment upon the defendant's words, acts or other communications, liability ought to be imposed; (2) so ought it to be imposed when the defendant should realize that a person such as the plaintiff might reasonably entertain particular expectations and the defendant should appropriately be held responsible for satisfying those expectations. These vague generalizations are put forward to supplant the law of contract and the law of tort, or in the latter perhaps just the law of negligence, for it hardly seems likely that Professor Reiter is suggesting that we abandon the law of defamation, conspiracy, inducing breach of contract, and so forth. (Or is he? It must be said that one never knows with some of the writers in this book just how far they are willing and prepared to go.) The author then proceeds, in the next section of this study, to consider some "limits on the liability". Predictably, this involves him in a consideration of "reasonable reliance and expectations" (the basic assumption of Study 1 rendered applicable in this context) and "discretion in remedies". Under the first heading, the author discusses various factors which might be "strongly suggestive" to a court "of the desirability of legal intervention".[50] Under the second,[51] he con-

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[46] *Ibid.*, 259.

[47] *Ibid.*, 263.

[48] (1980) 12 A.L.R. (2d) 135 (C.A.): *cf.* Morgan, *The Negligent Contract-Breaker* (1980) 58 Can. Bar Rev. 299. See also *Ross* v. *Caunters* [1980] Ch. 297, which is not cited by Professor Reiter, although the similar case of *Whittingham* v. *Crease & Co.* (1979) 88 D.L.R. (3d) 353 (B.C.S.C.) is discussed on p. 308.

[49] *Supra*, note 3, 242.

[50] *Ibid.*, 251.

[51] *Ibid.*, 252-8.

siders the problem of identifying the type of action that might be available to an injured party. In this respect he is very much occupied with the problem of giving a remedy for "innocent misrepresentation", and with the way the law has changed since the decision in the English case of *Esso Petroleum* v. *Mardon*.[52] He states at one point:

> The problem remains, in theory: the law has not yet accepted in express terms the proposition proposed above that relational liability will be imposed on a defendant where reasonable reliance is engendered in a party whom the defendant should know will rely in this manner.[53]

In practical terms, he appears to be saying that this is what the courts are doing. He objects to their refusal to put this in theoretical terms. But is this the case? Have the courts not in effect stated such a proposition, although not in the terms proposed by Professor Reiter? What about the law of negligent misrepresentation, and the law of warranties? Is Professor Reiter objecting to the techniques of the law rather than the actual decisions? Several times he agrees with the way courts have decided cases (sometimes, as with *Northwestern Mutual Insurance Co.* v. *J. R. O'Bryan & Co. and Thibeau*,[54] he does not) even though he does not accept the methods employed by those courts. He argues that developments in recent times "foreshadow a melting together of many strands of tort and contract as the courts recoguize that liability is *imposed by law* in each case and that there is considerable latitude in defining the relationship, its legal incidents, and the rights of parties when things go awry".[55] So far so good, but the author goes on to say that these developments of which he has been speaking "will require us to reconsider many doctrines once regarded as fundamental in both contract and tort."[56] Doctrines are continually being reassessed and redefined. That is not to say that contract and tort are gradually, and inevitably, merging into one amorphous mass of "obligations". I see no reason why there will not have to continue to be some distinction between contract and tort at least for some purposes. For some considerable time the law has not been bedevilled by the niceties of procedure or the need to separate too carefully contract situations from those giving rise to possible tort liability. But some of Professor Reiter's "spurious" problems,[57]

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[52] [1976] Q.B. 801.
[53] *Supra*, note 3, 256.
[54] (1974) 51 D.L.R. (3d) 693 (B.C.C.A.).
[55] *Supra*, note 3, 256-7 [emphasis in the original].
[56] *Ibid.*, 257.
[57] *Ibid.*, 311.

thrown up by the rationalization of civil liability, may still be with us. These are not, it may be suggested, "pesky" doctrinal problems, as Professor Reiter calls them.[58]

The purpose of Professor Trebilcock's Study (No. 11), "An Economic Approach to the Doctrine of Unconscionability" is to show that "only a judicial doctrine of unconscionability grounded in sound economic considerations is likely, over the long run, to prove a coherent and manageable tool of intervention in contract enforcement."[59] It would seem that the author is by no means a devotee of judicial intervention on grounds of unconscionability. The doctrine may have its uses, for example, in redressing transactional inequities flowing from what he calls "situational monopolies",[60] that is, where there is duress of an economic kind, as in salvage cases. However, he is not keen on broad use of the doctrine that appears to have been developing in recent years, a development which he sketches in the opening section of this study.[61] I find myself generally speaking in sympathy with this attitude, although perhaps not for the same reasons, nor from the same data-base as the author. I agree with him that there are dangers in "too intuitive a notion of distributive justice"[62] (a reason for his criticism of the decision of the House of Lords in *Macaulay* v. *Schroeder Publishing Co. Ltd*[63]). Professor Trebilcock is quite convincing when he reveals how the decision in that case is hardly justifiable on a proper, economic analysis and how the House of Lords reached its conclusion on what must have been "gut-based" thinking, even though their Lordships purported to found their approach upon "economic" considerations. In other areas too the author demonstrates how the courts have tackled the task of providing reasons for their intervention without accurate economic analysis, indeed with inaccurate analysis. All that this indicates to me is that economic reasoning is a poor basis for judicial decisions, unless you have a court that is composed of experts. Even then, as we all know, different economists think differently: which school, therefore, is to be taken as correctly enshrining the economic tenets upon which "proper" decisions are to be based?[64] Indeed, when Professor Tre-

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[58] *Ibid.*

[59] *Ibid.*, 421.

[60] *Ibid.*, 392-6.

[61] *Ibid.*, 381-90.

[62] *Ibid.*, 421.

[63] [1974] 1 W.L.R. 1308 (H.L.): see pp. 396-404.

[64] See generally Atiyah, *No Fault Compensation: A Question That Will Not Go Away* (1980) 54 Tul. L. Rev. 271, 279 and Leff, *Law And* (1978) 87 Yale L.J. 989, 1007-8.

bilcock is discussing the constraints that should and do apply to the application of the doctrine of unconscionability in cases of "informationally-impaired markets",[65] he appears to be putting into economic language what courts almost instinctively do after centuries of familiarity with such problems. There may be some advantage in describing or analysing what the courts are doing in novel language and ascribing to the courts ability to cope with their problems from the standpoint of the "economic man", as contrasted with the "reasonable man". I am not sure that any advantage to be gained outweighs the disadvantage of forcing lawyers to learn a new kind of grammar, a different vocabulary, and an impossible syntax.

The core of Professor Belobaba's interesting, well-written and thoughtful study (No. 12: "The Resolution of Common Law Contract Doctrinal Problems Through Legislative and Administrative Intervention") is to be found in this passage: "The critical area for research and study in the next decade will be the legislative and regulatory process. The common law is in decline, the transition to a purely legislative legal system seems inevitable".[66] While the author agrees with some remarks of Professor Waddams[67] as to the general ability of the common law to grow and to tackle new problems, he does not agree with the latter's conclusion that legislation is unnecessary, yet he does concede that legislative intervention will be necessary in what he calls "the commercial context".[68] It will be vital in "the consumer context".[69] Does that mean that the earlier cited remarks of Professor Belobaba are valid? Or is he inferring that they are limited in scope to the narrow area of consumer contracts? He admits himself that he is not as yet settled in his attitude towards the question of whether the courts are the appropriate forum to determine fundamental values, since they are "a non-elected, non-representative institution".[70] To what extent, however, in any *real* (as opposed to formal or structural) sense, are legislatures any more representative? If it may be necessary for us to trust legislatures, or else "democracy" will not work, why not also trust the courts? In the Anglo-Canadian tradition judges are appointed on some basis of ability and merit rather than only for the purposes of enshrining the particular point of view of a narrow minority or a group of the population. I am

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[65] *Supra*, note 3, 404-19.
[66] *Ibid.*, 450.
[67] Waddams, *Legislation and Contract Law* (1978) 17 U.W.O. L. Rev. 185.
[68] *Supra*, note 3, 437.
[69] *Ibid.*, 439.
[70] *Ibid.*, 449.

touched by Professor Belobaba's faith in legislatures and administrative and regulatory bodies. He, in turn, criticizes those, including myself, who lack his faith, when he says that the "mere mention of administrative regulation causes many Canadian lawyers and academics to clutch their hearts, dust off their Dicey, and begin a ritual lamentation about the disintegration of the Rule of Law."[71] Nonetheless, it is a point of view that is argued with verve and reason, with style, and from a basis of considerable expertise in recent statutory developments in the field of consumer law. To say that one is not prepared to accept unquestioningly Professor Belobaba's arguments or conclusions is not to say that one is entirely opposed to all legislation or to all codification. But it does mean that one must examine carefully whether reform of any particular areas of law need to come about in that way. There may be some middle ground between the faith of Professor Waddams and the creed of Professor Belobaba. If so, we should be looking for it.

These last few essays do not seem to propound with quite the same uncompromising attitude as found in the earlier ones, the approach that is founded upon the editors' "basic assumption". By way of contrast they appear to be more inclined towards attacking what Professor Belobaba terms[72] "the mythological capabilities" of the common law. There is, one suspects, a certain "mythology" about the notion of "reasonable expectations" that is intrinsic to the Swan-Reiter approach.[73] What they may be said to be suggesting is a somewhat psychological approach to the law of contract, one that does not entirely accord with the historical development of the common law. The common law has always been much more down to earth, even "realistic" in its own way, than some of the writers of the studies in this book would be prepared to acknowledge. But the common law's realism, I suggest, is not necessarily the same as the "realism" of, for example, Professor Belobaba. Common law judges who, after all, must have had some experience of the ways of the world of commerce, may be presumed to have some acquaintance with what goes on in the world outside the limited and limiting boundaries of the law courts. From that experience they may have distilled some understanding of what the law should be about, and how the law should cope with actual problems. The usual arguments about the difficulties of conducting law reform by

[71] *Ibid.*, 454.

[72] *Ibid.*, 461.

[73] *Cf.* the criticism of § 90 of the *First Restatement of Contracts* 1932, which was the progenitor of much of the recent espousal of this view of contract (Eisenberg, *Donative Promises* (1979) 47 U. Chi. L. Rev. 1, 19-26).

means of rendering decisions in haphazard litigation cannot be refuted with complete satisfaction. However, that is not to say that the courts as may be conceived of as being opportunity to effect such changes as may be conceived of as being necessary in order to achieve substantial justice.

The real argument, I suggest, does not concern ways and means: it concerns attitudes and directions. In other words the dispute takes the form of settling the lines on which the law should be moving. The writers of these studies, naturally enough, have their point of view. They will perhaps forgive a reviewer who does not go all the way, and sometimes even part of the way, with them. The various authors whose contributions have been considered may be said to belong to a school of thought which places great reliance upon a particular approach to the law. That approach is inclined towards the view that everything can be resolved by a gradual process of rational, demystifying analysis, which takes into account what those for whom the law is created want out of law. They have a belief in the inherent rationality of man, such that one has only to point out certain arguments, based, for example, upon economic or sociological "facts", for everyone to accept the validity of the conclusions that follow.[74] In this respect, as also in the underlying idea that the law is not a subject for "myth" and "magic" but a much more hum-drum, mundane affair, they are exponents of the Benthamite tradition. Their critical approach to some of the issues dealt with in this volume, like that of Bentham, reveals an essentially antagonistic attitude to the spirit of Blackstone.[75] They are far from being laudatory of the common law. They appear to regard the common law of contract as being in a state of considerable disarray, waiting for the adoption of more reasoned and reasonable doctrines, along the lines these authors indicate. There is nothing wrong with being critical nor with making suggestions for future development. These authors, I suggest, are rather hypercritical. They tend toward the revolutionary. They sometimes suggest that, in some of its attitudes and developments, the common law of contract is slightly ridiculous or, at best, archaic and out of touch. With some trepidation I venture to put forward the idea that the authors of these studies have "myths" of their own. The "basic assumption" seems to me to involve far too much psychology. It would require the courts to place great emphasis upon discover-

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[74] *Cf.* Gilmore, *The Ages of American Law* (1977), 99-100 and Leff, *supra*, note 64, 1010. See further, Ackerman, *Private Property and the Constitution* (1977), especially pp. 10-20.

[75] See Posner, *Blackstone and Bentham* (1976) 19 J. of L. & Econ. 569.

ing what parties really meant or understood at the material time they contracted. And, in the final analysis, would it produce a better result or a more "realistic" solution of problems? What the courts do now is to combine the attempt to discover what was the true nature of the bargain between the parties, seen in the light of its context, with the application of legal policies that are intended to give effect to what the courts believe will be a reasonable, workable, and suitable law of contract. They may not always succeed in achieving either or both of these aims. When that occurs we may argue that a particular court has come to a "wrong" decision. At least there is some purpose to the behaviour of the courts that is consistent with the underlying nature of judicial legislation and the interpretation and application of the law. To replace this by some more general, supposedly "people-oriented", approach to the law of contract, would, I suggest, invite perhaps a less "mythological" system of rules into the courtroom, but also a less certain, less secure system.

Moreover, can a legal system survive, or survive in a satisfactory way without some degree of "mythology"? The past two hundred years have seen the consequences of Bentham's revolt against Blackstone. We may have simpler, faster procedure: laws which are attuned to a more humanitarian, populist approach to law; doctrines which purport to enshrine and give effect to a more liberal, rational attitude. In terms of the impact and effectiveness of the law, have we really advanced? Or have we undergone some regression?

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*The Equal Protection of the Laws.* By Polyvious G. Polyviou. London: Duckworth, 1980. Pp. xiv, 757.

> [N]or shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. — from the Fourteenth Amendment to the U.S. Constitution.

Mr Polyviou is University Lecturer in Law at Oxford and author of several books on the Greek-Turkish conflict in Cyprus. With this new book he has turned his attention to the more abstract issue of the equal protection of the laws, primarily in relation to the Fourteenth Amendment to the Constitution of the United States. For Canadians, this book appears at an opportune time, given the keen national debate over the entrenchment of a bill of rights in a new or recycled constitution. While much argument in this country has focused on language rights, relatively little has concerned the rights to equality and to freedom from discrimination, and as a result the meaning and scope of these cardinal principles remain uncertain. Polyviou's lengthy review of the U.S. Supreme Court's interpretation of the Equal Protection Clause in the Fourteenth Amendment may provide useful hints as to the path Canadian courts would follow in interpreting similar constitutional guarantees.

But Mr Polyviou did not have a Canadian audience in mind when his interest in the subject developed in the early seventies. He was responding to the needs of tribunals in Cyprus and other newly independent Commonwealth nations, where inadequate law libraries make the study and interpretation of constitutional bills of rights rather difficult. The author hoped his book would serve as a

> comprehensive monograph on the jurisprudence of Equal Protection that would constitute both a full exposition of the substantive law of equal rights and a guide to some of the principles, trends and problems relating to the endlessly controversial topics, so fruitfully discussed during recent years, of judicial review of governmental action and the discharge of the function of constitutional adjudication (p. xi).

With this two-fold approach Polyviou attempted to synthesize a vast and often contradictory jurisprudence into a manageable handbook for those not well versed in the literature of equal protection.

The American experience is the principal source. Eleven of the thirteen chapters deal with the application of the American Equal Protection Clause to racial and economic classifications, with specific emphasis on the criminal process, the right to vote, educational desegregation and general consideration of relevant classification and affirmative action. Individual chapters focus on Canada and India, while appendices touch on electoral apportionment in Australia, anti-discrimination legislation in Great Britain and the

*European Convention on Human Rights.* But this is not a comparative book. Indeed, each chapter is largely independent of the others, little effort having been made to contrast interpretations of the equal protection concept in various nations, or even among diverse fields of legislative activity in the United States. Given the several nations discussed, a valuable contribution is therefore lost. Polyviou's sole reference to foreign jurisdictions in his discussion of the American situation is to the system adopted in most Scandinavian countries which provides for the appointment of counsel for indigents.

Polyviou distinguishes between "equality before the law" and "equal protection of the law", a distinction that is perhaps more apparent than real. He equates the former with the Diceyan view that each individual is subject to the ordinary law of the land as applied by the ordinary courts of justice. This suggests that equality is primarily a procedural concept, roughly equivalent to the "equal application of the law to all to whom it extends", and that it is caught by the larger notion of due process. By contrast, the author understands "equal protection of the law" as embodying an implicit guarantee that all groups of individuals would enjoy similar, but not necessarily identical, treatment. The accuracy of this neat dichotomy must be questioned. In Canada especially, one must take issue with the continued adherence to a strict Diceyan notion of "equality before the law". Section 1(b) of the *Canadian Bill of Rights*[1] guarantees the enjoyment of certain human rights and fundamental freedoms without discrimination, amongst them "the right of the individual to equality before the law and the protection of the law". In the landmark decision of *R.* v. *Drybones*[2] Ritchie J., speaking for a majority of the Supreme Court, rejected the contention that equality before the law was analogous to "equal application of the law".[3] His Lordship reversed his position almost four years later in the *Lavell* case,[4] holding that section 1(b) was to be interpreted in light of Dicey. Polyviou joins in the chorus of those who in doctrine and later jurisprudence find this an improper interpretation of the phrase.[5]

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[1] S.C. 1960, c. 44; R.S.C. 1970, Appendix III.

[2] [1970] S.C.R. 282.

[3] *Ibid.*, 296-7.

[4] *A.-G. Canada* v. *Lavell* [1974] S.C.R. 1349.

[5] See, *e.g.*, Laskin C.J.C. and Beetz J. in *A.-G. Canada* v. *Canard* [1976] 1 S.C.R. 170; Tarnopolsky, *The Canadian Bill of Rights*, 2d ed. (1975); Tarnopolsky, *The Canadian Bill of Rights and the Supreme Court Decisions in Lavell and Burnshine: A Retreat From Drybones to Dicey?* (1975) 7 Ottawa L. Rev. 1; Hogg, *The Canadian Bill of Rights — "Equality before the Law"* (1974) 52 Can. Bar Rev. 263.

That statutes of universal application are few, that governments *must* classify, and that laws necessarily differentiate between those affected and those not, lead ineluctably to the crux of the problem of judicial enforcement: what test can the courts use to distinguish between laws that offend the principle of equal protection and those that do not? Apart from the introductory and concluding chapters, where notions of equality and the role of the Supreme Court are discussed, Mr Polyviou is not at all concerned with the underlying philosophical question, but simply with judicial interpretation of the principle.

He shows that the solution of the U.S. Supreme Court has been a two-step reasonable classification test. First, the Court determines whether the law in question pursues a permissible state purpose and, second, whether its classifications are "rationally related" to that purpose. The standard for such a determination varies from the extremely strict test of "compelling state interest" for classifications which are *prima facie* suspect, such as race, where the link must be "necessary and essential", to the more lenient "basic rationality" measure of non-suspect classifications that has been applied to state financing schemes for public education. In the latter case the classification must, to be ruled unconstitutional, be wholly irrelevant to the legitimate purpose. Extracted primarily from the renewed importance placed on the Equal Protection Clause in the spate of cases since *Brown* v. *Board of Education of Topeka*,[6] and clearly stated in Powell J.'s opinion in *San Antonio Independent School District* v. *Rodriguez*,[7] this structure continues to evolve with the development of a moderate approach in other recent cases.[8]

Undoubtedly a constitution must be interpreted more broadly than ordinary statute law so as to allow the courts to meet unforeseen difficulties; but the words must be given their proper force. One may discern that American courts have developed a multi-level approach to the problem of legislative differentiation dependent upon the subject matter of the statute. The unavoidable issue is whether the Supreme Court, in attempting to realize the elusive ideals of justice and equality, has forsaken the canons of reasonable construction. The chequered history of the Fourteenth Amendment illustrates the highly political role forced on the Court

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[6] 347 U.S. 483 (1954).

[7] 411 U.S. 1 (1973).

[8] Especially *Reynolds* v. *Sims* 377 U.S. 533 (1964). See also *Frontier* v. *Richardson* 411 U.S. 677 (1973); *Weinberger* v. *Wiesenfeld* 420 U.S. 636 (1975); *Mathews* v. *Lucas* 427 U.S. 495 (1976).

in this area and the sort of temptations that induced Presidents Roosevelt and Nixon to "pack" the Bench. The book, in describing the American Supreme Court and the Australian High Court's approach to apportioning electoral districts, supplies the material for an interesting contrast in judicial habits of law-making. The U.S. Supreme Court read the Fourteenth Amendment as providing a principle of one man — one vote — one value, thus requiring electoral districts to contain roughly an equal number of constituents; the Australian High Court read the Constitution and attendant legislation narrowly, and rejected the principle.[9] Mr Polyviou is not oblivious to these controversies concerning the role of the courts in society but it is disappointing that he reserves his brief discussion of them to the conclusion.

Although the author has done his research thoroughly, the absence of analysis is the book's greatest weakness. With approximately 2,700 footnotes, few, if any, cases or commentaries dealing with the Fourteenth Amendment are overlooked. The legal reasoning of the Supreme Court on the selected topics is set out in detail. Writing a good introductory text, however, like good teaching, depends in large measure not so much on what one puts in, but on what one chooses to leave out. Polyviou is not very discriminating, and prefers to repeat arguments rather than situate them in context and examine them. The critical reader must supply most of the effort himself.

The strengths and weaknesses of this work are best reflected in the treatment of guarantees similar to the Fourteenth Amendment in India and Canada. The provisions of the Indian Constitution are not common knowledge in the West and Polyviou's explications of article 14 and related articles are therefore enlightening. Indian tribunals have apparently followed closely American precedent in giving the relevant provisions meaning although they display greater reluctance to stray from traditional methods of interpretation. Polyviou shows, however, that the Indian Supreme Court's formalistic approach appears to be waning as broader American concepts of state action permeate the case law. Articles 15, 16 and 17 of the Indian Constitution prohibit most forms of discrimination, but contain certain provisions of particular interest. First, article 17 abolishes "Untouchability" and forbids its practice. A closer look at the application and enforcement of this imperative would have been illuminating. Second, articles 15 and 16, concerning non-discrimination, explicitly reserve the right of the government to make

[9] See *A.-G. Australia* v. *Commonwealth* (1975) 7 A.L.R. 593, which is considered by Polyviou in Appendix Three.

special provision for women, children or "for the advancement of any socially and educationally backward class of citizens".[10] As American courts have furthered affirmative action programmes by reading similar ideas into the Fourteenth Amendment, a deeper exploration of the Indian case law might again have been worthwhile.

Readers in Canada are likely to have a deeper knowledge of the *Canadian Bill of Rights*. Not being constitutionally entrenched, it presents the courts with problems of conventional statutory interpretation and implied repeal. Polyviou's presentation of the Supreme Court's treatment of the Bill is adequate but does not offer the detail or insight necessary for serious investigation. He delineates the major issues — the applicability to law existing at the time of the Bill's passage, the scope to be extended the "equality before the law" clause, and the paramountcy of the Bill *vis-à-vis* inconsistent legislation — and sets out well the Supreme Court's approach to them, especially with regard to the *Indian Act*.[11] As with the American jurisprudence, one questions the amount of thought Polyviou accords the cases and issues raised. His study rehearses the arguments of the commentators, especially Hogg and Tarnopolsky, and of the courts. For example, Ritchie J. in *Lavell* is cited as authority for the idea that most of the *Indian Act* concerns the lives of Indians on reserves. Polyviou also makes the blanket statement that "[p]rovisions dealing with the conduct of Indians off reserves and their contacts with other Canadian citizens fall into an entirely different category" (p. 149). Those familiar with the case will recognize that this contention, expressed by Mr Justice Ritchie, is far from settled. Similarly, the treatment of the issues raised by *Drybones* and possible grounds for distinguishing it amounts to little more than judicious paraphrasing of statements by subsequent panels in *Lavell* and *Canard* (p. 153).

The appendices serve varied and uncertain purposes. The first offers a brief glance at equal protection provisions enshrined in the constitutions of other nations and divides them into global equal protection guarantees and non-discrimination safeguards. Appendix Two reproduces the previously discussed articles of the Indian Constitution and Appendix Three deals with the *Bakke*

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[10] For the text of the *Constitution Act of India*, see Blaustein & Flanz, *Constitutions of the Countries of the World* (1980), vol. 7, and especially arts 15(4) and 16(4) regarding equality of opportunity in matters of public employment.

[11] R.S.C. 1970, c. I-6 as am.

case.[12] Appendix Four cursorily examines the aforementioned High Court of Australia's opinion regarding electoral apportionment.

Appendices Five and Six treat vast subjects and are somewhat more problematic. Appendix Five is primarily concerned with British race relations and sex discrimination statutes. The provisions of the two main acts are summarized but little is said about judicial enforcement or the lack thereof. Racial animosity is an especially contentious issue in Great Britain in relation to immigration, yet no mention is made of the *Immigration Act 1971*, to which the courts have decided these acts are inapplicable.[13]

Appendix Six examines article 14 of the *European Convention on Human Rights*, and the scope accorded it by the European Court and Commission. Again, the problem is that of trying to cover an enormous field in far too few pages. This article, providing for the enjoyment of rights without discrimination, has been the subject of intensive scrutiny, primarily in the *Belgian Linguistics Case*[14] which Polyviou deals with only briefly.

The book also suffers from stylistic maladies that make it unnecessarily awkward. Interminable sentences and unending paragraphs increase the difficulty of comprehending a convoluted subject. The author states (p. xii) that the only way to enjoy the rich flavour of the explication of the Fourteenth Amendment is through extensive quotation of judicial opinion. Polyviou strings together short snippets of quotations using connecting words or phrases rather than using excerpts to set forth the law and the legal reasoning behind it.[15] His understandable desire to be as current as possible leads the author to incorporate into discursive footnotes discussions of cases, like *Bakke* and *Weber*,[16] that appeared just prior to publication. These serve more to distract than inform.

One final drawback cannot escape mention: the index, only five pages long, is ridiculously inadequate and practically worthless. An extensive, accurate index is essential for any serious work but even more so for an introductory text of such length. "Canada" is

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[12] *Regents of the University of California* v. *Bakke* 438 U.S. 265 (1978).

[13] See, *e.g.*, *R.* v. *Immigration Appeal Tribunal, Ex p. Kassam* [1980] 1 W.L.R. 1037 (C.A.), in which it was held that the *Sex Discrimination Act 1975* did not apply to the *Immigration Act 1971*, and leave to appeal was refused.

[14] *Case relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* (1968) 11 Y.B. Eur. Conv. on Human Rights 832.

[15] *Cf.* Laskin, *Canadian Constitutional Law*, 4th rev. ed. (1975).

[16] *United Steelworkers of America* v. *Weber* 443 U.S. 193 (1979).

found between "compelling state interests" and "conclusive presumptions", both of which direct the user to other headings.

Despite its flaws, *The Equal Protection of the Laws* remains a valuable piece of work. The main concepts, competing ideas and important cases are all sufficiently presented. At the end of each chapter or important section the author appends an excellent summary of its contents. The reader desiring an overview of judicial interpretation of equal protection before the laws, particularly as it applies in the United States, can certainly obtain it, so long as he is aware that the treatment may at times be superficial.

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*The Law in Classical Athens.* By Douglas M. MacDowell. Ithaca: Cornell University Press, 1978. Pp. 280.

The author of this book is not a lawyer but a scholar of ancient Greek literature, and so the book is intended primarily for the general reader who is interested in the social and moral life of ancient Athens. But *The Law in Classical Athens* is also a book that deserves a place on any lawyer's reading list. The reader will discover that ancient Athenians confronted many of the same legal issues that arise today, and frequently resolved them with procedures and remedies that are similar to those in modern law. Sometimes their responses to these problems were imaginative and worthy of our practical consideration. This book also has many bits of ancient legal lore that are enjoyable merely for the discovery: for example, the destruction of olive trees was strictly regulated, and the death penalty could be imposed for the destruction of certain sacred trees.

Professor MacDowell notes at the outset (p. 8) the paucity of sources available to the scholar:

> Ancient Greek law is a fragmented and elusive subject for study. Every city-state had its own laws; no doubt there were similarities and some states copied laws from others, but we should never assume without evidence that any particular rule was shared by two different states. And often the evidence is lacking. Even for Athens, the state about which we know most, we have only a limited number of texts of actual laws. Our chief source of information is the texts of about a hundred law-court speeches, in all of which the speakers are arguing on one side of a case, so that their statements about the law are tendentious and incomplete. These have to be supplemented by allusions in comedy, history, philosophy, and other literature, which have their own difficulties of interpretation.

Although the materials are fragmentary by comparison with the large corpus of Roman law, the author has assembled his sources carefully and judiciously to form a coherent view of his subject.

The book has three major divisions: growth of the legal system, scope of the law, and legal proceedings. Professor MacDowell concentrates on everyday legal problems in the classical period of Athenian life. Extended discussion of constitutional law and the philosophy of law has been deliberately omitted, and this is unfortunate.

The author begins by tracing the development of the jury system in Athens. Democratic juries played a large role in the administration of Athenian justice. Jurors had a great deal of responsibility, in as much as there was no appeal from their verdict. Even though jury panels were quite large by our standards, empanelling a re-

presentative cross-section of the population was a challenge that was not consistently met. To ensure representation of the poorer elements of society, the government paid jurors a daily fee for their service, but low pay attracted the elderly and discouraged younger, able-bodied men with good jobs.

Athenians stressed the importance of a written legal code. Laws were written in wood or stone and exhibited in public places — partly, it seems, to reflect the Athenians' view of law as a physical object. But, because this ancient people realized that no code could anticipate all possible situations, jurors were sworn to decide cases "according to the laws and decrees of Athens, and matters about which there are no laws I will decide by the justest opinion" (p. 44). It is regrettable that Professor MacDowell does not say more about the relationship between the code and "the justest opinion" in the administration of Athenian justice.

The Athenians had an unusual attitude toward legislation which was inconsistent with prior laws. One who proposed such legislation was subject to criminal prosecution. Upon conviction, he was punished, and his law annulled. Inconsistency was rooted out rather than allowed to supersede the earlier law.

Professor MacDowell presents a particularly lucid account of the transmission of property from one generation to the next. Each man was the head of a household, which he was obliged by religious custom to deliver to the next generation. Thus, the deceased's property automatically passed to his son or to his sons equally. If he had no male descendants, the property could pass to a daughter, but only to hold, under the watchful eye of a male guardian, for eventual transmission to her son. The deceased's wife could not inherit. Gradually, the practice developed whereby one might adopt a son by will. The will could not disinherit male descendants, nor could it foreclose the possibility of eventual inheritance by the son of a daughter. Adoption by will was not meant to displace the descent of property through male descendants, but merely to make the system work for those who lacked male descendants. This device was often susceptible to over-reaching. Accordingly, the law invalidated an adoption by will if the "testator" made his will "when out of his mind because of madness or old age or drugs or sickness, or under the influence of a woman, or compelled by force or restriction of liberty" (p. 101).

Religious beliefs also had an effect upon the law of homicide. Punishment served two ends familiar to the modern lawyer: deterrence and vengeance, but religious purification was also extremely important. An unpunished killer would invite divine retri-

bution on the community at large if the community took no steps to bring him to justice. The citizen accused of unlawful homicide could not set foot in public or sacred places, such as the temples or the market, and, like Oedipus, he was viewed as a pollution in the land. Unless he violated this prohibition upon contact with the community, the accused would not be imprisoned to await trial. Flight from Athens and life in exile, albeit self-imposed, were considered as terrible a punishment as death itself. If the accused entered public places, he would be imprisoned and tried for this as a separate offence. One case involving this doctrine illustrates the subtlety of ancient legal thought. The accused was exempt from prosecution for murder because of a general amnesty for all crimes committed before a certain date, but he was prosecuted on the ground that he had entered public places after that date. Notwithstanding the amnesty, he remained a murderer and continued to pollute the community.

In his discussion of homicide Professor MacDowell, who wrote an earlier book on Athenian homicide law, makes a judgment with which I disagree: he finds the Athenians' "distinction between intentional and unintentional homicide ... crude, by our standards" (p. 115). By his reading of Athenian law, intent to injure the victim could support a charge of intentional homicide if the victim died, even though the accused had no intent to kill. On the contrary, if the intended harm was of a serious nature, the Athenians correctly allowed no distinction between intent to kill and intent to harm, provided that death resulted. In theory, the distinction may exist, but in practice the two states of mind are difficult to separate. Modern criminal codes reflect the treatment of this issue in Athenian law and impose murder liability for less than an intent to kill.

Athenians adopted rigorous standards for the conduct of public officials and employed unusual procedures to implement these standards. Making a false promise to the people or to a public body was a capital offence, as was receipt of a bribe from foreign enemies to speak to the Athenian people. Each public official's conduct was examined monthly; if found wanting, he could be dismissed. When his term of office expired, his performance in office, particularly his handling of public funds, was automatically subjected to a formal public inquiry. If found guilty, he could be assessed heavy fines that would disenfranchise him and his family until he made restitution.

The book concludes with a discussion of procedure and evidence. The author recounts a particularly chilling aspect of Athenian evidence law. A slave could not testify in legal proceedings, but

his out-of-court statement could be accepted into evidence if extracted under torture. The truthfulness of such a statement was perversely thought to be enhanced by the means of its extraction.

I wished that the book had been somewhat longer, and particularly that it had included a concluding chapter of general observations. But this is only a mild criticism of a sound piece of scholarship that is also a delight to read.

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