BOOK REVIEWS
LIVRES NOUVEAUX

Benjamin's Sale of Goods, General Editor A.G. Guest, London: Sweet & Maxwell Limited, 1974, Pp.i-ix, 1287 ($81.60).

Judah Philip Benjamin's classic, *A Treatise on the Law of Sale of Personal Property with references to the French Code and Civil Law*, was first published over a century ago in 1868. The editorial policy of the succeeding editions remained constant: change no more than necessary so as to retain as much as possible of the original. But legal masterpieces cannot survive indefinitely. Their shape and design become obsolete; they become disfigured by the haphazard accretions of case law. When this occurs it is time to begin again and this is what the new editors of Benjamin have done. In the place of an old fashioned craft, creaking at the joints with a cargo of old cases, they have produced an entirely new vessel, designed to take account of the developments that have occurred in sales law in the course of this century. The result is a *tour de force* whose comprehensiveness, style and scholarship will ensure its prompt acceptance as a worthy successor to its venerable forebear.

The book is divided into eight Parts, the first six of which, under the titles "Nature and Formation of the Contract of Sale", "Property and Risk", "Performance of the Contract", "Defective Goods", "Consumer Protection", and "Remedies", deal with the law of sale generally. The remaining two Parts (which account for 530 pages out of a total of 1217) are concerned with the specialist topics of "Overseas Sales" (including methods of payment) and the "Conflict of Laws". Despite the fact that each Part is contributed by one of a team of seven editors, there is a fluency and uniformity of presentation that allows the reader to pass smoothly from one section to the next without noticing any grinding of stylistic gears. The very full cross-indexing contributes much in achieving this sense of continuity and integration.

One or two remarks might perhaps be made first with respect to those Parts dealing with the general law. Since the publication of the book, the cases of *Lloyds Bank Ltd* v. *Bundy*,[1] *A. Schroeder*

[1] [1974] 3 All E.R. 757 (C.A.). See also *McKenzie* v. *Bank of Montreal* (1975) 55 D.L.R. (3d) 641 (Ont.H.C.).

Music Publishing Co. Ltd v. *Macaulay*[2] and *Clifford Davis Management Ltd* v. *W.E.A. Records Ltd*[3] appear to have established a doctrine of unconscionability that will allow the courts to mitigate the rigour of the theory of freedom and sanctity of contract and so relieve a party from a contract which is unfair. Chapter 3 (Part One) which discusses the "Application of General Contractual Principles" will therefore have to be read accordingly. Indeed, even before these recent decisions, there were indications in Canada that such a doctrine was being bred out of Duress and Undue Influence and, bearing in mind the generally commendable effort made by the editors to note Commonwealth decisions, one might perhaps have hoped for a reference to such cases as *Morrison* v. *Coast Finance Ltd*,[4] *W.W. Distributors & Co.* v. *Thorsteinson*[5] and *Knupp* v. *Bell*,[6] if not in this chapter then at least in that on consumer protection.

In the chapter on "Risk and Frustration" (Part Two) the editors have attempted to resolve the apparent conflict between *Mash & Murrell Ltd* v. *Joseph I. Emmanuel Ltd*[7] and section 33 of the *Sale of Goods Act*[8] by adopting Dr Sassoon's suggestion[9] that the words "risk of deterioration in the goods necessarily incident to the course of transit" in section 33 should be taken to refer to that deterioration to which all goods of the *genre* would be subject. It remains to be seen whether Benjamin's authoritative *imprimatur* will persuade the courts to imply the obligation that the goods be capable of withstanding a transit both where the seller undertakes merely to dispatch them and where he is responsible for their arrival. A small point might also be made with respect to the section on frustration where it is said that generally a contract for the sale of goods will not be frustrated if the property has previously passed to the buyer. Suppose that specific goods perish after property has passed but before the passing of risk so that section 7 will not apply. If delivery were to

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[2] [1974] 3 All E.R. 616 (H.L.).

[3] [1975] 1 All E.R. 237 (C.A.).

[4] (1966) 55 D.L.R. (2d) 710 (B.C.C.A.).

[5] (1961) 26 D.L.R. (2d) 365 (Man. C.A.). *Cf. Towers* v. *Affleck* [1974] 1 W.W.R. 714 (B.C. S.C.); *Pridmore* v. *Calvert* (1975) 54 D.L.R. (3d) 133 (B.C. S.C.); *Paris* v. *Machnik* (1973) 32 D.L.R. (3d) 723 (N.S.S.C.).

[6] (1966) 58 D.L.R. (2d) 466 (Sask.Q.B.); aff'd (1968) 67 D.L.R. (2d) 256 (Sask.C.A.).

[7] [1961] 1 W.L.R. 862 (Q.B.).

[8] *Sale of Goods Act, 1893*, 56-57 Vict., c.71 (U.K.).

[9] See D.M. Sassoon, *Deterioration of Goods in Transit* (1962) J.B.L. 351 and *Damage Resulting from Natural Decay under Insurance, Carriage and Sale of Goods Contracts* (1965) 28 M.L.R. 180, 189-190.

have been at the seller's place of business, then, since the passing of property would constitute delivery, the object of the contract of sale would have been achieved and there would be no frustration. But suppose that in our hypothetical situation the point of delivery be the buyer's premises and the goods perish before the date set for delivery (property having passed but not risk). Why should the contract not be frustrated so as to relieve the seller from an action in damages for non-delivery?

The chapters on the "Passing of Property" and the "Transfer of Title by Non-Owners" (Part Two) and "Acceptance and Payment" (Part Three) are especially good. One might mention particularly the passages on the passing of property in unascertained goods and the problems posed by the concurrency of the obligations of delivery and payment. The treatment here is superb, perhaps the best in the book, with rigorous analysis and lucid exposition combining first to reveal and then to explain the subtleties and refinements of these two difficult and often perplexing topics. The exceptions to the *nemo dat* rule, an imbroglio if ever there were one, are similarly dealt with. One would only comment that the Kenyan case, *Mubarak Ali* v. *Wali Mohammed*,[10] the sole decision cited to support the view that the words "consent of the seller" in section 25(2) of the *Sale of Goods Act*[10a] are to no different effect than "consent of the owner", does not stand alone. The Canadian case of *Brandon* v. *Leckie*[11] and a New Zealand authority, *Elwin* v. *O'Reagan and Maxwell*,[12] also decide this issue and discuss it at least as profoundly as does Thacker J. in the Kenyan appeal.

The obligations of the seller with respect to the quality of the goods are covered in Part Four, "Defective Goods". The rather elaborate classification of express statements as to quality is comprehensively canvassed and our understanding of the area greatly assisted by the references to historical development. The passages on implied terms are also admirably clear. However, the different considerations that might affect the implications of the condition of description depending on whether the goods be specific or unascertained could perhaps have been more fully explored. In this connection Salmond J.'s masterly judgment in *Taylor* v. *Combined Buyers Ltd*[13] deserved more extensive recognition, despite the trend

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[10] (1938) 18 K.L.R. 231.
[10a] *Supra*, note 8.
[11] [1972] 6 W.W.R. 113 (Alta S.C.).
[12] [1971] N.Z.L.R. 1124 (N.Z.S.C.).
[13] [1924] N.Z.L.R. 627 (N.Z.S.C.).

established by such recent decisions as *Beale* v. *Taylor*.[14] More, too, might have been said on the use by the House of Lords in *Ashington Piggeries*[15] of the damages remoteness test to establish liability under section 14(3). The implications of the decision, particularly for those who deal in commodities, are very far reaching indeed.

The possibility of an action based on the *Hedley Byrne*[16] doctrine for a negligent misrepresentation made by the seller with respect to the goods is briefly touched on in the chapter "Remedies in Respect of Defects". The point is, of course, that section 2 of the English *Misrepresentation Act*[17] already occupies this vantage point and is unlikely to be out-flanked by the common law, particularly in view of the reluctance of English judges to apply the new doctrine. Unfortunately therefore, the book will be of little guidance on this topic to common law Canada. In fact, in the long run, one may be better off without such piecemeal statutory amendment for its absence is already obliging Canadian judges to overcome the dogma of Victorian legal classicism and finally recognise that the common law should offer a remedy for what is really, *au fond*, a species of injurious reliance. To date, advances in this direction have been made in tort[18] where, despite the initial set back of *Nunes Diamonds*,[19] such cases as *Walter Cabott Construction Ltd* v. *The Queen*[20] and *Porky Packers Ltd* v. *Town of The Pas*[21] have allowed a *Hedley Byrne* action despite the existence of a contract between the parties. These developments suggest the beginnings of an evolution in the common law in Canada similar to the one already noted by Professor Gilmore in the U.S.[22] We may be witnessing the first tentative steps towards a generalized law of civil obligation better suited to meet expansionist demands on legal liability, and if this is to proceed with some inherent consistency it is probably better left not to the mercy of bits and pieces of legislation, but in the hands of the judges, provided, of course, they be not timorous souls.

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[14] [1967] 1 W.L.R. 1193 (C.A.).

[15] *Ashington Piggeries Ltd* v. *Christopher Hill, Ltd* [1971] 1 All E.R. 847 (H.L.).

[16] *Hedley Byrne and Co.* v. *Heller & Partners, Ltd* [1964] A.C. 465 (H.L.).

[17] *Misrepresentation Act 1967*, 15-16 Eliz.II, c.7.

[18] *Cf. Watson* v. *Canada Permanent Trust Co.* (1972) 27 D.L.R. (3d) 735 (B.C.S.C.), where the effect of the decision seems to be that promissory estoppel will support an action brought on an otherwise bare promise.

[19] *J. Nunes Diamonds Ltd* v. *Dominion Electric Protection Co.* [1972] S.C.R. 769.

[20] (1974) 44 D.L.R. (3d) 82 (Fed.Ct. Trial Div.).

[21] (1974) 46 D.L.R. (3d) 83 (Man.C.A.).

[22] G. Gilmore, *The Death of Contract* (1974).

The concluding chapter of Part Four is devoted to exemption clauses. Here, too, there has been a major legislative initiative in England, this time in the guise of the *Supply of Goods (Implied Terms) Act 1973*[23] which, in the case of consumer sales, renders void any clause excluding the terms implied by sections 13-15 of the 1893 Act,[24] and in any other case subjects an exemption clause to the test of being reasonable and fair. The statute is in addition to, and not in substitution for, existing rules of law, but given the technique of the Act, the common law rules will generally only be relevant to non-consumer sales. The tortuous learning of the doctrine of fundamental breach and *Suisse Atlantique*[25] therefore lives on and I know of no finer analysis of this troubled area than that to be found in this chapter of the new Benjamin. *Harbutt's Plasticine*[26] is rightly regarded as a confusing aberration and persuasive criticisms are made of the suggestions in *Suisse* that upon a rescission for breach the whole contract, including provisions in the nature of liquidated damages clauses, comes to an end.

Since the appearance in 1950 of the last edition of Benjamin, sales law has been forced to accept that it is no longer exclusively concerned with merchants but must also meet the very different demands made on it by the consumer. This fundamental shift in axis is recognised in the new book by the inclusion of Part Five which consists of a chapter entitled "Consumer Protection and Manufacturers' Guarantees". The chapter proceeds by outlining first the consumer's remedies in contract and tort, then the special problem posed by manufacturers' guarantees, and finally the remedies and protection afforded by certain statutes. In the course of describing the various private law remedies, mention is made of the challenging emergence in the U.S. of the strict tort doctrine and those other assaults on privity countenanced in America to enable the consumer to hold manufacturers strictly liable for personal injury or damage to property resulting from the use of defective goods. It might be thought, particularly in North America, that a major new work on sale should be more responsive to the burgeoning movement of consumerism, but it must be remembered that the book is intended primarily as a practitioner's work and as such it is

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[23] *Supply of Goods (Implied Terms) Act 1973*, 21-22, Eliz.II, c.13 (U.K.).

[24] *Supra*, note 8.

[25] *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 (H.L.).

[26] *Harbutt's Plasticine, Ltd* v. *Wayne Tank and Pump Co.* [1970] 1 Q.B. 447 (C.A.).

not an appropriate vehicle for proclaiming a new legal order. Legal evangelism belongs in the law journals, not practitioners' treatises.

Remedies are dealt with in Part Six which is divided along traditional lines into three chapters, "The Seller's Remedies Affecting The Goods", "Other Remedies Of The Seller" and "The Remedies Of The Buyer". In the first of these chapters considerable space is devoted to the right of stoppage *in transitu* and yet this is a remedy rendered all but obsolete by contemporary methods of financing, noticeably documentary credits. Obviously, a major work on sale must, *ex abundante cautela,* cover this topic in some detail, but bearing in mind the remedy's marked decline if not fall, the presentation here is overdone.

The treatment of the personal remedies, actions for the price and damages, is also extremely detailed, in this case as it should be. And here, in marked contrast to the corresponding sections in the old Benjamin, the law is presented in a clear, systematic fashion with care taken to keep specific considerations in touch with general principles and modern learning.

Part Seven treats of the specialist topic of "Overseas Sales". Unlike most other practitioners' works, whose treatment of overseas sales rarely amounts to more than an enumeration of the duties of the respective parties, the new Benjamin adopts a distinctly academic, almost didactic approach. Part Seven begins with an introductory chapter in which the function and legal significance of documents of title are carefully explained, as are the special considerations affecting the passing of risk and property. This introduction is immensely valuable when one comes to the chapters that discuss C.I.F. and F.O.B. contracts in detail. What might previously have appeared as two forbiddingly esoteric creatures, particularly to the student, turn out to be readily comprehensible after all — a considerable achievement. A further chapter covers other special terms such as F.a.s. and C. & f. and also deals with conventions on international carriage of goods and the legal implications of containerization. Part Seven concludes with four chapters on payment. Discussed in turn are negotiable instruments in overseas sales, documentary credits and finance by mercantile houses, export credit guarantees and exchange control. The last two topics are of little relevance to Canada but the first two, particularly the second, are very important.

The last Part (Part Eight), deals with the "Conflict of Laws". As one would expect, a good deal of space is given to the Proper Law Doctrine. There is also a very full discussion of proprietary matters, followed by sections on risk, performance of the contract

of sale, and remedies. It should be noted that since the book was published, the House of Lords has decided in *Miliangos* v. *George Frank (Textiles) Ltd*[27] that an English court is now entitled to give judgment for a sum of money expressed in a foreign currency where the proper law of the contract is that of a foreign country, and the money of account is of that country or possibly some other foreign country.[28] In such a case the conversion date is when the court authorises enforcement of the judgment in terms of sterling. The old "breach date conversion" rule is therefore thankfully dead and buried and paragraphs 2381-2382 should be read accordingly.

To conclude, *Benjamin's Sale of Goods* is a splended achievement. The editors are to be congratulated for producing a practitoner's work which not only treats its subject in depth but does so with impressive scholarship and in a graceful and lucid style. With the Canadian law of sale entering an era of fundamental change, the role Benjamin will play in Canada may not be as assured as it once was. However, in the absence of a Canadian text remotely approaching the standards set by Professor Guest and his co-editors, it is probable that, for the time being at least, the new Benjamin will enjoy a deserved pre-eminence here. In fact it is only likely to be challenged by American works, as this branch of Canadian law seeks its inspiration for reform from developments in the U.S. rather than from traditional English sources.

Finally it must be remembered that as we welcome a new book to the Canadian legal scene, we are witnessing the demise of a work that over the course of a century assumed a dominating place in the common law Commonwealth. And the reviewer in Quebec bids adieu to the old Benjamin with a special affection. Gone is Benjamin's masterful survey of the Roman Law of Sale. Gone, too, are the learned references to the Civil Law which invariably saw the Quebec Civil Code cited in conjunction with the Code Napoleon. All this was of course inevitable. We take consolation in the fact that even though Pothier has been shown the door, the new work is every bit as distinguished a piece of legal scholarship as was its celebrated predecessor.

R. A. Field*

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[27] [1975] 3 W.L.R. 758 (H.L.). It had previously been held by the Court of Appeal in *Schorsch Meier G.m.b.H.* v. *Hennin* [1975] Q.B. 416 (C.A.), that the Treaty of Rome obliged English courts to adopt the new rule where both parties derived from member states.

[28] The House left open the question of whether the new rule would apply to an action in damages as opposed to one in debt.

* Of the Faculty of Law, McGill University.

The Admissibility of Confessions in Criminal Matters (2d Edition), by Fred Kaufman, Toronto: The Carswell Company Limited, 1974. Pp. xxvii, 282 ($22.50).

In 1960 Fred Kaufman wrote *The Admissibility of Confessions in Criminal Matters*. It was the first attempt by any author to present a complete statement of the Canadian position in this vital area of the law. The book was well received in the profession because of its thoroughness and lucidity. Now Mr Kaufman, who in the interim has become Mr Justice Kaufman of the Quebec Court of Appeal, has enlarged and revised the 1960 edition.

The revisions and enlargement consist mainly in the addition of four chapters, the discussion of selected new and important cases, and from time to time a more complete and detailed treatment of certain issues than was accomplished in the first edition.

The basic organizational pattern of the subject matter remains the same. Mr Justice Kaufman takes the reader through the historical development of the rule and its evolution in Canada, to the principles of law that surround its application. Substantive chapters are devoted to the paradigm of the rule itself and are entitled "Burden of Proof", "Persons in Authority", "Free and Voluntary", "Spiritual Inducements", "Temporal Inducements", "Threats and Violence", "Use of Tricks", "Declarations by Others", "Judicial Confessions" and "Appeals".

The four new chapters added in the second edition discuss the weight to be attributed to confessions, the confirmation by subsequent act rule of *Wray*,[1] the right to counsel rules of *Brownridge*[2] as they affect the admissibility of confessions, and the developing line of cases recognizing that juvenile defendants may be entitled to some special protections. There is no doubt, of course, that these modern developments deserve such attention in any complete discussion of this increasingly complex area of our law.

The other changes in the second edition revolve around the effect of new decisions on the rule regarding admissibility of confessions, particularly decisions of the Supreme Court. Mr Justice Kaufman is typically thorough in listing these new decisions. It is in considering them, however, that the book suffers its only serious flaw. Unfortunately, the author's clear, crisp and efficient writing style, which typifies the remainder of the book, is not so apparent in his discussion of new cases. He seems at times reticent to deal fully

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[1] *R.* v. *Wray* [1971] S.C.R. 272, [1970] 4 C.C.C. 1, 11 C.R.N.S. 235.

[2] *Brownridge* v. *The Queen* (1972) 28 D.L.R. (3d) 1, 7 C.C.C. (2d) 417, 18 C.R.N.S. 308 (S.C.C.).

with the implications of new decisions. This is especially evident in his treatment of *Piche*[3] and *Wray*[4] which ultimately leaves the reader to her or his own devices to determine the compatibility, if any, of these two decisions.

Although the author obviously made a conscious choice to focus primarily on Supreme Court decisions, the book could be improved by a more complete discussion of some provincial decisions — particularly those that cement the conceptual framework of our law in this area.[5] It is understandable, of course, that an author who is likely to face cases raising new questions in this area from the Bench would be hesitant to predict future results. Nevertheless, the book's overall quality could be improved by the inclusion of more of the author's own ideas and insights on the future of the law in this area. It would be interesting to know, for example, if Mr Justice Kaufman believes that the cumulative effect of recent innovative decisions permits one to say that our courts are slowly gravitating toward a "totality of circumstances" test analogous to the American position.

These criticisms, however, are only minor in the face of the overall quality of this book. It is on the whole well-written and should prove highly valuable to any person working or researching this complex area of the law. Mr Justice Kaufman has once again made a significant contribution to our understanding and appreciation of the vicissitudes and complexities of the law of evidence.

Jim Ortego*

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[3] *Piche* v. *The Queen* [1971] S.C.R. 23, [1970] 4 C.C.C. 27, 12 C.R.N.S. 222.

[4] *Supra*, note 1.

[5] See, *e.g.*, *R.* v. *Hodd* [1970] 12 C.R.N.S. 200 (B.C.) and *R.* v. *Dietrich* [1970] 3 O.R. 725, 1 C.C.C. (2d) 49; leave to appeal refused [1970] 3 O.R. 744, 1 C.C.C. (2d) 68 (S.C.C.).

* Of the Faculty of Law, Dalhousie University.

Cases and Materials on Criminal Law and Procedure (4th Edition), by M. L. Friedland, Toronto: University of Toronto Press, 1974. Pp. xiv, 1021 ($40.00).

The arrival of the fourth edition of Friedland's *Cases and Materials on Criminal Law and Procedure* in October 1974 was an opportune and most welcome event. Four years had passed since the third edition appeared in September 1970. Since that time there has been considerable development in the criminal law. Heralding the onslaught of change was the *Bail Reform Act*[1] formulated in 1970 and 1971 and coming into force in January 1972. The amendments in that Act relative to detention and release would without more have justified a fourth edition. However, the changes were followed by provisions relating to vagrancy[2] and capital punishment,[3] others terminating corporal punishment[4] and still others introducing air hijacking[5] and wiretapping,[6] to mention only a few. Such a substantial number of changes made a fourth edition not only welcome but necessary.

Friedland's book, like almost everything else, was hard struck by inflation in the past four years. The third edition had 701 pages and cost $15.00. The new edition has 1021 pages and costs $40.00. It was clearly necessary to add new materials in view of the legislative changes and judicial pronouncements. However, I am not convinced that more ruthless editing could not have kept the volume to about 700 pages, although the cost may still have risen to its present level. It seems to me the book has reached, if not surpassed, its maximum size. The next edition, in order to add new materials, will have to drop some of the existing references, a process which probably could have been started with the fourth edition.

The new edition has changed little in form and retains the unmistakable mark of scholarly excellence which characterized preceding editions, and which readers of M. L. Friedland's work have come to expect. The book continues to consist of nineteen chapters and some supplementary material. For those unfamiliar with the previous editions, these chapters deal with an introduction to procedure, pretrial procedures, codification of offences at common law, morality and criminal law, attempts, quantum and burden of

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[1] S.C. 1970-71-72, c.37.
[2] *Criminal Law Amendment Act, 1972*, S.C. 1972, c.13, s.12.
[3] *Criminal Law Amendment (Capital Punishment) Act*, S.C. 1973-74, c.38.
[4] *Criminal Law Amendment Act, 1972, supra*, note 2, s.70.
[5] *Ibid.*, s.6.
[6] *Protection of Privacy Act*, S.C. 1973-74, c.50.

proof, the mental state, strict liability, mistake, ignorance, vicarious and corporate liability, drunkenness, insanity, automatism, excusable conduct, necessity, duress and self-defence, trial process, double jeopardy and sentencing. The supplementary material deals with some constitutional matters and the *Canadian Bill of Rights*.[7]

Within this familiar structure Friedland has made changes, some necessary, some interesting and thought-provoking. In Chapter Two dealing with pretrial procedures, it was necessary to insert material resulting from the new bail reform provisions[8] and the wiretapping legislation.[9] This Chapter has increased by some 50 pages, part of which is of questionable value, other than as a teaching tool, an aspect on which I will comment later. For example, the first draft of the wiretapping bill (Invasion of Privacy) is set out in full at pages 73-80; it does have some value for comparison with the final provisions as passed. Similarly, at pages 129-137 there are found several schedules of fees relevant to *The Legal Aid Act*[10] in Ontario.

Other noticeable changes are found in Chapters Thirteen, Fifteen and Sixteen. Chapter Thirteen includes a new Section IV on the "Effect of Drugs on Mental Capacity". Although the section contains only one page it is a handy reference for a more and more often asked question, namely how do the courts distinguish between drugs and drink relative to mental capacity? The answer is that they don't. An interesting change was moving the Section on provocation from Chapter Sixteen on excusable conduct to Chapter Fifteen on automatism. While the move was unnecessary in the sense that the topic will fit into either Chapter, it is certainly thought-provoking. Other changes are found in Chapter Nineteen on sentencing, particularly the inclusion of a separate Section on conditional and unconditional discharges and fines. Those Sections improve the Chapter, with few additional pages.

Friedland's book is primarily a teaching tool and must be assessed as such. From this point of view it is without reservation the best of its kind in Canada, although not without fault. As indicated, it is getting too large and expensive and could be reduced by hard editing. It contains too much material to cover in a basic criminal law course, but on the other hand does not deal with nearly the whole field of criminal law; substantive offences are not included. But then no one volume could span this amount of material. However, it is not exorbitantly expensive by today's standards, and an

[7] S.C. 1960, c.44 (see R.S.C. 1970, Appendix III).
[8] *Supra*, note 1.
[9] *Supra*, note 6.
[10] R.S.O. 1970, c.239.

instructor or student can choose particular parts to study, using the other materials for reference only. The book is clearly structured to facilitate its use in this way.

Throughout the book the author poses problems and questions for his readers, which is excellent for both student and teacher. The practitioner, however, already has a problem in mind when he turns to reference material. Nevertheless the problems posed can be helpful to him as well. My greatest regret about the book is the lack of comment by Friedland himself. His knowledge of criminal law and his experience would make his comments of the greatest value and add considerably to the stature of the book. Unfortunately such comments would also add to its length. However, the reduction of some lengthy material to a comment by Friedland might have the salutory effect of condensing the book and allowing the reader to hear from the author himself at the same time.

Once again M. L. Friedland is owed a debt of gratitude — by teachers and students of criminal law for an excellent teaching tool, by the practicing bar for a handy and reliable reference and by the whole legal fraternity for his continued contribution to criminal jurisprudence in Canada.

D. M. Hurley*

In The Last Resort: A Critical Study of the Supreme Court of Canada, by Paul Weiler, Toronto: The Carswell Company Limited, 1974. Pp.xv, 246 ($12.95).

In The Last Resort is devoted to a study of the Supreme Court of Canada in the period 1950 to 1974. Beyond doubt the book is a distinguished and important contribution to the literature on the law and constitution of Canada. Professor Weiler is concerned with the nature and quality of decision-making in Canada's final court of appeal, as revealed in the reported reasons for decisions of the Supreme Court justices of the period. The genesis of the book is best described in the words of the author himself, taken from the preface:

> In 1969, along with two of my colleagues at the Osgoode Hall Law School, I received a grant from the Canada Council to study the Supreme Court of

* Of the Faculty of Law, University of New Brunswick.

> Canada. Since then I have written and published several articles on the contribution of the Court to the evolution of selected fields of Canadian law since 1949 (when it succeeded the Privy Council as our final court of appeal). Each piece involved a detailed examination of every decision of the Court in the area in question, in order to discern the extent of the influence of its judges on the growth of Canadian law and to evaluate the quality of this product.
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> For each of these studies, I had to develop a thesis about the proper scope of the judicial function which would serve as a vantage point for my selection and analysis of the decisions. Because of the lengthy detail in which the various articles described what the Supreme Court was actually doing, these views of what it should have been doing tended to recede into the background. In this book I have tried to draw them together into a more or less systematic theory of how the judicial function should be carried on in Canada. Since the Supreme Court, from its position at the top of our judicial hierarchy, sets the tone for our judicial process as a whole, it was natural to focus my illustrations on the structure and work of that Court alone. The theory is used to appraise some examples of the Supreme Court's performance while these same illustrations put flesh on the abstract propositions of the overall scheme. (pp.vii-viii)

In accordance with this plan, Professor Weiler appraises the performance of the Supreme Court, as illustrated by selected recent decisions, under the following five headings:

> The Architect of the Common Law
> The Oracle of the Criminal Code
> The Supervisor of the Admnistrative Process
> The Umpire of Canadian Federalism
> The Defender of our Civil Liberties

Clearly, in making such evaluations, the author is attempting a task that is both difficult and important. As I will indicate later, I disagree deeply with some of his conclusions. First, however, I should say that I welcome this book for its thorough scholarship and straightforward style. The author has raised issues that should be raised — in the main he has identified the right problems and asked the right questions. This means he has succeeded, in these respects, with the exacting task he set himself.

His language is lucid, straightforward and generally free of special or mysterious legal terminology. For the most part he accomplishes this without oversimplifying the issues he is confronting. While the finished text flows easily, the subjects are difficult, and one suspects that the process of composition was a painstaking one. While in some respects Professor Weiler is rather sharp with adverse criticism of the Supreme Court, at other times he strongly praises certain of the Court's decisions. Perhaps he might have been more diplomatic with the expression of adverse criticism, but nevertheless, the Court is very much in the public domain, so that frank and res-

ponsible criticism is desirable. The Court inevitably deals with many issues of public importance and high sensitivity, and this will be increasingly true now that it has gained substantial control of the selection of the cases to be given full hearing by it. The appeals as of right involving $10,000 or more, of which Professor Weiler properly complains, were finally abolished in January, 1975.[1]

It is not the function of a reviewer to rehearse in detail the whole of the book in question. Nevertheless, when the book is important, as this one is, the main thrust of the author's position should be given, with critical comment. In general, Professor Weiler takes the view that, all too frequently, members of the Supreme Court of Canada do not seem to have been aware of the creative role which they inevitably play in the development of the law when deciding the cases that come before them. Whether or not this is so, the author is right to insist that on difficult cases of public importance, the leadership properly expected of our final Court requires that it should be innovative when the pre-existing law is somehow incomplete or unsatisfactory for the case in hand, and needs further definition and improvement in fulfillment of the underlying purposes of the branch of law concerned.

While the point is of general application, the author emphasizes that in particular, this spirit and approach should inform the decisions of the Court in its functions as "Architect of the Common Law" and "Oracle of the Criminal Code". He gives examples from decided cases that he finds both encouraging and discouraging in this regard, but he has no doubt that these areas of the law should be (as they are) primarily in the hands of the courts both as a matter of original and appellate jurisdiction, with the Supreme Court of Canada at the apex of the system. But what of the administrative process, the federal distribution of legislative powers in the *B.N.A. Act*,[2] and general civil liberties of the type specified in the *Canadian Bill of Rights*?[3] Respecting these areas of the law and the constitution, Professor Weiler takes the position that the lower superior courts and the Supreme Court of Canada either should not be in the act at all, or else should be practicing considerable restraint about the parts they do play.

Many statutory schemes are now entrusted to specialized administrative tribunals as a matter of original jurisdiction, labour relations boards being a principal example. There are usually

[1] *An Act to amend the Supreme Court Act and to make related amendments to the Federal Court Act*, S.C. 1974-75, c.18, s.3.

[2] *The British North America Act, 1867*, 30-31 Vict., c.3 (U.K.)

[3] S.C. 1964, c.44, (now R.S.C. 1970, Appendix III).

privative clauses in the relevant labour relations statutes, to the effect that the decisions of the labour relations boards are final and not subject to review in any way by the superior courts. If such privative clauses were constitutionally valid, they would keep this area of the law out of the court system altogether, and thus out of reach of the Supreme Court. But the courts have treated privative clauses as unconstitutional, and have insisted on reviewing the boards for excess of jurisdiction and for breach of natural justice in procedure. Professor Weiler concedes that the courts have succeeded in maintaining this position and that judicial review of administrative tribunals will probably continue in spite of privative clauses. He thinks this is desirable for breach of natural justice in procedure, but regrets that it is so as far as excess of jurisdiction is concerned. He points out that in the latter case, if a superior court treats as jurisdictional error any interpretation of the statutory terms of the labour code by the labour board with which the judges disagree, then the courts are assuming a total appellate or revising power over the labour boards. He quotes with approval Mr Justice Rand who has held that any reasonable interpretation of a labour relations code, by the labour board entrusted with original jurisdistion to apply it, should be accepted by a reviewing court even though it is not the interpretation the judges of that court would have favoured had they been the original decision-makers.[4] Professor Weiler is able to point to some cases where the Supreme Court has not acted with appropriate restraint under this test.

I agree with the author that judicial review for excess of jurisdiction should be exercised with all the restraint Mr Justice Rand spelled out, but with this qualification: I regard judicial review of administrative tribunals in this respect to be essential to maintaining the rule of law. The appropriate judicial restraint concedes and respects proper scope for the experts on specialized boards, but it does not leave them entirely unchecked, as they would be if privative clauses were valid. If this last situation is what Professor Weiler wants, then we are indeed far apart. The countervailing considerations which he overlooks are these: There are many and various administrative tribunals made up of many types of specialists. Autonomous and inpartial generalists are necessary, having the power to survey the whole scene and to put proper limits on the natural imperialism of these many groups of experts, in accordance with wide-ranging views of where the overall public interest lies. Our whole constitutional history is to the effect that this vital need

[4] *Toronto Newspaper Guild* v. *Globe Printing* [1953] 2 S.C.R. 18, 30.

for autonomous generalists who have the last word is best met by the high courts, following the model of the English Superior Courts established after the *Act of Settlement*, 1701.[5] It is strange that Professor Weiler should overlook this in connection with judicial review of administrative tribunals, because later, in his discussion of civil liberties, he clearly recognizes the virtues of our autonomous superior courts of general jurisdiction. He says:

> At this very point many of the institutional characteristics of courts which were the source of concern earlier now appear in a different light. The structure of adjudication is designed to preserve as high a level of impartiality as is possible. Because judges are tenured, they are not beholden to the majority for re-election. Because judges are generalists, they are not committed to any one administrative goal, such as crime control. They operate within the framework of the adversary process which provides access to the "one man lobby" to complain about political injustice done to a minority. Within this forum, each side, government and individual, is represented only by counsel whose function is to provide arguments for the resolution of the dispute on the merits. The criterion for decision is not the number of voters represented by each party, a standard under which the individual would almost invariably be the loser. (p.212)

The same historic virtues of the superior courts make the Supreme Court of Canada the logical institution to have the last word in the interpretation of our distribution of primary legislative powers in Canada, as expressed in the *B.N.A. Act*.[6] The Court should be the "Umpire of Canadian Federalism". But Professor Weiler has a very different conception of the distribution of powers system itself and of the proper place of the Supreme Court. He believes that the words and phrases by which our federal constitution distributes legislative powers were relevant to society and full of meaning when the constitution was first drawn up in 1867, but that as society in our country changed over the years, these words and phrases became increasingly unreal and irrelevant to prevailing social conditions. Hence he tells us that a hundred years later, the Supreme Court justices can really get no guidance from the original text of the *B.N.A. Act*, no guidance from the concepts denoted by the original words and phrases. He alleges that in making interpretative decisions today, the Supreme Court is really making up a new constitution piecemeal as it goes along, and not doing it very well. Now I would agree that a final judicial interpretative tribunal has important degrees of discretion here, as in other parts of the law, but Professor Weiler goes much too far in what he has said.

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[5] 12-13 Will.III, c.27.

[6] *Supra*, note 2.

I consider the true history of the development of the *B.N.A. Act* by judicial interpretation to be almost the complete reverse of what Professor Weiler says it is. The greatest uncertainty about the meaning of the power-conferring words and phrases of the constitution in relation to one another occurred at the beginning. As time went on and precedents accumulated, many years of judicial interpretation greatly reduced this uncertainty and made the distribution-of-powers system much more meaningful. In other words, after a hundred years of judicial interpretation, the *B.N.A. Act* has become more, not less, meaningful than it was in 1867, and of course it was by no means devoid of meaning then. We are talking of matters of degree and of the main trends, positive or negative, in the development of the meaning and utility of the constitution. Moreover, judicial interpretation over the years has shaped the original power-conferring words and phrases in relation to one another, so that they have been capable of affording guidelines for new problems of legislative power-distribution arising from social change. This parallels the function and operation of judicial precedent in other branches of the law, so there should be nothing surprising about it.

Now in saying this, I do not mean that the *B.N.A. Act* is complete and all-sufficient in the sense that it contains in its text detailed principles and concepts that automatically embody easy solutions for every problem in the division of legislative powers that may arise. If this were so, reading the Act would be all that was involved in constitutional interpretation. While this extremely simplistic view of interpretation and meaning is not valid, Professor Weiler has gone to the opposite extreme. He feels that the federal constitution has become virtually meaningless, so that the Supreme Court is really making up new constitutional rules as it goes along under the guise of interpreting the text of the *B.N.A. Act*. This extreme is just as invalid as the other; it too does not properly describe our true operating federal jurisprudence. As always, the truth lies at some middle position between these opposed extremes. Professor Weiler has gravely oversimplified the nature of constitutions and constitutional history.

Logically enough as a result of his views, however, Professor Weiler considers that we would be better off if the courts in general, and the Supreme Court of Canada in particular, were out of the business of judicial review of the federal constitution altogether. He would look instead to the model afforded by collective bargaining in labour relations for the operational jurisprudence of our federal system — he would put the main issues of the federal constitution into constant negotiation at federal-provincial conferences of

the elected political leaders of government. For my part, I think these ladies and gentlemen already have quite enough to do operating *within* the basic guidelines afforded by judicial review of the constitution.

Professor Weiler does concede a marginal role for the courts in this area. If some unfortunate citizen is caught by actual conflict of federal and provincial statutes applicable to him, Professor Weiler would allow him to go to court. But this qualification simply makes his main position less credible than ever. Conflict or inconsistency is a complex and flexible concept. There are thousands of pages in the federal statute books, and tens of thousands of pages in the provincial statute books, to say nothing of subordinate legislation; a good counsel could nearly always find enough conflict or inconsistency of some kind to get into court, and we would be back to full-fledged judicial review.

In any event, I do not find the model afforded by labour relations jurisprudence in Canada to be satisfactory as a type of system for control of the operating fundamentals of our federal constitution. The labour relations model is no substitute for sophisticated judicial review at the highest levels in these fundamental matters. It is to the latter that we must look for a satisfactory operating jurisprudence of Canadian federalism.

Concerning the position of the final Court as the umpire of our federal system, I prefer the views of Professor Cairns to those of Professor Weiler. Cairns says:

> A strong and effective court requires a variety of supporters. It must be part of a larger system which includes first class law schools, quality legal journals, and an able and sensitive legal fraternity — both teaching and practicing. These are the minimum necessary conditions for a sophisticated jurisprudence without which a distinguished judicial performance is impossible. Unless judges can be made aware of the complexities of their role as judicial policy-makers, and sensitively cognizant of the societal effects of their decisions, a first-rate judicial performance will only occur intermittently and fortuitously.[7]

Suffice it to say here that I consider the record of the Supreme Court of Canada in constitutional interpretation to be much better than Professor Weiler would have us believe.

Finally, we come to the concept of the court as the defender of civil liberties. Here the author is much more sympathetic towards a major role for the courts, under the Supreme Court's leadership. But he is uneasy about the wide-ranging power conferred on the courts

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[7] A.C. Cairns, *The Judicial Committee and Its Critics* (1971) 4 Canadian Journal of Political Science, 331.

by such phrases as "freedom of speech" and "equality before the law" in the *Canadian Bill of Rights*.[8] He perceives the delicate balancing of competing interests that is involved, and also the issue of the extent to which appointed judges should be striking down the statutes of elected parliamentarians for offence to criteria of "freedom" or "equality". He seems equivocal in the end about the part that the courts should play here. The difficulties concerning the proper terms of partnership between courts and legislatures in these matters are indeed very great. Uncertainty is understandable and caution is called for. Personally, I think it *is* desirable that the courts should endeavour to apply these general standards, provided they confine themselves to striking down obnoxious and obvious inequalities or very clear denials of essential freedoms. But I do agree with Professor Weiler that, in the end, elected parliamentarians have supremacy over appointed judges.

Obviously, I have found much to agree with and much to disagree with in this book. It has pleased me and discouraged me; it has angered me and enlightened me; it has even moved me to rethink the basis of some of my own opinions. This means that, in my view, *In The Last Resort* is a very good book indeed and deserves to be widely read.

W. R. Lederman*

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[8] *Supra*, note 3, s.1(b) and (d).

* Of the Faculty of Law, Queen's University.