

## BOOK REVIEWS

### CHRONIQUE BIBLIOGRAPHIQUE

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Raymond A. Landry & Ernest Caparros, eds, *Essays on the Civil Codes of Québec and St Lucia*. Ottawa: University of Ottawa Press, 1984. Pp. xii, 400 [\$29.00]. Reviewed by P.P.C. Haanappel.\*

Between 1879 and 1882, the then-British colony of St Lucia, an island in the West Indies, received slightly modified versions of the *English* texts of Quebec's *Civil Code* and *Code of Civil Procedure*, of 1866 and 1867 respectively, as domestic legislation. What Quebec and St Lucia, which are otherwise distant and very different territories, had in common, and still have in common today, is a similar colonial background: originally, they were French colonies governed by French law, and later they were British colonies where French civil law survived, notwithstanding the change in "colonial masters".

The "exportation", in the late 1870s and early 1880s, of the young Quebec *Codes* to the island of St Lucia was in very large measure the result of the efforts of two men: James Armstrong and William Des Voeux. Mr Armstrong was a lawyer from Sorel, Quebec, who had become Chief Justice of St Lucia. Mr Des Voeux, the island's Administrator, had received his legal training at Osgoode Hall in Toronto.<sup>1</sup> Besides colonial links of a legal nature, there were thus, at the time of St Lucia's codification, also close personal links between Quebec and St Lucia in the form of the Quebec lawyer and the Ontario barrister. The latter, while at Osgoode Hall, had passed a comprehensive examination of civil law.<sup>2</sup>

For a period of one hundred years after St Lucia's codification, there existed hardly any legal relations between the island and Quebec. During that period, the civil law of both jurisdictions was subjected to considerable common law influence, although much more so in St Lucia than in Quebec. Pursuant to *The Laws of Saint-Lucia (Reform and Revision) Ordinance* of 1954, large chunks of English law, particularly in the fields of contracts,

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<sup>1</sup>R.A. Landry, "Foreword" in R.A. Landry & E. Caparros, eds, *Essays on the Civil Codes of Québec and St Lucia* (Ottawa: University of Ottawa Press, 1984) ix at ix.

<sup>2</sup>N.J.O. Liverpool, "The History and Development of the Saint Lucia Civil Code" in Landry & Caparros, *ibid.*, 303 at 331 n. 83.

torts and trusts, were introduced into the St Lucia *Civil Code*, in part through incorporation by reference.<sup>3</sup>

After more than one hundred years, the civil law in both jurisdictions is at a crossroads. Quebec, where the civil law has clearly survived, is re-codifying. But St Lucian lawyers are examining how much civil law is left in the island, especially after the *Civil Code* amendments of the 1950s, whether it is worth retaining, and if so, whether some of the common law influence should be undone. It is in this context that two seminars were held, in 1983-84, on the civil law of Quebec and St Lucia. The book under review contains a selection of papers presented at these seminars. The first seminar was held at the Château Montebello (Quebec), the second at the St Lucian Hotel in Castries (St Lucia). The seminars were organized under the auspices of an ongoing exchange programme between the Faculty of Law of the University of the West Indies (Barbados) and the Faculty of Law of the University of Ottawa. All the seminar papers were presented in English. Part I of the book contains the papers presented at the second seminar, while Part II reproduces four of the papers presented at the first seminar. These latter four papers were previously published.<sup>4</sup>

Part I of the book is organized around six panel topics: the evolution of the *Civil Codes* of Quebec and St Lucia; evidence in civil and commercial law; the notarial system; the law of prescription; the law of successions; and a comparison between statutory law and a civil code. With the exception of the last panel, panel subjects were discussed by two lawyers, one from Quebec and the other from St Lucia or elsewhere in the West Indies. The last panel subject was discussed by five lawyers, all from Quebec. (It should be noted that Quebec lawyers, in the sense used here, includes lawyers from the Civil Law Section of the Faculty of Law of the University of Ottawa.) As mentioned earlier, Part II of the book contains four papers. Three of them deal with St Lucian law and one with Quebec law.

Most of the papers contain an overview of legal developments in *either* Quebec *or* St Lucia. Some go beyond that and compare aspects of Quebec and St Lucian law. This is the case especially in Dean Landry's paper<sup>5</sup> on prescription and in Professor Belleau's paper<sup>6</sup> on civil procedure. A few — particularly interesting ones to which more attention will be devoted later

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<sup>3</sup>A. Lewis, "Official Opening of Conference" in Landry & Caparros, *supra*, note 1, 9 at 13-4.

<sup>4</sup>See (1983) 14 R.G.D. 373-446.

<sup>5</sup>R.A. Landry & F. Lefebvre-Landry, "Prescription as a Mode of Acquiring Property: Myth and Reality" in Landry & Caparros, *supra*, note 1, 125.

<sup>6</sup>C. Belleau, "The Law of Civil Procedure in the Province of Québec with Special Reference to the Field of Execution of Judgments as Compared with the St Lucia Experience" in Landry & Caparros, *supra*, note 1, 265.

— transcend even this bilateral comparative approach and examine the two jurisdictions' laws in the context of a general comparison of civil and common law, and civilian and common law methodology.

The remainder of this book review will be devoted to a discussion of a number of the papers submitted by St Lucian or other West Indian authors. This is not to downgrade the papers submitted by Quebec authors; rather, for most readers the papers on St Lucian law open up as yet unexplored juridical horizons. Two things, nevertheless, should be said about the papers on the various aspects of Quebec law. First, since they are in English, they are accessible to a wider public than is usually the case with publications on Quebec civil law which, of course, are mostly in French. In fact, all of the Quebec academic contributors to the *Essays* (Professors J.-L. Baudouin, A. Bisson, G. Brière, E. Caparros, L. Ducharme, Y. Duplessis, R.A. Landry, A. Larouche and L. Perret) publish only occasionally in English. Second, the publications on Quebec civil law do not break new ground, as they were written, understandably, in a context where lawyers from different jurisdictions familiarize each other with their respective legal systems.

In his opening speech at the second seminar on the *Civil Codes* of Quebec and St Lucia,<sup>7</sup> Sir Allen Lewis, Governor General of St Lucia, set out a number of factors which have contributed to the decline of the civil law on the island. In 1916, St Lucia adopted a *Commercial Code* based on English codifying Acts. Previously, commercial matters had been governed by Part Four of the St Lucia *Civil Code*, albeit already with considerable common law influence. In 1940, the Royal Court of St Lucia was abolished and replaced by a Supreme Court shared by the other British Windward and Leeward Islands. On all these other islands, the common law was in force — civil law did not survive in the originally Spanish colony of Trinidad — and the new Court's judges were all English-trained. In 1946, *The Legal Practitioners Ordinance* substituted the English Law Society's examinations for local St Lucian examinations, with the result that prospective lawyers began to concentrate more on English common law than on St Lucian civil law. In fact, from then until the establishment of the Faculty of Law of the University of the West Indies at Barbados in the 1970s, most St Lucian lawyers studied law in England. (A legal qualification received from a civilian jurisdiction does not suffice for the practice of law in St Lucia.<sup>8</sup>) The large-scale introduction of English private law in the 1950s has already been mentioned.<sup>9</sup> The developments of the 1940s and 1950s must be seen in the

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<sup>7</sup>Lewis, *supra*, note 3.

<sup>8</sup>N.J.O. Liverpool, "The Law of Succession in St Lucia" in Landry & Caparros, *supra*, note 1, 191 at 214 n. 80.

<sup>9</sup>See *supra*, note 3 and accompanying text.

light of the eventually unsuccessful movement towards a Federation of the West Indies.

Another factor mentioned in the Governor General's speech was the Castries Fire of 1948 which, amongst other things, destroyed the local law library.<sup>10</sup> Legal works lost in the fire were not replaced. Yet another factor, referred to by several authors in the book, is that over the generations St Lucian lawyers gradually lost fluency in French, thereby hampering access to original French legal sources. Although the Creole dialect of French has not altogether vanished in St Lucia, the official language is English; the *Codes* are in English only and legal proceedings in St Lucia have been in the English language since 1842,<sup>11</sup> that is, even before codification. St Lucia thus shares a linguistic access barrier to original French legal sources with other civilian jurisdictions like Louisiana.

"The Viability of the Civilist Tradition in St Lucia"<sup>12</sup> is examined by K.D. Anthony of the Faculty of Law of the University of the West Indies. He starts by stating that, as in Quebec, the civilist tradition in St Lucia only applies to the field of "property and civil rights".<sup>13</sup> Following V.F. Floissac,<sup>14</sup> he portrays St Lucia's civil law as "a fascinating blend of Quebec, French, English and indigenous law".<sup>15</sup> In some detail, Anthony describes the legislative reforms of the St Lucia *Civil Code* in the 1950s. He writes: "Importation was achieved in some cases by codifying common law principles into the Code, while in others, by introducing within the body of the Code open reception provisions to allow for the entry of English law."<sup>16</sup> These "open reception provisions" constitute the "incorporation by reference" method referred to earlier. An excellent example is article 917A of the St Lucia *Civil Code*, as amended. It provides:

917A. Subject to the provisions of this article [*i.e.*, subject to stated exceptions] ... the law of England ... relating to contracts, quasi-contracts and torts shall *mutatis mutandis* extend to this Colony [*i.e.*, St Lucia], and the provisions of articles ... of this Code shall as far as practicable be construed accordingly; and the ... articles shall cease to be construed in accordance with the law of Lower Canada or the "Coutume de Paris" ... . Where a conflict exists between the law of England and the express provisions of [the] Code ... the ... Code ... shall prevail.<sup>17</sup>

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<sup>10</sup>Lewis, *supra*, note 3 at 13.

<sup>11</sup>Liverpool, *supra*, note 2 at 325.

<sup>12</sup>K.D. Anthony, "The Viability of the Civilist Tradition in St Lucia: A Tentative Appraisal" in Landry & Caparros, *supra*, note 1, 33.

<sup>13</sup>*Ibid.* at 37.

<sup>14</sup>V.F. Floissac, "The Interpretation of the Civil Code of Saint Lucia" in Landry & Caparros, *supra*, note 1, 339 at 340.

<sup>15</sup>Anthony, *supra*, note 12 at 41.

<sup>16</sup>*Ibid.* at 49.

<sup>17</sup>*Civil Code of St Lucia, 1957*, Laws of St Lucia, title 33, c. 242.

Here is an indeed exceptional legislative method: existing *Civil Code* provisions are maintained in force, while a body of imported law is superimposed upon them covering the same subjects, but from a different source and with a different content. In case of conflict, the *Code* prevails. Obviously, the question arises as to how much original civil law has been preserved in such areas as contracts, torts and quasi-contracts. The question is difficult to answer for a number of reasons, including the small corpus of decided cases. But when one looks at the overall effects of the legislative reforms of the 1950s, it appears that the only area of civil law which has escaped large-scale common law influence is the law of property.<sup>18</sup> From a sociological point of view, Anthony draws the conclusion that some civilian tradition in St Lucia has survived, but only "by default".<sup>19</sup> He mentions the lack of loyalty of newly-trained lawyers to the civilian tradition<sup>20</sup> and the alienation of the average St Lucian (St Lucia has a population of only 124,000) from the legal system<sup>21</sup> as factors which militate against the survival of the civil law. Yet the civil law has to some extent survived, if for no other reason than that successive generations of St Lucian lawyers have become acculturated to it, and because there has never been any serious, comprehensive law reform in St Lucia. All the reforms have been piecemeal.<sup>22</sup>

Anthony devotes considerable attention to the methodology employed to decide cases in purely civilian, purely common law and mixed or hybrid jurisdictions. In doing so, he uses comparative sources from an interesting variety of jurisdictions. In his summary of sources of law used by judges in mixed jurisdictions in order to arrive at decisions, he cites doctrine (learned writings) ahead of jurisprudence (decided cases).<sup>23</sup> One wonders whether, apart from the applicability or non-applicability of the doctrine of *stare decisis*, this approach is correct. It seems that, in practice, previous jurisprudence may be a more important source of inspiration to judges than doctrine. Anthony does concede that, in St Lucia at least, jurisprudence is a more important source than doctrine, especially given that jurisdiction's dearth of civilian doctrine.<sup>24</sup> Anthony's major conclusion is that St Lucia should either convert totally to the common law or "pursue hybridism as an end in itself".<sup>25</sup> If the latter path is chosen, he asserts that the process of assimilation with the common law must be controlled or reversed, the

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<sup>18</sup>Anthony, *supra*, note 12 at 54.

<sup>19</sup>*Ibid.* at 59.

<sup>20</sup>*Ibid.* at 58.

<sup>21</sup>*Ibid.* at 59.

<sup>22</sup>*Ibid.*

<sup>23</sup>*Ibid.* at 66.

<sup>24</sup>*Ibid.* at 60-1 and 71.

<sup>25</sup>*Ibid.* at 72.

1950s amendments to the *Civil Code* re-examined, and closer relations with other mixed jurisdictions created.

In the end, the choice of which road to follow will be a political one.<sup>26</sup> Not mentioned by Anthony, but relevant in a political context is the importance attached by St Lucia's politicians to historical roots and to links with neighbouring islands. The Federation of the West Indies did not prove viable, but close links with neighbouring former British colonies, now independent, remain important. Equally important, however, may be the links with nearby French jurisdictions. St Lucia's closest and largest neighbour, for instance, is civilian Martinique, a French *département d'outre-mer*. Anthony points out that, where hybridism has been pursued "as a permanent feature of the legal process",<sup>27</sup> one requirement is local doctrine. In this context, it is surprising that he downgrades the role of the Faculty of Law of the University of the West Indies.<sup>28</sup> It seems that if local doctrine is to be built up, this Faculty should play a central role, notwithstanding the fact that it serves mainly common law jurisdictions.

Anthony's paper is interesting and challenging. It is not always easy, though, to follow the author's train of thought. To some extent the paper lacks clarity and a systematic approach.

In "The History and Development of the Saint Lucia Civil Code",<sup>29</sup> Professor Liverpool (of the Faculty of Law at Cave Hill, Barbados) deals with the events leading up to the St Lucian codification in 1879. During the seventeenth and eighteenth centuries, St Lucia changed hands between the British and the French several times. For most of that period, however, it was French territory. It was only in 1814, by the Treaty of Paris, that it ultimately reverted to British rule, under the express condition that French civil law would remain in force.<sup>30</sup> Liverpool devotes considerable attention to the English doctrine of reception of the law of the parent state in settled or occupied territories, and in conquered and ceded territories, and the application of this doctrine to St Lucia.<sup>31</sup>

While the Treaty of Paris confirmed the maintenance of civil law in St Lucia, the civil law in question was French civil law as it stood in 1803, the last time the island was conquered by the British.<sup>32</sup> The law included the *Coutume de Paris*, Royal French Ordinances, Edicts and Declarations,

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<sup>26</sup>*Ibid.* at 42.

<sup>27</sup>*Ibid.*

<sup>28</sup>*Ibid.* at 58 and 61.

<sup>29</sup>Liverpool, *supra*, note 2.

<sup>30</sup>*Ibid.* at 308.

<sup>31</sup>*Ibid.* at 308-13.

<sup>32</sup>*Ibid.* at 308.

and laws relating to colonial matters, published in the *Code de la Martinique*, but not the *Code Napoléon*. Colonial courts also had recourse to Roman law and French authors, in particular Pothier.<sup>33</sup>

In great detail, Liverpool describes the period between 1814 and 1879, when the St Lucia *Civil Code* came into force. This period was characterized mainly by uncertainty about which laws were in force and the gradual anglicization of law and legal procedure. As mentioned earlier, English became the language of St Lucia's courts in 1842 and eventually the *Civil Code*, adopted through the efforts of Armstrong and Des Voeux, was promulgated in English only.

V.F. Floissac, President of the St Lucia Bar, writes on "The Interpretation of the Civil Code of Saint Lucia".<sup>34</sup> He stresses the statutory character of the *Code*,<sup>35</sup> and sets out its French, Quebec, English and indigenous sources.<sup>36</sup> Among the interpretation rules discussed by Floissac is the "judicial precedent rule",<sup>37</sup> frequently applied in St Lucia, especially prior to the *Civil Code* amendments of the 1950s. Articles in the *Code*, derived from the Quebec *Code* and expressing Quebec or French law, would be interpreted by reference to Quebec decisions; articles derived from English law, by reference to English decisions. The amendments of the 1950s have led to their own interpretation questions.<sup>38</sup> For instance, the importation of English law into the *Civil Code* has been interpreted so as to comprise both the common law and statutory law. Furthermore, there is authority for the proposition that the importation of English law into the *Civil Code* may have "ambulatory effect", in other words, comprise English law both prior to and subsequent to the 1950s amendments.<sup>39</sup> In his conclusion, Floissac hails hybridism. He states:

Our Civil Code acquired and retained the French law of real property. It would be lamentable if the complicated English law of real property were ever substituted for the simple system we inherited from France through Quebec ... . On the other hand, we have adopted the English commercial law. We cannot regret having done so.<sup>40</sup>

The last contribution to the *Essays* is that of Andrew Huxley.<sup>41</sup> Huxley is a Lecturer at the University of the West Indies, and his piece is entitled

<sup>33</sup>*Ibid.* at 315.

<sup>34</sup>Floissac, *supra*, note 14.

<sup>35</sup>*Ibid.* at 340.

<sup>36</sup>*Ibid.* at 340-7.

<sup>37</sup>*Ibid.* at 354-5.

<sup>38</sup>*Ibid.* at 355-9.

<sup>39</sup>*Ibid.* at 358.

<sup>40</sup>*Ibid.* at 359.

<sup>41</sup>A. Huxley, "How Hybrid Is Saint Lucian Law?" in Landry & Caparros, *supra*, note 1, 371.

“How Hybrid Is Saint Lucian Law?” He addresses a number of questions on the effects of the *Civil Code* amendments of the 1950s, including whether or not the reception of English law provisions is ambulatory.<sup>42</sup> He indicates two important reasons why many of these questions are as yet unanswered: inadequate law reporting and the paucity of decided cases in a small and “only averagely litigious” jurisdiction like St Lucia.<sup>43</sup> In concluding, he writes:

My posing of some unanswered questions about the 1957 changes is by no means to be taken as implied criticism ... . [It] reflect[s] only the regrets of one comparative lawyer that he could not have been born two hundred years later in time to see the mature fruits of St Lucia’s experiment in hybridization.<sup>44</sup>

*Essays on the Civil Codes of Québec and St Lucia* (accompanied by a Table of Cases, an Index of Treaties and Statutes and a General Index) makes interesting reading for the civilian, the comparatist and the legal historian. The civilian obtains an overview — in English, which is relatively rare — of legal developments in two originally civilian jurisdictions. The comparatist is acquainted with the special problem of “mixed” jurisdictions, be it sources of law, language or otherwise. In this context it must be noted, of course, that Québec is infinitely closer to being a “pure” civilian jurisdiction than is St Lucia. Finally, the legal historian is offered an example of how civil codes and codes of civil procedure have spread throughout the civilian world, in the case of St Lucia by a combination of voluntary adoption of foreign codes<sup>45</sup> and close colonial and personal contacts.

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<sup>42</sup>*Ibid.* at 373-6.

<sup>43</sup>*Ibid.* at 372.

<sup>44</sup>*Ibid.* at 376.

<sup>45</sup>It is interesting to note — although it is not mentioned in the book under review — that these are not the only foreign legal codes adopted in St Lucia. In 1920, St Lucia enacted a code of criminal law and procedure patterned after the *Criminal Codes* of Bermuda, St Vincent, the Transvaal and, indeed, Canada. See Note, “The Criminal Code of St Lucia” (1921) 3 J. Comp. Leg’n & Int’l L. 325-6.



William F. Foster, *Real Estate Agency Law*. Toronto: Carswell, 1984. Pp. xliii, 272 [\$42.50]. Reviewed by G.H.L. Fridman.\*

The author of this book, a Professor at McGill University's Faculty of Law, has performed a useful service for practitioners of law and real estate agents alike. He has filled the need for a comprehensive, specialized work dealing with the particular issues involved in the law relating to an important, everyday commercial activity. Real estate agents, or brokers as they are sometimes called, belong to the legal genus "agent". Hence the general common law of agency applies to them and regulates their relations both with those who employ them (whether such employers be vendors or purchasers of realty) and with strangers to that relationship. There are certain special problems, however, associated with this species of agent. In Canada, unlike in England (notwithstanding the passage at Westminster of the *Estate Agents Act 1979*<sup>1</sup>), there is legislation in all the common law provinces which determines what such agents can do, and how they are to exercise their calling, as well as the kinds of people who can become real estate agents. Such legislation complicates any account of real estate agency, and makes its discussion more than a mere recital of the general law. This is one area of the law of agency that compels any author to engage in a detailed consideration of statutory language and the way it has been interpreted and applied by the courts.

The task of presenting this amalgam of common law and statute is carried out admirably by Professor Foster. He has given a clear account which successfully analyses both the common law and the statutory requirements. Each of the seven chapters is well-constructed, written in straightforward language that is easy to understand and to digest. References in the footnotes are strictly to the authorities, namely decisions, statutory provisions and the occasional textbook or periodical article. This is not one of those books that relegates the discussion of vital matters to lengthy, complex and usually indigestible footnotes, covering more than one page each. Important issues are dealt with in the text, which is precisely where they should be considered. Moreover, the author has not hesitated to subject leading decisions to more detailed analysis and discussion where it is necessary to do so for the better comprehension of the points being explained, and to critical comment where this is called for by the nature of the decision. In some contexts, for example the effect of the expiration of the agency

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<sup>1</sup>(U.K.), 1979, c. 38.

agreement,<sup>2</sup> the statutory provisions dealing with the expiry date of an agreement,<sup>3</sup> or contracts by unregistered brokers and salesmen,<sup>4</sup> the author uses hypothetical examples to illustrate the various possibilities and to clarify the common law or statutory position. Where relevant, a comparative approach to the different provincial statutes is employed, exposing their differing treatments of the same issue or problem, such as the definition of "real estate"<sup>5</sup> and statutory prerequisites to an action for commission.<sup>6</sup>

An exposition of this kind is informative and helpful. It provides more than a mere simplistic account of the common law and the relevant statutes, offering anyone giving legal advice, preparing an argument for litigation or trying to understand what can or cannot be done by a real estate agent sufficient background to enable the task at hand to be completed. In other words, in addition to serving as a "handbook" for lawyers and real estate agents, it is a full-fledged analytical account that goes in depth into some of the more egregious, perhaps even unsolved, problems of the law.

The question of privity is one such problem.<sup>7</sup> The nature of exclusive contracts of agency is another.<sup>8</sup> To a degree these two matters are related, at least in so far as they affect the notion of consideration. They are dealt with at different points in the book, and apropos different issues, viz. the creation of the contract of agency and the right of the real estate broker to remuneration respectively, because they fit more tightly into those particular contexts. But they both involve, albeit in distinct ways, the troublesome question of consideration. In these two sections the learned author demonstrates his ability to explain and expound on decisions and theories, and to relate the general law of contract and its difficulties to the special problems of real estate agency. In both instances there are statements that can be made with the confidence and certainty that are derived from decisions by courts of some authority, and there are more tentative statements that can be supported, if at all, only by arguments drawn from analogous decisions or areas of law. Professor Foster is careful not to be dogmatic. He makes his suggestions and is prepared to substantiate them. It is legitimate, even desirable, for a writer to make suggestions in this way as to what the law should be, or can rationally be interpreted to mean; it would be going a stretch too far, however, for an author to present his view of a given area of the law as being the only correct one intellectually, if not indeed divinely

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<sup>2</sup>W.F. Foster, *Real Estate Agency Law* (Toronto: Carswell, 1984) at 108-15.

<sup>3</sup>*Ibid.* at 56-61.

<sup>4</sup>*Ibid.* at 69-75.

<sup>5</sup>*Ibid.* at 14-6.

<sup>6</sup>*Ibid.* at 102-5.

<sup>7</sup>*Ibid.* at 42-50.

<sup>8</sup>*Ibid.* at 166-74.

inspired. Happily, the author is not so foolhardy as to attempt to impose his view of the law on his readers in such a forceful manner.

The idea that unites the discussion of privity and exclusivity is the claim that the contract of agency between a principal and a real estate broker is a unilateral contract, defined by the author as "a promise by the former to pay the latter a reward on the occurrence of a specified event but which event the latter is under no obligation to try to bring about".<sup>9</sup> This is mooted as the solution to the problem of consideration in connection with the requirement of privity between broker and principal (as illustrated in *Leading Investments Ltd v. New Forest Investments Ltd*<sup>10</sup>). It is also put forward as the explanation of exclusive agency contracts.<sup>11</sup> The suggestion is not novel; it was discussed as early as 1975, in an article by Murdoch on which Professor Foster relies heavily.<sup>12</sup> There is certainly great attraction in this idea. It affords an explanation of some of the ambiguities inherent in the principal-agent relationship, all of which are fully discussed by the author. It is intellectually satisfying: the application of the increasingly useful concept of "unilateral contracts", in the context of agency, makes sense in terms of technical legal analysis. Emotionally, though, if one may speak in such terms, it leaves much to be desired. Does the average householder (or potential purchaser of a house) consider that his broker is not bound to do anything (albeit at the cost of earning no commission)? Or does he understand by the signing of the appropriate documents that he, the principal, has really engaged someone, in a contractual sense, to perform some act, viz. the sale or purchase of a house? If the latter is the case, as I venture to suggest it may well be, there is a great divergence between legal theory and practical reality, which I am sure many commentators would deplore, even if they are not members of the "realist" school of jurists.

What this illustrates is that it is difficult to approach the concept and problems of real estate agency from a "philosophical" point of view. The whole area is too rooted in the practical everyday necessities of life to lend itself to schematic theoretical considerations. Take, as another example, the question of causation. For a broker to earn his commission he must establish that he was the "effective cause" of the happening of the event upon which his commission is earned.<sup>13</sup> What is "effective cause"? This cannot be answered in the abstract. It only emerges after a detailed examination of the many decisions in which the issue has been raised and resolved *quoad hoc*. One may attempt to categorize the different potential situations, as the

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<sup>9</sup>*Ibid.* at 49.

<sup>10</sup>(1981), 34 O.R. (2d) 175, 126 D.L.R. (3d) 75 (C.A.).

<sup>11</sup>Foster, *supra*, note 2 at 170-4.

<sup>12</sup>J.R. Murdoch, "The Nature of Estate Agency" (1975) 91 L.Q. Rev. 357.

<sup>13</sup>Foster, *supra*, note 2 at 149-58.

learned author does. In the end, however, it all comes down to a listing, in some kind of order or systematic account, of the various possibilities. No doubt this is as it should be. Courts should not be bound by any formal rules as to causation, whether culled from science, philosophy or history. Judges are dealing with practical problems and questions of policy; this is especially so in the area of real estate agency where legislatures have intervened to protect vendors and purchasers who employ such agents. They must therefore be free to do "justice" having regard to the circumstances and relative situations of the parties.

An interesting area of the law, which is explored by the author in Chapter 6, relates to the duties owed by a real estate broker to third parties, that is, those other than his principal. The statutes contain important provisions.<sup>14</sup> Since no contract regulates the relations between broker and third party, it is to the law of tort that an injured party must look for a remedy. Fraud has long been a basis for liability. Only since 1963, however, when the House of Lords issued its ruling in *Hedley Byrne*,<sup>15</sup> has it been possible for a third party to seek compensation where he cannot prove fraud, but could establish negligence on the part of the broker. The proliferation of reported decisions since 1963<sup>16</sup> testifies to the growth in importance of this type of liability, and the extent to which real estate brokers may ignore the interests of those to whom they are not contractually bound. Curiously, the author does not consider the potential liability of the principal for fraud or negligence on the part of his agent, although he does mention the consequences of the principal's having to pay damages to such a third party in terms of the broker's liability to the principal. Yet in the law of agency, the potential vicarious liability of the principal is an important aspect of the whole relationship.

Enough has been said to indicate that this work is an important and welcome addition to the library of any real estate lawyer or real estate agent. It is informative and clear. The student of the law of agency would also do well to acquire a copy, since it will enlighten him on the problems of applying the general law of agency in the particular context of real estate transactions, for the rules of agency as they have developed over the centuries do not always fit such transactions conveniently and easily.

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<sup>14</sup>These provisions are outlined *ibid.* at 248-9.

<sup>15</sup>*Hedley Byrne & Co. v. Heller & Partners Ltd* (1963), [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

<sup>16</sup>These decisions are considered in Foster, *supra*, note 2 at 243-6.

Robert F. Reid & Richard E. Holland, *Advocacy: Views from the Bench*. Aurora, Ontario: Canada Law Book, 1984. Pp. xii, 164 [\$25.00]. Reviewed by Barry Landy.\*

It has often been observed that basic skills of advocacy are not well taught by law schools. There are several reasons why this is so, not the least of which would appear to be that the subject matter is one which requires first-hand training, experience and a certain cunning which only develops with time and "hands-on" practice.

Here then is a new book on the subject. *Advocacy: Views from the Bench* is written by two Justices of the Supreme Court of Ontario, Robert F. Reid and Richard E. Holland, and is concerned with the practice as well as the customs and traditions which prevail in that Court. Aimed primarily at the young attorney just beginning his career in the trial bar, this volume contains certain universal truths for trial lawyers presented in a humorous and entertaining manner.

*Advocacy* comprises two Parts. Part I, prepared by Mr Justice Reid, is entitled "Do's and Don'ts for Advocates". Part II, prepared by Mr Justice Holland, is entitled "The Advocate at Trial".

One difficulty with any book written by two people is that the reader is apt to conclude that he has read two different works. This the authors concede in their foreword, acknowledging that there is an "unsettling difference in both the style and the tone of the two parts".<sup>1</sup> Unfortunately, they are not able to smooth over this difference completely, giving the book a slightly disjointed tone.

Part I is generally witty and anecdotal. A case in point is the discussion of personal appearance, where one reads of anxious clients being represented by a sloppily-dressed lawyer who "looks as if, while shaving, he suddenly remembered he was in court that morning and already late".<sup>2</sup> Other attorneys, somewhat more concerned about their attire,

do not simply fling their gowns over their arm; they sling them over their shoulder in a zippered plastic bag embellished with the name of the clothing shop where they bought their last suit of clothes. Some favour air-line bags. The least fastidious, or the most hurried, it is hard to tell, actually carry their gown in a green plastic garbage bag. I say "actually" to mean I have witnessed

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<sup>1</sup>R.F. Reid & R.E. Holland, *Advocacy: Views from the Bench* (Aurora, Ont.: Canada Law Book, 1984) at x.

<sup>2</sup>*Ibid.* at 53.

that and know it to be true. I would not otherwise have believed it. Does a lawyer who is capable of carrying his gown to court in a green garbage bag have any idea what that says about him? Does he think that will inspire confidence in his professional ability in anyone but his mother?<sup>3</sup>

At another point, we are treated to an engaging discussion on how the advocate's personal mannerisms can seriously interfere with his effectiveness in court:

For a judge to make a comment upon even the most irritating mannerisms is probably rare. For the most part judges just sit patiently trying to ignore them, and to follow the evidence or the argument. Some are not easy to ignore. One counsel, exceptionally talented in other ways, had a curious habit of reacting to questions from the Bench by holding up his hand like an imitation pistol, with forefinger pointed and thumb cocked, aiming it at the judge and saying, "Chuff, Chuff," as if firing. Another able counsel is known to some as "the finger" from his habit of fixing judges with a glittering eye and pointing menacingly at them, as one might at a pet dog to emphasize one's demand to be obeyed.

I think few people could continue to concentrate objectively on the evidence or the argument while this kind of thing is going on, and, as I have said before, it is useful to keep in mind that judges are people.<sup>4</sup>

Law schools do not teach personal appearance or offer courses concerning courtroom demeanour, and while some might quibble that such topics are best left to a primer on elementary etiquette, Mr Justice Reid has provided some valuable insights for those who seek to practise before law courts and administrative boards.

Part II of *Advocacy*, written by Mr Justice Holland, is more serious than Part I in both tone and content. Mr Justice Holland discusses the role of the advocate in a civil trial in six brief chapters entitled "Paper", "Opening", "Examination-in-Chief", "Cross-Examination", "Re-Examination" and "Closing". With the exception of the chapter covering the opening address, which is not relevant from a Quebec civil law perspective, many valuable points are presented. For example, in the chapter entitled "Paper", he stresses the importance of knowing how to organize one's exhibits effectively, preparing a dated and indexed chronology of facts, and keeping a trial book containing both the written pleadings and a book or books of authorities.

The chapter on cross-examination is particularly well-written. Mr Justice Holland sets out certain rules which he feels are essential to any good cross-examination:

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<sup>3</sup>*Ibid.* at 53-4.

<sup>4</sup>*Ibid.* at 72-3.

## PRIMARY RULES

1. Prepare your cross-examination carefully.
2. Always lead. Ask "closed" questions; never ask an "open" question.
3. Make your point and switch to another or stop.

## SECONDARY RULES

1. Try to start well and end well.
2. Use simple language with short questions.
3. Do not ask a question unless you have a very good idea of the answer.
4. Do not get into arguments with the witness: keep your temper.
5. Be aware of the value of the "surprise" question.
6. Do not "pass a witness".<sup>5</sup>

Each rule is then succinctly discussed and explained in a simple but illustrative manner.

Other writers have made essentially the same points on cross-examination as Mr Justice Holland. The celebrated American trial lawyer F. Lee Bailey, for instance, in his "how-to-do-it" manual entitled *To Be a Trial Lawyer*,<sup>6</sup> has offered similar lessons. Preparation is essential; cross-examination should be avoided unless it is absolutely necessary; the lawyer should always lead and never argue with the witness; he should make his point and switch to another topic: these are the key points that *Advocacy* attempts to drive home. While Mr Justice Holland has not purported to write the definitive treatise on the subject of cross-examination, he has provided a helpful introduction to the subject.

In conclusion, this book is entertaining, informative and imparts many useful lessons in a painless way regarding the role of the trial lawyer. It is recommended to all who hope to embark upon this most difficult — or should I say most trying — profession.

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<sup>5</sup>*Ibid.* at 136.

<sup>6</sup>F.L. Bailey, *To Be a Trial Lawyer* (New York: John Wiley & Sons, 1985).