son some years previously[4] and that Dr. Lumb's views on the significance of the proceedings are available elsewhere.[5]

This brings me to the last of the eight essays, that by Professor Stoljar. Aside from reiterating its incongruity (made even more apparent by the book's title), I propose to say nothing about it.

Having now amplified the book's table of contents slightly, what have I left to say? I suppose I can report the result of my check list of typographical errors: I counted nine.[6] I can report that four books and five articles of Professor Sawer's are referred to by the essayists paying him tribute.[7] I can rail against the book's cost and ask why it is not available in paperback. In the end, however, I must admit that I find attempting to review this book as a whole as impossible as attempting to review an unusually lengthy issue of a law review. All that I can say is this — I have read other writings on Australian constitutional law by six of the seven people who contributed essays on that topic to this book, the exception being Mr. Rose. In none of the six cases can I claim that their contribution to this book has been their writing which I have found most stimulating. Nevertheless, anyone with a genuine interest in Australian constitutional law will feel, as I did, a duty to read this book and, having read it, will, I expect, feel, as I did, that he has gained information on the subject which might be useful to him at some time in the future.

LESLIE KATZ*

Logique Juridique, Nouvelle Rhetorique. Chaïm Perelman. Paris, Dalloz, 1976, 193 pp.

It has always been clear that the basic principles of legal reasoning in the French legal system are at drastic variance with those favoured in the Common Law, certainly so far as these are reflected in the judgments of the superior appellate courts of each system. If there were no treatises on *"Logique Juridique"* in French it was because the French lawyer did not believe there to be any difference between the standards of sound reasoning, i.e. logic, in law or in any other discipline, whereas

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[5] Commentary, *Labor and the Constitution,* 1972-1975, (1977) p. 98.

[6] On pp. 8, 20, 24, 105 (two), 119, 123 and 216.

[7] The books are: *Australian Federal Politics and Law* 1901-1949 (1956 and 1963); *Australian Federalism in the Courts* (1967); *The Australian Constitution* (1975); *Australian Constitutional Cases* (3rd ed. 1964). The Articles are: "Councils, Ministers and Cabinets in Australia" [1956] *Public Law* 110; "Australian Constitutional Law in Relation to International Relations and International Law" in O'Connell (ed.), *International Law In Australia,* (1965), p. 35; "Political Questions" (1963-64) 15 *University of Toronto Law Journal* 49; "Commonwealth Taxation Laws — Uniformity and Preference" (1958) 32 *A.L.J.* 132; "Getting Around The Constitution" (1970) 29 *Public Administration* 25.

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Common Law theorists have long accepted that legal reasoning has its own particular techniques and is very often not logical (in the strict sense) at all.

It is one of the merits of Perelman's work, by exposing the philosophical assumptions of classical French theory and analysing the persuasive functions of judicial writing, to have enabled greater understanding of, and possibly to have paved the way for a closer drawing together of the theories behind these two very different systems.

The author begins by describing three basic periods of development in the theory of legal reasoning in France: the school of textual exegesis from 1790 to 1880, the functional and sociological school from 1880 to 1945, and the third and current school which is best understood, according to Perelman, as representing the "topical" mode of reasoning.

In a careful analysis the author explains why the theories of the exegetical school such as the conception of *"droit"* as *"loi"* (s. 16) and of the judge as a finder of facts (s. 18), the fiction of the "intention" of the legislator (s. 25) and the theories of "antinomies" (s. 27) and *"lacunes"* (s. 29) in the law allowed the judge far wider powers than his theoretical limitation to application and strict interpretation of the law. By the end of the nineteenth century there was sufficient judicial material for Gény to expose the basic inadequacies of exegetical theory and his influence was then dominant in the teleological, functional and sociological theories which followed.

In seeking to fulfil the functions of law the judges of this second period could no longer hope to see themselves as simply attributing a fact situation to a certain fixed legal category, thus merely supplying the minor premise and inevitable conclusion to a principle already given in the Code. They found themselves using arguments, not of formal logic, but arguments such as *a contrario, a fortiori,* analogy, *reductio ad absurdum* and so on (s. 33) and making use of fictions and irrebuttable presumptions. This period was characterized by the judges' willingness to modify the law (s. 36).

Since 1945 Perelman sees the revolt against the positivist theory of law and the emphasis on justice and natural law (a reaction after the excesses of the Nazi era and the turn to natural law justification in the Nuremburg judgment) as leading Continental courts to emphasize the justice of their decisions (s. 38) and where necessary to appeal to general principles of law common to all peoples as a justification, rather than to seek some deduction from the "black letter law", which often did not in any event make provision for the case in hand (s. 40). In particular he emphasizes the work of the German scholar Josef Esser and his school (ss. 43, 44) in his analysis of judicial reasoning as the search for an equitable solution which can be justified, i.e. shown to be reasonable in terms of the existing legal system. In other words, the reasoning process follows, rather than precedes, the choice of solution, and it is the decision which determines the course of the reasoning of the

judgment, rather than the other way round. The need to obtain the assent of the community to the solution, i.e. to justify it, is what prevents purely subjective and whimsical decisions and ensures still some predictability and stability in the law.

In the second half of the book Perelman goes on to examine the intellectual procedures used by the judge to render his decision acceptable (s. 50). He summarizes the argument of his book *Traité de l'Argumentation, La Nouvelle Rhétorique,* 1958. In that book he had developed a theory of non-stringent reasoning which did not meet the criteria of validity required by formal logic but was nonetheless reasonable, plausible or acceptable. A feature of this form of reasoning were the *"topoí"*, certain theses whose acceptance by the audience can be assumed and from which the arguer can proceed to develop his line of reasoning. Perelman saw this "new rhetoric" (so-called after the *Rhetorics* of Aristotle who was the first to list such *topoí*) as the art of increasing the acceptance by an audience of principles presented to it and as a particularly suitable technique for obtaining assent in arguments about values, and therefore typical of legal argument.

Perelman's foremost insistence is on the importance of the *audience* in any kind of rhetorical reasoning (s. 52). It is this part of Perelman's thesis which seems to this reviewer one of the most interesting aspects for legal theorists, raising as it does the question, Who is the audience of a judgment? and, ultimately, helping us to account for the wide differences of judgment style between the courts of the major legal systems.[1]

Each discipline which, because of its subject matter, needs to employ "rhetorical" reasoning favours certain techniques to the exclusion of others. Thus beyond the theory of rhetorical reasoning in general stand certain specialized forms of it, such as legal reasoning (s. 56). Among the *topoí* of particular importance in legal reasoning are "the general principles of law" and the traditional maxims.

In its increasing reliance on justification of decisions as "reasonable" rather than by appeal to black letter law, Perelman sees Continental law in the third period as coming closer to the traditions of the Common Law.

Part of Perelman's book is an illustration of truths long accepted by Common Law theorists, e.g. that the written law frequently does not reflect the legal reality which is affected not only by judicial policy, but even more by administrative action (e.g. refusal to prosecute) (s. 72). Perelman also, most importantly and unlike some other important writers on judicial reasoning in French,[2] makes the very significant distinction between the psychological process resulting in the judge's decision and the judgment justifying that decision (s. 82). There is also a plea for more flexible law and for an end to legal formalism which may have

[1] See further the remarks of this reviewer in the forthcoming book *The Latent Power of Culture and the International Judge.*

[2] E.g. Sauvel, *"Histoire du Jugement Motivé"* [1955] *Revue de Droit Public* 5.

effects which are quite unacceptable to society. In the adaptation of law to reality, in the development of reasonable solutions to current social problems, Perelman sees rhetorical reasoning as having a major role to play.

There have been in the last decade some radical developments in French theory about legal reasoning, e.g. in writings on the creative role of civil law judges,[3] questioning of the classical stringency and brevity of the judgments of the *Cour de Cassation* in favour of the more explicit judgments of the Common Law.[4] There can be little doubt that Perelman's work, not only in the *Traité de l'Argumentation* but also in a series of articles in which he has developed his thoughts in relation to legal theory and culminating in the present book, has done much to prepare the climate in which these newer writings have emerged. On the other hand the English-speaking reader is struck by the theoretical nature of Perelman's work: no jurist has yet catalogued the *topoi* most favoured in French law (nor for that matter, in Common Law, though this surely can be done) by working through the case-law with the repertoire of techniques which Perelman and his collaborator Mme. Olbrechts-Tyteca diligently provided in the *Traité*. But this has been done for German law by Struck,[5] and the contrast between the practical implications of such a book and the more abstract tone of Perelman's newest work (despite some references to case-law) is striking.

What significance does Perelman's book have for theorists of Common Law? One important element to which Perelman draws attention is the significant influence of fashions in philosophical theorizing on the development of legal theory. This certainly remains to be explored in English law. Thus theorists of French judicial reasoning can start at the Revolution where the reaction against the judicial processes of the *ancien régime* led to an explicit attempt to revolutionize judicial method. It is clear that an adequate account of the development in the Common Law would need to go back very much further than the eighteenth century and its emergence would be far less explicit.

Secondly Perelman's book once again illuminates the very different incidents of "interpretation" in a Code and a case-law system and suggests the inevitability of no longer applying the doctrine of precedent (fundamentally a case-law doctrine) to cases on the interpretation of statutes in the same way as on Common Law questions.

It is a pity that Perelman's new book, which is undoubtedly a most important contribution to contemporary legal theory, is marred by some points of detail such as inaccuracies in the Index (e.g. the reference to s. 92 is inaccurate for Husson). The Bibliography has several errors of

[3] E.g. Belaid, *Essai sur le pouvoir créateur et normatif des juges* (1974).

[4] Touffait and Tunc, *"Pour une motivation plus explicite des décisions de justice, notamment de celles de la Cour de Cassation"* (1974) *Revue trimestrielle de Droit Civil* 487.

[5] Struck, *Topische Jurisprudenz* (1971).

detail (e.g. in the citation of Stone, *Legal System and Lawyers' Reasonings*) and the system of citation is not uniformly applied.

LYNDEL V. PROTT*

Conflict of Laws in Australia (3rd ed.), by P.E. Nygh, Sydney, Butterworths Pty. Limited, 1976, xlviii + 530 pp. (including index) $20.00 (limp cover), $25.00 (hard cover).

The conflict of laws is a subject students find difficult to grasp, practitioners are quick to ignore and judges too often are halting and confused in expounding. But it is a subject of the greatest importance to any person who claims to think about the law, to educate others in thinking about the law, or to practise it at any level of sophistication. Particularly is this so in a federal system.

The first edition of Professor Nygh's work thus responded to a great need in Australia upon its appearance in 1968. There is now a third edition in less than ten years, evidence enough that the need continues.

Clearly there is much of value in the third edition; the chapters on negotiable instruments (Chapter 16), international monetary obligations (Chapter 17) and exclusion of foreign laws and institutions (Chapter 14) are necessary reading to any lawyer desiring acquaintance with these important topics or an answer to a problem facing him.

However, there are matters of design and size which impose such constraints upon the third edition as seriously to impair its worth as a whole. The first is that of space. It appears from the Preface that the author was obliged to keep the book within "manageable proportions". The result is that the first edition had some 175 more pages of text than the third, and this over a period when the flow of decisions and legislation has greatly increased. This "gain" has been achieved by severe pruning of, for example, the treatment of so important a subject as full faith and credit. It is all too true to observe (at page 8) that the High Court has yet to answer the fundamental question of whether full faith and credit is a doctrine of substantive or evidentiary effect; but it is a question that one day must be answered and in the meantime it is the task of a scholar in the field, such as the author, to seek to point in the right direction those who will argue and settle the issue, by a reasoned statement of his own views on the matter.

Further, the quest for space saving has led in this edition to the virtual elimination of footnotes. This is a retrograde step. Perhaps in no other field is there such an abundance of scholarly (and not so schol-

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