

BOOK REVIEW

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Payne's Consolidated Digest of Cases and Materials
on
The Divorce Act of Canada

Richard De Boo Ltd., 1980, \$C200 (approx.)

There has, indeed, been a massive information explosion in the area of family law especially in Canada. In addition to the present compendious loose-leaf work compiled by Professor Payne and his colleagues, two new journals, the *Canadian Journal of Family Law*, published under the auspices of Osgoode Hall School of Law at York University, and the *Family Law Review*, published under the same imprint as the well known *Chitty's Law Journal*, have been established. As someone working in the field of comparative family law, the amount of available literature presents a continuously daunting prospect to me: scarcely a day goes by but new reports and periodicals appear on my desk adding to my own confusion and contributing to the alleged worldwide paper shortage. There has also been a development in almost all jurisdictions towards the publication of thematic series of law reports; thus, in Australia, C.C.H. produce *Australian Family Law Cases*, Butterworths produce *Family Law Reports*, in Canada, Carswell produce *Reports of Family Law* and, in the United States, the Bureau of National Affairs produce the *Family Law Reporter*. All this activity necessitates, from the point of view of the busy practitioner or academic, someone willing to distil and evaluate this veritable mountain of material.

From every point of view, this two volume work by Professor Payne, already a noted scholar in the field, is to be commended. Quite apart from its content (about which more later), the whole work is quite admirably produced. The typeface is clear and good quality paper has been used. At least one Australian publisher, whose books are distinguished by a disarming ability to self-destruct, by transparent paper and by a typeface which might test one of Marvel Comics' superheroes, would do well to take notice of this De Boo publication !

From a Canadian practitioner's point of view *Payne's Digest* must be an indispensable tool. The *Canadian Divorce Act* 1968 is a rather strange piece of legislation, but one which is explicable in historical terms: prior to 1968, divorce law fell within the *aegis* of the provincial legislatures with bizarre results. In Newfoundland and Quebec, which latter contains approximately one quarter of the population of Canada,

the courts were not permitted to grant divorce at all, whilst in the other provinces the predominant and, frequently, sole ground was that of adultery. Perhaps as a result of serious ideological differences which exist in almost all communities, the resultant Act was certain to lack an effective theoretical base. Canada is, of course, not alone in that regard — England (and, now, regrettably, Scotland) has also, with a somewhat different approach from that of Canada, sought to achieve a compromise between the notions of the matrimonial offence and irretrievable breakdown of marriage as grounds for divorce. The odds are singularly stacked against any such system producing simple and elegant solutions even to the matter of principal relief and the matters discussed in Professor Payne's substantial work testify to that very fact. Grounds for divorce such as cruelty and desertion inevitably accumulate an encrustation of highly technical case law, which, from the point of view of the teacher of law, takes up a vastly disproportionate amount of class time which could be better spent on more detailed analysis of issues, say, in parent and child law. Australia is fortunate in that regard at least.

Having mentioned the different philosophical approaches between the bases of divorce law in Canada and Australia, of what utility is Professor Payne's book likely to be to those of us here? It has long been my opinion that Australian lawyers have failed to take account of developments and writings from Canada. Canada has a population rather larger than our own, but it is also a federal system and is concentrated in centres of population in a not dissimilar way to our own. It is true that there is no Australian Quebec, but, at the same time, there is probably no Canadian Queensland. Further, Canada must, to a degree, be influenced by the United States where legal, like social and technological, developments are ahead of those elsewhere. A feature of Professor Payne's two volume treatise is that he has not been concerned solely with Canadian case law and comment. This approach vividly contrasts with an outbreak of somewhat virulent Australian legal nationalism, perhaps finding its origin in the High Court's decision in *Viro v. The Queen* (1978) 18 A.L.R. 257 which may have caused a development in one area of family law — that of the legal response to unformalised relationships — which seeks to reject an English solution simply because it is English. In the introductory bibliography one can find reference, not only to Canadian literature, but to books, reports and articles from Australia, New Zealand, the United Kingdom and the United States.

Comparison is probably the first, and major, step towards effective criticism. The law does not exist in some kind of sterile vacuum, immune from social and international influence, nor is it, particularly in the family area, a perfect instrument (indeed, it probably can never be so). A major characteristic of the book under review, even though it is intended primarily for practitioners in the field of family law, is that it does not shirk the task of comment, Professor Payne and his associates have rightly adopted the approach that rigorous analysis of the law can be of more help to the reader, in whatever legal sphere he operates,

than bald statement of principle. In this regard, this book is significantly ahead of the loose-leaf services produced for use in Australia.

Lawyers in Australia can learn a great deal from this book, not merely from its content — though that itself is important — but also from its form. A discursive and critical approach to family law and its agencies should never be the prerogative of the academic, even though that may be his primary function, but the lawyer who handles, in his daily work, these crucial issues must also contribute. Any Canadian practitioner who uses this book will have to face this fact every time he opens it for use in a case. From another jurisdiction, thousands of miles from Ottawa, where Professor Payne is based, one may find a thorough appraisal of Canadian divorce law placed in a critical context which can help to elucidate present Australian law and suggest future paths. Julien Payne has done a singular service and I hope that note will be taken of this book in all its regards in Australia. Regrettably, I may be shouting into the wind.

Frank Bates