BOOK REVIEWS

FREEDOM IN AUSTRALIA, *by Enid Campbell and Harry Whitmore.* Sydney University Press, 1965, pp. 1-298.

The description of this work appearing on the cover of the book refers to it as a "Survey for the laymen" of "the law as it relates to civil liberties and individual liberty". In so far as this indicates that this treatise is capable of being understood and appreciated by those who are not trained lawyers the claim is doubtless well justified, but it would be unfortunate if students of the law rejected the volume as being more suitable to the layman. It is, in fact, a useful work for the practising lawyer and the law student.

The authors have not hesitated to criticise the law enforced in Australia, whether made by Parliaments or declared by Judges, wherever in their view the law has encroached upon the freedom of the individual more than is necessary to preserve the freedom of the community. Certain intrusions upon the liberty of the individual are roundly condemned by the authors. For instance, in dealing with the vagrancy laws they say: "The present writers are firmly of the view that the vagrancy concept is outmoded, that it should be scrapped entirely, and replaced by some more intelligent scheme for redeeming the heterogeneous vagrant population, and minimising its nuisance effect". Nevertheless they are careful not to condemn a law merely because it curtails liberty. To do so would be to follow in the footsteps of Proudhon, who protested: "Whoever lays his hand on me to govern me is a usurper and a tyrant; I declare him to be my enemy . . . Government of man by man is slavery".

The work is divided into four parts and has an addendum containing references to recent decisions and certain recent legislation and intended legislation including the Bill introduced in the South Australian House of Assembly in October 1965 (but not yet contained in the Statute law) designed to give statutory force to the new English Judges' Rules, and to restrict publication of newspaper reports of preliminary hearings. The references to statute law and case law are not only up to date, but, as would have been expected by anyone who has read the excellently documented papers published from time to time by Dr. Campbell, they appear comprehensive and always in point.

The four parts of the book deal respectively with Personal Freedom, Freedom of Expression, Economic Freedom and The Individual and the Government.

In the first part the chapter on Police Powers contains a useful exposition of the relevant law, and discusses in the well-balanced and judicious manner which characterises the rest of the work, such thorny questions as interrogation of an accused, and the right of the police to seize property.

In the chapter on Freedom of Movement, attention is drawn to the important question thus postulated by the authors: "At what point, if ever, does an immigrant pass into the general Australian community so that he cannot be excluded or deported by exercise of the immigration power?" The authors' suggestion is: "It is to be hoped that the High Court will take the first opportunity to declare unequivocally that persons who demonstrate their allegiance to Australia by registration or naturalisation are forever beyond the power of

deportation possessed by the Commonwealth Government. The aphorism 'Once an immigrant, always an immigrant' is offensive to a large proportion of the population of Australia in the mid-twentieth century."

As might be expected, the section on Freedom of Expression is the most extensive. Here the authors range through the law of censorship and defamation and of obscenity insofar as it relates to the various media of public statements, radio and television, theatre, cinema and the press, and books. Contempt of Court and contempt of Parliament are dealt with in one chapter, and in the chapter relating to Security of State and Freedom of Speech, the authors consider, *inter alia*, the law of sedition, laws relating to official secrets, cabinet secrets, government documents, and the security services. In referring to an occasion when the Prime Minister of the day quoted from a series of defence documents to combat what he termed a "grave public misconception", the authors' comment is: "Political advantage will surely be subordinated to public interest when there is real danger in disclosure. Nevertheless, it is interesting to note the marked contrast in attitudes towards disclosure by public servants and disclosure by members of the Government. Political reputations are obviously best preserved by complete secrecy on the part of public servants, and expedient disclosure by Members of Cabinet".

That somewhat caustic comment recalls the criticism some months ago when there was a reference by Ministers to the contents of security documents concerning the mother of a school boy who left the school because required to wear the uniform of the cadet corps.

Parts 3 and 4 of the volume seem to this reviewer of rather lighter weight than Parts 1 and 2. However it would have been difficult to have dealt with, for instance, the powers of the unions under the heading of Freedom to Work in other than a cursory manner, without extending the work beyond one volume. Similarly, the chapter which discusses the rights and duties of the Aboriginal necessarily skims only the surface of that vexed problem.

The style of the book is clear and concise and it contains a number of thought-provoking suggestions for reform.

ROMA MITCHELL*

INTERNATIONAL LAW IN AUSTRALIA, *edited by D. P. O'Connell, assisted by J. Varsanyi.* Published for the Australian Institute of International Affairs by The Law Book Company Ltd., 1965, pp. i-xliii, 1-603.

We live in an age in which international law is fortunately becoming more of a science and less of an art. Past is the time of the great deductive systems in which reference to state practice, one of the constitutent elements of customary international law, was accidental rather than intentional, sporadic rather than systematic. Yet also gone is the time of those treatises whose authors mistook the practice of their own country for general international law. This is an auspicious development, though it has yet a long way to go. To succeed, it needs access to the vast amount of pertinent material and depends thus on the publication of the international legal practice of the greatest possible number of states.

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International Law in Australia is a valuable contribution to that cause. In twenty-one essays it gives a detailed account of the Australian practice of international law, which is the more interesting because it is influenced by the difficulties resulting from the division of competence in a Federation. Professor G. Sawer's contribution "Australian Constitutional Law in Relation to International Relations and International Law" is specially dedicated to that problem, but the latter is also vividly demonstrated by the conflict situations concerning jurisdiction over Australia's territorial waters which Professor D. P. O'Connell depicts in his usual masterly way in a contribution entitled "Australian Coastal Jurisdiction".

Readers outside Australia will particularly appreciate Professor O'Connell's other contribution on "The Evolution of Australia's International Personality", a sort of introduction to the whole volume which, because of its clear construction and model language, will reveal the secrets of the Empire's and Commonwealth's legal evolution even to those unfamiliar with English law.

Two other contributions deserve special attention for treating matters that recently were or still are the subject of codification by the United Nations. Thus Mr. A. H. Body on "Australian Treaty Making Practice and Procedure" should be consulted with a view to the forthcoming United Nations Conference on the Law of Treaties, whereas Dr. J. Leyser's essay on "Diplomatic and Consular Immunities and Privileges in Australia" allows useful comparisons to be drawn since it states the law existing before any changes were made to adjust it to the terms of the Vienna Conventions.

A number of essays deal with Australia's activity in international organizations, such as the International Labour Organization (Mr. J. G. Starke), GATT (Dr. C. H. Alexandrowicz), several international financial institutions (Mr. P. H. Bailey), ANZUS and SEATO (Professor N. C. H. Dunbar), the South Pacific Commission (Dr. J. Varsanyi), etc. Mr. R. L. Harry's paper entitled "Australia's Commitments under the United Nations Charter" contains a pentrating if somewhat orthodox discussion of the legal force of General Assembly Resolutions. The reviewer prefers the inquiry into the same subject by Dr. A. C. Castles ("The United Nations and Australia's Overseas Territories") who has a more subtle approach to this complex question.

Dr. Castles has also contributed two other essays on Australia's overseas territories, of which that on "The International Status of the Australian Antarctic Territory" is particularly informative for its discussion of the status of national claims in relation to the Antarctic Treaty of 1959. Australia's special needs, arising from its geographical position, are also manifest in Sir Kenneth Bailey's essay on "Australia and the Geneva Conventions on the Law of the Sea" and in Mr. T. A. Pyman's contribution entitled "Australia and International Air Law".

The papers by Dr. K. W. Ryan on "Immigration, Aliens and Naturalization in Australian Law" and by Mr. I. A. Shearer on "Extradition and Asylum in Australia" make profitable reading because they draw on Australia's experience as one of the leading immigration countries of the world. Other valuable information on matters which are the subject of much controversy is found in Dr. R. D. Lumb's report on "Alien Property in Australia" and in that of Mr. P. H. Bailey on "Borrowings by the Australian Government Overseas".

Taken all together, editors and authors are to be congratulated on having achieved a fairly homogeneous work which combines the quality of a treatise

with the usefulness of a digest. Since each of the contributions contains an exhaustive analysis of the pertinent judicial decisions and of administrative practice, the book covers the quasi-totality of the Australian practice of international law. It will not only permit Australians, jurists and others, an insight into the legal implications of their country's foreign relations, otherwise unobtainable in such a comprehensive form, but will benefit students of international law all over the world. One may hope, moreover, that it will serve as a model for other states which for various reasons cannot afford to publish an encyclopaedic digest of their international legal practice.

K. ZEMANEK*

THE LAW OF RESTITUTION, *by Robert Goff and Gareth Jones.* Sweet and Maxwell Ltd., England, 1966, pp. i-lxxix, 1-540.

This book is much more than a mere exposition of the principles of quasi-contract: it also deals with restitutionary claims based on equitable principles, on rules of mercantile law and even on the law of property. The authors maintain that their attempt to weld restitutionary principles from many areas of the law into a coherent whole improves their rational clarity and facilitates the search for sound and valid principles. They are critical of the traditional exposition of quasi-contract in terms of remedies: in their view it tends to perpetuate archaic pleading requirements and to inhibit desirable re-adjustments of old principles (*cf.* page 26, n. 43). One might object that the traditional structure of quasi-contract is familiar to most lawyers and that it should not have been disturbed. However, as J. H. C. Morris has said: "We do not agree with the suggestion that only students deserve rationally arranged textbooks and that practitioners will put up with anything provided that it is traditional". Moreover, despite its novel approach and arrangement, this treatise rarely strikes the reader as unfamiliar, since it is skilfully set against a background of well-known cases. The arrangement adopted by the authors is perhaps best demonstrated by asking: what has become of the traditional quasi-contractual heads of recovery in their hands?

The action for money paid for the defendant's use seems to have lost its identity completely. The cases involving this action are examined by the authors in Part II ("The right to restitution") subdivision C ("Necessity. Restitution in respect of benefits conferred in an emergency without request"). This subdivision contains a chapter concerned with common law equivalents of the Roman *negotiorum gestio* (pages 231-247): the doctrine of agency of necessity and "necessitous intervention by a stranger". Since the common law gives necessitous interveners no legal rights to compensation, this latter section amounts to little more than an entirely justified plea for more generous treatment of such interveners, followed by the optimistic assertion that it is still possible for the courts to expand the "nascent English development into a coherent and rational doctrine" (page 247). Sub-division C also contains a separate and extensive chapter concerned with maritime salvage (pages 248-264).

The action for money paid under a mistake we find analysed separately (pages 61-90), but linked, under the broad heading of "mistake", with problems arising from mistaken transfer of chattels or land and the mistaken

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performance of services (pages 91-100). The inclusion of a detailed account of rescission and rectification in the following chapter (pages 101-142) is of doubtful merit. Rescission admittedly raises problems of restitution, but its main effect (especially in view of the reluctance of the courts to allow rescission of executed contracts) is that of relieving parties of executory obligations; in view of this main function it is an instance of discharge of contract which is traditionally treated by contract textbooks. Goff and Jones have given no valid reasons for its transfer to the law of restitution.

The action for money paid in pursuance of an ineffective contract is dealt with as part of a section of about 100 pages, entitled "ineffective transactions" (pages 265-368). The section contains a searching examination of the restitutionary problems arising from contracts which are ineffective due to lack of agent's authority, mistake, uncertainty, informality, illegality, incapacity, frustration or breach. In keeping with the book's tendency to aim at the most general validity possible for the principles it expounds, there is also an investigation into ineffective transactions other than contracts, such as trusts and conditional gifts.

In the second subdivision of Part II the authors examine the action for money had and received, together with numerous other situations which all have in common the fact that a claim arises from a situation in which the defendant has acquired from a third party a benefit for which he must account to the plaintiff: attornment, subrogation, claims under trusts, fraudulent disposition of property, voidable preferences, and perfection of imperfect gifts are all represented. The "general principles" relating to subrogation, which precede the authors' treatment of various specific instances of subrogation (see page 376), amply demonstrate how difficult it is to formulate any general propositions which apply to all or even some of these divers matters. Subrogation may well be granted in the future in new types of cases, but the general rules advanced by the authors do not seem sufficiently certain to give any guidance to likely future developments. One wonders whether it might not have been preferable to have left the treatment of specific instances of subrogation to the specific subject-matters from which they are taken, such as guaranties, bills of exchange or insurance.

The quasi-contractual claims against tortfeasors, and the mysterious doctrine of waiver of tort have been combined with similar claims under the more general heading: "Where the defendant has acquired a benefit by his own unlawful act". Not only tortious conduct, but also crimes, breaches of fiduciary relationships and breaches of contract, and the restitutionary problems thereby created, are examined.

Parts III and IV deal with defences (such as *res judicata*, illegality and estoppel) and with "restitution in the conflict of laws" respectively.

The authors acknowledge in their preface (page v) that they have cast their net very wide. In some respects they might have cast it too wide. Rescission of contract and the various specific instances of subrogation were mentioned earlier as topics which should perhaps not have been included. Similarly, the accounts of duress and undue influence as prerequisites to the rescission of contracts (pages 143-156, 163-167), and the discussion of the conditions which disentitle a beneficiary from taking under a will or intestacy because of his own criminal acts (pages 439 *et seq.*) seem out of place. But, these matters apart, the authors' policy of including all rules and principles with a restitutionary function, has been a wise one. It has enabled them to pursue their search for basic principle unhampered by artificial subdivisions. If the book's

numerous suggestions for improvements in the rules of restitution cause practitioners to be a little more adventurous in advising their clients to litigate restitutionary claims, then we may well find the authors' prediction fulfilled that "the law of restitution is not yet past the age of childbearing". It is a dangerous fallacy to assume that any unjust principle generates, under the pressures of continuing litigation, the means for its evasion. For example, this reviewer has little faith in the authors' claim that the absence of case law is an indication that necessitous interveners rarely ever press their claims (page 236). The absence of case law might equally well result from the fact that lawyers advise against litigation because they see no escape from the supposed rule that the common law gives no relief to necessitous interveners.

Few subjects invite historical treatment as much as the law of quasi-contract; while the authors, perhaps understandably, show contempt for the "implied contract" controversy (pages 5-11), and dispose of one other aspect of the historical development simply by calling it "an intractable mass of conflicting authority" (page 369), their historical treatment is, on the whole, thorough. Ample reliance is placed on Jackson's leading treatise.

Goff and Jones have looked beyond the narrow confines of English case law. They quote extensively, not only from transatlantic, but also from Australasian sources. This thorough and scholarly work demonstrates most persuasively that restitution is a self-sufficient field of law which the courts in Commonwealth countries should acknowledge and which the law faculties should teach as such. The authors' endeavours may well lead to a renaissance of their subject.

HORST K. LUCKE*

CASES AND MATERIALS ON CONTRACT, *by R. E. McGarvie, C. L. Pannam and P. J. Hocker.* The Law Book Company Ltd., 1966, pp. i-xxxii, 1-1103.

Law School libraries are not well enough equipped to enable all students to read their cases in the law reports. For this reason the casebook, though still frowned upon by some conservatives, has become indispensable. McGarvie, Pannam and Hocker differs very significantly from its predecessor (McGarvie and Donovan: *Cases and Materials on Contract* (1962)) and should be regarded, not as a second edition, but as a completely new book. McGarvie and Donovan pursued a conservative selection policy, relying primarily on English cases, but with a very liberal admixture of Australian decisions. The new book constitutes an attempt to break away entirely from the traditional predominance of English authorities. Many leading English cases have given way to Australian decisions in which the same or similar principles were expounded. Famous cases like *Balfour* v. *Balfour*[1] and *Rose and Frank* v. *Crompton*[2] have been relegated to "notes" which follow selections of Australian decisions of which many Australian practitioners may previously only have heard by accident: *Todd* v. *Nicol*[3], *Reid* v. *Zoannetti*[4] and *Heale* v. *Phillips*[5].

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1. [1919] 2 K.B. 571, C.A.
2. [1925] A.C. 445, H.L.
3. [1957] S.A.S.R. 72 (Mayo J.).
4. [1943] S.A.S.R. 92 (Mayo J.).
5. [1959] Qd.R. 489 (Stanley J.).

Not to know *Balfour* v. *Balfour* would make it difficult for an Australian lawyer whose studies had been confined to this casebook, to converse with an English colleague about the "intention to create legal relations". On the other hand, it would be worse for him to be ignorant of, for instance, the important principle expounded by Mayo J. in *Reid* v. *Zoannetti* that "where parties negotiate, and after agreeing on a variety of matters *designedly* leave out some of these from the formal record of their contract, the proper inference may well be that the omitted terms have been abandoned, or alternatively have been left to the honour and goodwill of the contractor".

Whatever the place of English authorities in Australian legal education, under no circumstances should the contribution of Australian courts to the law of contract be neglected. Indeed, there are areas of the law of contract which have been elaborated in great detail by the Australian courts and where Australian precedents provide ample guidance for future cases. This is true, for instance, for the law relating to options, which is a subject notoriously neglected by English treatises on the law of contract. It is pleasing to see three of the leading Australian cases concerned with options included in the book under review. Perhaps a future edition may also contain the interesting discussion of the nature of options by Smith J. in *Ballas* v. *Theophilas*[6].

A section for which Australian law teachers have reason to be particularly grateful is chapter 5, concerned with the terms of contracts. As the authors point out in their preface, this subject is not covered adequately by existing textbooks. Chapter 5 contains a large selection of materials which, it is to be hoped, will arouse a good deal of interest in this fundamental, yet neglected topic.

McGarvie, Pannam and Hocker's casebook will be extremely useful, particularly if used in conjunction with the English casebook by Smith and Thomas. However, one cannot conclude this review without commenting critically on a remark made in the preface concerning the way in which the authors would like to see the law of contract taught: "We believe that the most effective approach to this subject is to encourage the student to discover the general principles for himself by critical reading and class discussion of the decided cases". Is there any more difficult task for a lawyer than that of extracting from a group of decided cases the principles which reconcile them and can be said to underlie all of them? To suggest that this task can be performed successfully by students is to assume that students have as much insight into the law as Pollock, Anson or Salmond had. This approach too often produces in the student's mind a chaotic picture of the subject, a jumble of apparently unrelated principles which the student can neither apply successfully to new fact situations nor memorize and retain for future use.

Cases and Materials on Contract should prove indispensable to Australian teachers of the law of contract and also a useful addition to law office libraries. It constitutes the first comprehensive collection of Australian cases in an area of great practical importance. The logical and convenient arrangement of the material and the extensive index should prove an easy guide for practitioners.

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6. [1950] V.R. 576.

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AUSTRALIAN CRIMINAL LAW, *by Colin Howard.* The Law Book Company Ltd., 1965, pp. i-xxxiv, 1-379.

This is a recent text on both the specific and general parts of the criminal law applicable in both common law and code jurisdictions in Australia. It is an important work. One reason is that it contains the first analytical review of Australian criminal law, which, even in common law jurisdictions, is often materially different from English criminal law. Another is that the author has contributed many highly significant insights of general interest. Indeed the work is likely to attract considerable attention overseas more for the latter than even for the former.

The content of the book is not excessively large, and a suitable balance is maintained between the length of the treatment of the specific and general parts. After a useful introductory chapter, which deals with such matters as sources of Australian criminal law, burden of proof, and the relevant time in criminal law, the author devotes approximately half the book to a discussion of a select range of offences (murder, manslaughter, assaults and related offences, larceny and related offences). The remainder of the work deals with the general part, there being one chapter on ancillary responsibility (complicity, conspiracy, attempt) and a longer chapter on general concepts (for example, intention, recklessness, negligence, insanity, mistake). In respect of the specific part the author has excluded such bric-à-brac as, for example, the offence of blasphemy or offences relating to piracy, and has discussed only the more important indictable offences. However, as is pointed out in the preface, it would be desirable to include a treatment of forgery, housebreaking, and also motoring offences. In respect of the general part, such subjects as strict responsibility and double jeopardy have not been discussed at any length since a full discussion is contained in two recent books, Howard: *Strict Responsibility* (1963), and Morris & Howard: *Studies in Criminal Law* (1964), respectively.

The book is very well set out, and written clearly in an infectious, tight, modern, crisp, critical style which will undoubtedly stimulate and benefit students and others. In places it is difficult to read. However, this is attributable solely to the complexity of the thoughts or analyses expressed. Only rarely is greater elucidation called for. Perhaps two instances occur at pages 55, 56 during the discussion of the felony-murder rule, and at page 159 during the discussion of the notion of "continuing wrongful possession". At pages 55, 56 the term "manner of execution" requires further explanation otherwise one cannot appreciate fully what is meant by "incidental felony" or "incidental act". At page 159 the distinction drawn between "continuing wrongful possession" and larceny by finding situations is rather vague. Certainly the third sentence does nothing to assist the distinction since often in larceny by finding cases equally "there is never any question that the owner can be found by making reasonable inquiries".

Throughout the work a very high level of analysis is maintained. Indeed often the analysis is laser-like in its penetration. Notable examples include the discussions of proximity in attempts (although one might have reservations about the conclusion), the concept of negligence, and the relevance of mistake of fact. However, in some rare places the analysis falls beneath the high standard displayed elsewhere in the book. Several examples may be given. One occurs during the treatment of larceny by mistake where, at page 187, it is stated that the precise nature of the mistake made by V "is irrelevant to the question at issue". If the question at issue is merely whether or not V's mistake negatives consent to the passing of possession, this statement is probably sub-

stantially correct. However, if the question at issue includes the inquiry whether or not V's mistake prevents ownership from passing (and there is no indication that it does not) it is submitted that, despite *R.* v. *Middleton*[1], in this respect the above statement is erroneous. For example, it would seem odd if D were to be guilty of larceny by mistake where V's mistake is merely one as to the commercial value of an object sold to D. This oddity is avoided if the view is taken that D cannot be guilty of larceny by mistake if V loses ownership as well as possession, a view which requires account to be taken of the type of mistake made by V. Thus, in the above illustration, V's mistake, being one as to value, would not prevent ownership being lost by V, and D could not, therefore, be guilty of larceny by mistake.

Another example appears from the treatment of impossibility in attempts. The author sets out at page 264 to "draw an accurate and workable line" between impossibility in the *Ring* type of situation[2], and impossibility in the situation where D mistakenly believes it to be an offence to stick a postage stamp on a letter otherwise than the right way up, but after analysing the relevant case-law, he concludes at page 270 that *Stephens* v. *Abrahams*[3] was wrongly decided. In that case D was charged with the offence of defrauding the revenue in respect of goods stipulated to be dutiable. He believed that certain goods in respect of which he gave a false invoice were dutiable when in fact they were not. It may well be that D should have been convicted of attempt. If this view is taken, however, some adequate distinction must be drawn between such cases as *Stephens* v. *Abrahams* and that of the inverted postage stamp. In both types of case D, on the facts as he believes them to be, is not committing any offence. It is inadequate to argue (as the present author seems to) that D in *Stephens* v. *Abrahams* intended to commit the offence allegedly attempted because he intended to defraud the revenue. The relevant offence was not simply defrauding the revenue, but defrauding the revenue in respect of a certain range of dutiable goods.

Further examples which have occurred to this reviewer appear from the discussion of larceny by finding at page 194 where it is stated that this offence covers situations where there is no apparent owner of the property in question (how would the author classify the situation where D picks up, with the intention of keeping, a bank-note which he observes V, whom he knows, accidentally drop in the street?), and from the discussion of intent to defraud at page 160 and pages 176, 177 (for example, would D be guilty of obtaining by false pretences if he induces V to part with money by means of the false pretence "I'm broke" which he makes solely in order to test V's generosity?).

Although the book has been produced in a remarkably short time it is accurate and includes a very extensive reference to numerous books, articles, and overseas case-law (principally decided in the U.S.A., England and New Zealand). Very few authorities of any significance, Australian or otherwise, seem to have escaped attention. *R.* v. *Gallienne*[4] could be further cited at page 141, n. 56; *R.* v. *Borinelli*[5] merits discussion in respect of the issue whether V need lose ownership for the offence of obtaining by false pretences; *R. v. Rogers*[6] is perhaps of interest in the context of the felony-murder rule;

1. (1873) L.R. 2 C.C.R. 38.
2. See *R.* v. *Ring* (1892) 17 Cox. 491.
3. (1902) 27 V.L.R. 753.
4. (1963) 81 W.N. (Part I) (N.S.W.) 94.
5. [1962] S.A.S.R. 214.
6. [1950] S.A.S.R. 113.

Heffernan v. *Richardson*[7] should be referred to at page 272, and the Kidnapping Act 1960 (S.A.) at page 108; *People* v. *Gorshen*[8] and *People* v. *Wells*[9] could be referred to with advantage in the sections on provocation and insanity respectively[10]; and, finally, *Parker* v. *Queen*[11] receives but scant mention in the section on provocation. Furthermore, there are very few issues (bearing in mind the scope of the work) of any importance the author has omitted to mention. One is vicarious liability, the exclusion of which warrants at least some explicit explanation.

Perhaps one criticism which might be levelled at the author (but not by this reviewer) is that he has concentrated too much on Australian case-law at the expense of English case-law. Reference to the latter is definitely not as considerable as many are accustomed to or would prefer. Certainly, despite such events as *Parker* v. *Queen*[12], the majority of the Australian judiciary continue to regard English authority as highly persuasive in respect of both "matters of detail" and many "questions of general legal principle" (*cf.* page 8). However, this may be explicable on the basis that a work such as the present, which conveniently sets out and analyses the Australian criminal law, has not been available. In any event, even if this work leads to a greater emphasis being placed upon the Australian case-law than formerly it is unlikely that any harm will result.

In this reviewer's respectful opinion, the present book is especially fine. The many insights and arguments on contentious issues and the depth of analysis throughout are highly provocative and stimulating to anyone working in the sphere of substantive criminal law, whether Australian or not. Furthermore, the book is of considerable use to Australian students, teachers, practitioners and judges, since, in respect of the many matters which fall within its scope, it renders obsolete the practice of either relying upon such English treatises as *Kenny,* which are often both irrelevant and tedious, or of wending a way through the *Australian Digest,* which is simply tedious.

BRENT FISSE*

CRIMINAL LAW, *by J. C. Smith and B. Hogan.* Butterworth & Co. (Publishers) Ltd., England, 1965, pp. i-lxxix, 1-609.

This is a new English text on both the specific and general parts of the criminal law. It has been written in an attempt to replace the outmoded *Kenny's Outlines* and to fill the gap between *Cross & Jones' Introduction,* which is brief, and *Russell,* which is long.

The content of the book is fairly large. Most aspects of the general part of criminal law are dealt with as are numerous specific offences including even

7. [1946] S.A.S.R. 201.
8. (1959) 336 P. 2d. 492 (California).
9. (1949) 202 P. 2d. 53 (California).
10. See also Paulsen and Kadish: *Criminal Law and Its Processes* (1962), 345, 346; but *cf. Parker* v. *Queen* (1963) 37 A.L.J.R. 3, at 20, *per* Windeyer J.
11. (1963) 37 A.L.J.R. 3, H.C.; (1964) 38 A.L.J.R. 71, P.C.
12. (1963) 37 A.L.J.R. 3, at 11, 12.

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the offence of blasphemy. In addition there is an introductory chapter on the aims of the criminal law. Notable omissions from the treatment of the general part include the issue of "innocence"[1], the relevant time in criminal law, and the burden of proof (which receives scant mention). Few specific offences have been omitted which could have been included. The only ones which have occurred to this reviewer are those dealing with disturbances in churchyards or places of public worship.

The first part of the work deals with the general part and the second with the specific part. The treatment is reasonably well set out, adequate use being made of sub-headings and marginal headings. However, the use of a bolder type for marginal headings than for sub-headings at times creates initial confusion especially in the chapter on larceny and related offences. Furthermore, some matters are dealt with in odd places. For example, the obvious place for a justification of imposing criminal liability for negligence would be in the chapter headed "Crimes of Negligence" and not some 180 pages later tucked away in the discussion of involuntary manslaughter. Also, one would expect to find the discussion of the defence of diminished responsibility in the chapter on unlawful homicide rather than in the chapter headed "General Defences". These are minor criticisms however and certainly the layout is an improvement on *Kenny* and *Russell.*

In this reviewer's opinion the book has three commendable features. The first is that it makes (as is stated in the preface) "a completely fresh start" in the direction towards an adequate and comprehensive modern exposition of the present English criminal law. There have been too many editions of *Russell* and *Kenny,* works which could never be described as adequate today unless they were to lose many of the characteristics endowed by their original authors. The second is that the authors have aimed to rely upon sources other than British. This is a desirable departure from the insular approach evidenced in even recent editions of *Kenny* and *Russell.* The third is that the treatment of specific offences contains a wealth of detail which could not be found as conveniently elsewhere. The authors are to be congratulated for collating it and for presenting it clearly. They have saved many people much time.

The main criticism which may be directed at the authors is that they have not provided much stimulation. Few original thoughts have been articulated and the level of analysis throughout the book is not especially high. In fact at times it is decidedly low, particularly in the treatment of the general part of criminal law. Two examples may be given. The first is the discussion of impossibility in attempts. Apart from the absence of reference to authoritative American decisions where *People* v. *Jaffe*[2] has been expressly regarded as erroneous, there is a clear fallacy in the reasoning employed by the authors[3]. Furthermore, the authors never manage to get around to discussing the problems raised by "The Case of Lady Eldon's French Lace"[4]. Secondly, the treatment of vicarious liability in the context of regulatory offences contains no adequate attempt to explain when the delegation principle is applicable and not the scope of employment principle. The best the authors have managed is to provide a rationalisation which is patently in conflict with *Mousell Bros.* v. *L. & N.W. Rlwy.*[5] and also *Quality Dairies Ltd.* v. *Pedley*[6].

1. *Cf. R.* v. *Prince* (1875) L.R. 2 C.C.R. 154.
2. (1906) 185 N.Y. 497; 78 N.E. 169.
3. See Howard: *Australian Criminal Law* (1965), 265.
4. See Paulsen and Kadish: *Criminal Law and Its Processes* (1962), 480.
5. [1917] 2 K.B. 836.
6. [1952] 1 K.B. 275.

Some far less serious criticisms may also be made. There are several inconsistencies in the text. Minor ones appear from the discussion of *Lim Chin Aik* v. *Queen*[7] at page 56 and from the analysis of the mental element of the offence of assaulting a policeman in the due execution of his duty at page 272. On both occasions the authors depart from the definition of *mens rea* they provide in Chapter 4. A major inconsistency is apparent at page 82 where it is stated that complicity requires proof of *mens rea* because it is a form of liability which exists at common law. This is clearly inconsistent with the statement at page 76 that an accomplice may be held liable for negligently unforeseen consequences in the case of some offences (such as involuntary manslaughter) since, as the authors themselves point out in Chapter 4, *mens rea* does not include negligence.

There are also several errors. Examples include the statement (page 138, n. 8) that the decision of the Privy Council in *Mawji* v. *Queen*[8] has been followed in the U.S.A. (*cf. U.S.* v. *Dege*[9], a decision of the U.S. Supreme Court), and the section on page 58 suggesting that in England liability in the context of regulatory offences is never absolute but merely strict. One may sympathize with the authors in making this latter suggestion, but it is based mainly upon an extract from *Cross & Jones* which, in virtue of such authorities as *R.* v. *Larsonneur*[10] and *Parker* v. *Alder*[11] (which are not referred to by the authors) seems substantially erroneous.

Finally, one would like to have seen included numerous additional references. First, the chapter on the aims of the criminal law clearly calls for references to such further reading as, for example, Wootton: *Social Science and Social Pathology* (1959), Hart: *The Morality of the Criminal Law* (1965) (especially in view of the reference to Wootton: *Crime and the Criminal Law* (1963)), and Tappan: *Crime, Justice and Correction* (1960). Secondly, many further important overseas sources could be referred to with advantage. In the treatment of strict responsibility, for example, the only reference to Howard: *Strict Responsibility* (1963), occurs in a trivial context (page 60). A reference would be far more in place during the discussion of the question whether liability for negligence should be imposed rather than strict liability where a regulatory offence does not require proof of *mens rea.* One reason is that this work deals with the Australian case-law (not referred to either), which recognises negligence as being a suitable basis for liability in regulatory offences. Nor, for example, is reference made in the section on insanity to *Durham* v. *U.S.*[12] and other interesting U.S. decisions. The important decisions of the High Court of Australia in *Thomas* v. *R.*[13], *Proudman* v. *Dayman*[14] and *Reynhoudt* v. *R.*[15], are not referred to in the treatment of mistake of fact, and the treatment of mistake of law could be improved by references to the more significant American decisions in this area. *R.* v. *Enright*[16], *R.* v. *Mudda-*

7. [1963] A.C. 160, P.C.
8. [1957] A.C. 526.
9. (1960) 364 U.S. 51.
10. (1933) 24 Cr. App. R. 74.
11. [1899] 1 Q.B. 20.
12. (1954) 214 F. 2d. 862.
13. (1937) 59 C.L.R. 279.
14. (1941) 67 C.L.R. 536.
15. (1962) 107 C.L.R. 381.
16. [1961] V.R. 663.

rubba[17] and Brown's article "The 'Ordinary Man' in Provocation"[18] should be referred to in the section on provocation. The N.S.W. decisions *R.* v. *Stones*[19] and *R.* v. *Gordon*[20] would relieve the anxiety suffered by the authors in the discussion of intoxication at pages 117, 118.

The present work will probably command wide acceptance by English practitioners and students as a basic comprehensive text. It should, because it is much better than *Kenny* and much bigger than *Cross & Jones.* It may even discourage any further editions of *Russell* since it does much of what *Russell* seems intended to do more adequately and more economically. However, in Australia the book is likely to have far less appeal. In the first place it has little relevance in the code states. Secondly, in the common law jurisdictions it would often be dangerous to rely upon it since in numerous respects the criminal law (both statutory and common law) is quite different from that in England. For example, the treatment of strict responsibility and the relevance of mistake of fact in the criminal law would be quite misleading.

In this reviewer's opinion the basic requirements of Australian students and practitioners are met far more adequately by Howard: *Australian Criminal Law* (1965), which concentrates on the Australian case-law and statutory provisions (in both common law and code jurisdictions). Even where the English and Australian criminal law is similar the latter book contains a more perceptive and stimulating discussion than that in the work under review. Furthermore, Howard's book has the large bonus of a very fine (as opposed to a relatively poor) section on the general part of the criminal law. However, the present book would still be useful in respect of those offences which are not dealt with by Howard (for example, road traffic offences, blasphemy) and as a source of additional detail in respect of those offences which are, especially larceny and related offences.

BRENT FISSE*

AN INTRODUCTION TO LAW, *by D. P. Derham, F. K. H. Maher and P. L. Waller.* The Law Book Company Ltd., 1966, pp. i-viii, 1-217.

CASES AND MATERIALS ON THE LEGAL PROCESS, *by F. K. H. Maher, Louis Waller and David P. Derham.* The Law Book Company Ltd., 1966, pp. i-xlii, 1-457.

Introducing the student to the study of law presents a many-sided problem that has been dealt with in a variety of ways in different parts of the common law world. In some of the older English universities no introductory course at all is given to the student entering upon legal studies; he is expected to have digested in his own time the contents of an elementary book such as Glanville Williams: *Learning the Law* or Hood Phillips: *First Book of English Law* before or during a course of lectures in criminal law, contract, tort or property. In the United States, by contrast, a separate course in "Legal Method" has long been part of the curriculum of the major law schools. While

17. Unreported, but the judgment is set out in Donnelly, Goldstein & Schwartz: *Criminal Law* (1961), 692-696.
18. 13 *International and Comparative Law Quarterly* (1964), 203.
19. (1956) 72 W.N. (N.S.W.) 465.
20. (1963) 80. W.N. (N.S.W.) 957.

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a book of cases and materials continues to be the usual vehicle for a course of this type, recent experimentation has produced a "programmed introduction to legal studies" which, with the aid of simple mechanical devices, allows the student to acquire insights and skills in the legal process in his own time and without the constant help of an instructor[1].

The two books under review represent the results of the experience of the faculty of Melbourne University Law School in the teaching of legal method over a number of years. More recently the forerunners of the present works have been used in mimeographed form in the Law Schools of the Australian National University and of Adelaide and Monash Universities. Together they represent a compromise between the American casebook method of introducing the law and the "spoon-feeding" presentation of the elementary English text books.

The justification of a course in "Legal Method" and of the topics chosen for presentation in such a course has been given previously by one of the present authors[2]. The aims of such a course in the reviewer's opinion (and implicitly in the opinions of the authors) are: (1) to provide the student with the elementary "tools of trade" with which he must be equipped early if he is to grapple successfully with case-law subjects, especially criminal law which most Australian law students take concurrently in their first year of studies; (2) to introduce the student to the techniques of legal reasoning at a pace and at a degree of abstraction which is not possible in case-law subjects; and (3) to impart miscellaneous information about the law and the legal profession with special emphasis on the correction of popular misconceptions.

The present works are avowedly designed as companions but either one could be used profitably without the other according to the exigencies of existing first-year curricula. Broadly speaking, the first and third aims stated above are pursued in *An Introduction to Law* and the second aim in *Cases and Materials on the Legal Process.*

An Introduction to Law begins with a simple and readable account of the legal system, sources of law and the legal profession. In the second part of the book the divisions of the law are explained and elementary concepts of administrative law, criminal law, contract, tort, etc., are outlined. The third part entitled "The Fashioning of Law" is the core of the book and at the same time the most adroitly presented. With admirable clarity and conciseness the student is introduced to the concept of law-making through the cases and to the theory of precedent. Additional chapters deal with the basic canons of statutory interpretation, problems about facts and the techniques of judicial reasoning. The authors wisely leave until last some thoughts on "what is law?" A valuable appendix is added on the use of the law library. The only major criticism which the present reviewer would make is that the first part of the book is too heavily flavoured with reference to the courts and institutions of the State of Victoria alone. In a work which should secure wide circulation in Australia a more catholic presentation might be attempted in a second edition.

Cases and Materials on the Legal Process breaks no new ground so far as the already familiar format of the casebook is concerned. The major portion of the book presents the raw material from which an appreciation of the

1. Charles D. Kelso: *A Programmed Introduction to the Study of Law* (1965).
2. David P. Derham: "A First Course in Law", *2 Sydney Law Review,* 103.

techniques of legal reasoning is to be derived by the student with the aid of class discussion and collateral reading. Cases on the doctrine of *Rylands* v. *Fletcher* and the duty of care in tort are those primarily selected for this purpose. A wealth of other cases in unrelated fields is also reproduced in order to illustrate particular problems of finding the *ratio decidendi,* the authority of judicial propositions and the weight of judicial decisions. The need for such a numerous collection of cases for the latter purposes might be questioned; it would be a stoic group of students indeed that could solemnly digest all these cases without a feeling of super-saturation. The great merit of the book however, is that the instructor may pick and choose among the selected cases without undue difficulty to suit the requirements of his own course. The same might be said of the extensive selection of cases on statutory interpretation, which is designed not only to expose the student to a particular example of legal reasoning but also to the challenging implications of ordering action through language.

It should be noted that both volumes are produced in optional paper-back editions which offer a welcome saving to the many law students in Australia who will be using them.

IVAN A. SHEARER*

THE MEDICAL ASSESSMENT OF INJURIES FOR LEGAL PURPOSES, *by Arnold Mann.* Butterworth & Company (Australia) Ltd., 1966, pp. 1-288.

With the great increase in the last twenty years or so in the number of "injury" claims coming before both lower and higher courts it has become increasingly difficult for the non-medical man to appreciate, let alone keep up with, the growth of medical knowledge, and indeed most laymen have considerable difficulty in understanding the technical language used by medical practitioners. To date in this reviewer's experience the layman has attempted to bridge the gap between ignorance and understanding by the use of medical dictionaries and/or multi-volume works such as the American publication *Traumatic Medicine and Surgery for the Attorney.*

Without detracting from either source of information, both have obvious limitations. No dictionary can be a textbook and a ten volume publication can tend to be unwieldy. What has been needed is a book which will, for the laymen, bridge the gap referred to above sufficiently for him to be able to see the light of understanding. At the same time it should give some guidance to medical men as to how they can best serve their medico-legal function in making understandable their technical knowledge to a non-technical listener or reader. It is in this respect that this volume is a great success. Quite apart from the wealth of strictly medical knowledge set out for the assistance of the lay reader, the opening chapters in particular should be studied by all those interested in medico-legal practice whether as medical men or on the legal and quasi-legal side of injury claims.

The first two chapters, "Introduction" and "Injuries—General Consideration", are of considerable interest. Certainly to one unfamiliar with this particular field they are an excellent introduction to the general nature of medical evidence and how it should be collected and collated. The third chapter on "Psychological Disorders" should be read by everyone having to deal with injury claims.

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From the fourth chapter on, the book deals with specific parts of the body and the injuries associated with them until the finals chapters are reached. These deal with such topics as "Toxicology", "Anaesthetic Complications" and finally "Miscellaneous Disorders". These are topics of general interest and are dealt with by the author in a way readily understood by the lay reader and indeed the same may be said of the whole volume. Whilst this book will be of particular interest to those laymen such as lawyers, insurance assessors, employers, union secretaries and the like, who are in their everyday work faced with medico-legal problems it should be of equal interest to medical practitioners who are increasingly facing medico-legal problems from the other side of the fence. By the very simplicity and straightforwardness of the author's style many medical practitioners could perhaps learn an object-lesson in dealing with medico-legal problems at the report and evidence levels.

R. F. MOHR*

INTERSTATE RELATIONS IN AUSTRALIA, *by Richard H. Leach,* University of Kentucky Press, United States, 1965, pp. i-x, 1-183.

In the official records of South Australia, in the Archives Department of the State Library in Adelaide, there is evidence which shows that almost from the beginning of settlement here the top officials in the colonial government were in close touch with their counterparts in other colonies in Australia. Quite commonly, these officials exchanged the legislation which was passed by their respective legislative authorities and frequently no doubt the Act or Ordinance of one colony served as a model for similar laws in another part of the country. As early as 1839, three years after the foundation of South Australia, contacts with officials in New South Wales and Van Dieman's Land led to the Council passing an Act for the apprehension of convicts escaping from neighbouring penal settlements (3 Vict., No. 5). This Act was modelled on similar legislation in New South Wales and seems to have been the earliest example of uniform legislation passed in South Australia to deal with a matter of common concern to the British colonies in this region. Despite such early examples of inter-colonial co-operation, and the growth of inter-colonial consultations in the second half of the nineteenth century, the evolution of interstate relations in Australia has continued to the present day to be largely the product of informal arrangements. Generally, these have been made to solve matters of immediate concern to the State Governments and, since 1901, matters which touch and concern the Commonwealth as well. In some cases, of course, interstate co-operation and State co-operation with the Commonwealth on matters of mutual concern have been formalised by legislation, leading to the creation of bodies such as the River Murray Commission. By and large, however, some of the most important bodies which order uniformity in national policies, like the Australian Agricultural Council, are the product of informal arrangements. The Standing Committee of Attorneys-General, too, which has played such a significant rôle in producing uniform legislation, finds its authority only in the willingness of the State and Commonwealth

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governments to participate in its programmes. Because of the *ad hoc* nature of many of these arrangements it is not surprising that these have received little attention from lawyers. It is a little more surprising to find, however, that Australian students of public administration and politics have, in their turn, found little so far to interest them in these activities. Dr. Leach, who is an Associate Professor in the Department of Political Science at Duke University, and who has already engaged in similar studies in the United States and Canada, has now, in this volume, produced the first published examination of the existing methods for ordering interstate relations in the country.

As its size clearly indicates this volume is not, however, a comprehensive historical analysis and detailed study of the growth and operation of interstate relations within the Commonwealth. Basically, it sets out to examine briefly the main instruments which are used today for the ordering of inter-governmental co-operation in Australia. In three categories, the author classifies these instruments as those which owe their creation to Commonwealth inspiration, those which are basically informal arrangements and finally he examines the formal arrangements which have legislative support for their operation. Under each of these headings Dr. Leach discusses the methods which have been devised for inter-governmental co-operation and summarises the rôle which they play in government. To do this, he has obviously interviewed many government officials in a visit to Australia and has had a considerable amount of active co-operation from a variety of State and Commonwealth Departments.

Many of the instruments of inter-governmental co-operation which Dr. Leach describes in this volume are little known and he has clearly done a service to everyone who is concerned with the government of this country by his exhaustive listing of them. The chapter on Uniform Law, which originally appeared in much the same form as an article in the *American Journal of Comparative Law*, is also a useful introduction to the rapid developments which have taken place in this sphere in recent years. At the same time, however, although the book is clearly a readable and valuable addition to the literature on the operation of government in this country, particularly for the foreign reader, from an Australian point of view there are defects in this volume which cannot be ignored. The first chapter over-simplifies and generalises, often in an uncritical fashion, on the evolution of interstate relations in Australia and will hardly satisfy many Australian readers. It is something of a surprise, for example, to find a conclusion on the Australian desire for the maintenance of the federal system being partly tied to the failure of the Commonwealth Centre Party at the 1961 Federal elections. The existence of this small party was unknown to the vast majority of Australians and very few even had the opportunity of voting for it. There are times, errors of fact, too, like the misstatement on the date of the foundation of South Australia.

Despite defects like these, however, it cannot be denied that this pioneering work has opened up a new vista on the operation of government in this country. On its face, the book may seem to have no great significance for the constitutional lawyer in this country, particularly as the author is not basically concerned with constitutional and other legal problems related to his study. But on closer examination, it is a valuable insight into the way in which the strictures of the Commonwealth Constitution have perforce been overcome in

practice by the development of formal and informal instruments of co-operation between the State and Commonwealth governments. Without arrangements like these it is likely that long before now the federal system in this country would have proved to have been a more serious barrier to the economic growth and stability of this country, particularly in the post-war years. The lawyer should also recognise in the growth of these interstate relationships an important gloss on our constitutional law and a field of activity which should not be permitted to stray too far from the ordered path of legal regulation of governmental activities.

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