

BOOK REVIEWS

LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS IN AUSTRALIA, by *W. Anstey Wynes*, 5th edition, (Law Book Company, 1976), pp. xlv, 1-590.

This detailed study of Australian constitutional law by the late Dr. William Anstey Wynes is the most reprinted of the major texts which have appeared in the field since federation. Five editions in 30 years, with three in the past 14, evidence the special niche which Dr. Wynes carved for himself during his lifetime as a much respected commentator on the legal working of the Constitution. His work is the sole major commentary on the Constitution, published before the Second World War, which has continued to be updated and republished since then. Wynes' book may not have attained the stature of the great early volumes on the Constitution by Quick and Garran in their *Annotated Constitution* and Harrison Moore in his *Commonwealth of Australia*. Nevertheless, to generations of judges, practitioners and students, since the first edition appeared in 1936, *Legislative, Executive and Judicial Powers in Australia* has been a standard source of reference on the working of the Constitution. This fifth edition has been published posthumously following Dr. Wynes' death in July, 1975, when the edition had reached the proof stage. As with the previous editions, the fifth testifies again to the never slackening industry of its author.

The first edition was based on a thesis which Dr. Wynes submitted successfully for the award of the degree of Doctor of Laws in the University of Adelaide in 1933. When it appeared, it became only the second of the major texts on the Constitution published after the *Engineers Case*. The first was also based on a thesis which was awarded the degree of Doctor of Laws in the University of Adelaide. This was Kerr's *The Law of the Constitution*, published in 1925, following the degree awarded in 1919 for another substantial study of the Constitution. In the inter-war years, the only other major legal study of the Constitution which appeared in book form was Dr. Brennan's *Interpreting the Constitution*. But this could hardly be compared with either Kerr's or Wynes' books as a basic textual analysis of the Constitution. Rather, as Brennan himself pointed out, his was a politico-legal essay and essentially an attack upon the premises underlying the decision in the *Engineers Case*. Brennan was a noted and respected politician of the inter-war years and a Victorian barrister of consequence, and he had much of value to say about the working of the Constitution. But his book was essentially a polemical rather than a textual study of the Constitution. Only in the post-war era, with the publication of texts by Howard, Nicholas, Lane and Sawyer and the collection of essays edited by Else-Mitchell has the field of constitutional scholarship been enlivened and expanded by other major studies on the working of the Constitution which can be ranked sufficiently highly to deserve attention by serious students of the subject. And yet, through all this spate of publishing, Wynes' work has remained a respected and well-accepted part of the literature.

The basic reason for the continuing viability of *Wynes* is not hard to find. More recent books may be stronger in terms of historical insights or the application of critical analytical skills. But *Wynes* remains much like a textual encyclopaedia of Australian constitutional law. Presented along traditional lines, it attempts to be, often successfully, virtually all-embracing in its

coverage. In a very real sense, *Wynes* has been an essential updating of *Quick and Garran*. Certainly no other publication, even with the professed aim of serving as an annotation of the Constitution, such as Lumb and Ryan's *Annotation*, has come even within striking distance of adequately serving such a purpose.

For most readers, the encyclopaedic nature of *Wynes* has probably meant that it has been used more as a regular source of reference on particular topics rather than as a volume to be read as a whole. In many ways, this seems to be in accord with the basic legal philosophy which Wynes espoused and defended in some detail in the Preface to his second edition. In the light of his assertions in this Preface, it comes as no surprise that he emphasised the application of particular constitutional provisions in the context of individual cases. He sought, as far as possible, to avoid generalisations unless these were clearly directed by judicial decision-making. As Wynes affirmed, his work should be regarded as a "legal textbook", which another once described as "raw material". This, he made clear, was not only a justified approach to the exposition of constitutional law, but a necessary reflection of a fundamental philosophical approach which the author sought to follow. As Wynes demonstrated in this Preface, and in the body of his text, he was no modernist in the sense of approaching the working of the Constitution in its legal context as a subject for speculative discussion. Constitutional rulings were not to be the subject of anything more than analytical debate. An avowed conservative in terms of reverence for the acceptance of judicial decision-making at its face value, Wynes supported and extolled strict legalism, as he understood it. He regarded possible entry by courts and commentators into the consideration of "political-legal" conflicts as an "abnegation of law". To Wynes, there was no place for a "liberal" interpretation of the Constitution "to meet the needs or supposed needs of an atomic age". He was, it would seem, imbued with a sense of the continuing relevance of the traditional British conception of the judicial function. To this end, his work both reflected and supported the refusal to take into account political, sociological, economic and other "equally vague and ill-defined standards".

This philosophical underpinning was, at the same time, both a source of strength and an element of weakness in Wynes' general approach to constitutional law. It was a strength in the sense that his exposition provided a sound and generally unimpeachable summation of the judgments which have been the lifeblood of the law. As such, his book is a valued and often a necessary foundation for beginning a critical study of particular aspects of constitutional law. On the other hand, there may be dangers if *Wynes* is used in anything more than an encyclopaedic fashion like this. For centuries the forms of action mesmerised generations of common lawyers, and cloaked the realities of the working of the law. So, too, Wynes may through his form of exposition fail, in the last analysis, to expose the realities of constitutional law. In many ways, it would seem that the *Engineers Case* was Dr. Wynes' catechism. He was very much of the generation nurtured in its shadow. Unlike Brennan, he seems to have accepted the decision virtually without question, except as later explained by Chief Justice Dixon. But in this, as in other contexts, simply to accept a decision such as the *Engineers Case* may not be sufficient to understand it adequately even within the self-imposed restraints of describing the "law", as Wynes suggested he was doing. To ignore the essentially political motivations of Isaacs J. in the *Engineers Case*, and the political rhetoric, in the majority judgment, (albeit dressed at times in legal

garb) makes it difficult, perhaps impossible, really to understand such judgments as Isaacs' dissent in *Pirrie v. McFarlane*.

It may also, perhaps, be a misreading of the British tradition, to place so much emphasis on the purported objectivity of judicial decision-making. In the constitutional arena, at least, both "liberal" and "conservative" approaches to constitutional litigation have not been eschewed in the British tradition. Indeed, it might be argued that one of the greatest values of the British tradition has not been revealed in purported objectivity, as comforting as this notion might be in projecting the mystique of the law to the body politic. Rather, one of the great strengths of the British tradition has been its inherent capacity to operate flexibly in response to emerging political, social, economic and other forces, and to provide meaningful checks on the abuse of power by governments and others. The British system may not have always done this effectively, or acceptably, as evidenced in decisions such as *Roberts v. Hopwood*. Clearly to carry this process of judicial intervention too far may be to place in jeopardy the continuing acceptance of the judicial role in the constitutional arena. Rightly, too much judicial law making may be the subject of the style of criticism directed so devastatingly by Bentham at law makers such as Lord Mansfield, who assumed judicial roles now antipathetic to the *mores* of the body politic. To oppose such judicial law making is one thing. To attempt to ignore it, however, is a very different matter, quite arguably unacceptable in attempting to understand the present working of the law. The delicate balancing of self-imposed judicial restraints with forms of deliberated judicial intervention, as exposed in the cases, and the methodology used to achieve this, is surely an essential element for working within the law. It may well be regarded as characteristic of one of the main elements in Chief Justice Dixon's approach to constitutional litigation. Indeed this may well be regarded as one of the chief sources of Dixon's undoubted importance as a constitutional craftsman.

When all this is said, however, the fact remains that Wynes' book is a notable and important contribution to the literature of the law in Australia. Whatever its defects, the fact that it has passed through five editions in 30 years is assuredly recommendation enough of its undoubted utility to the student of constitutional law in this country. New and more provocative expositions on the Constitution have appeared. Some, no doubt, will have a more critical influence on the long-term evolution of thinking on constitutional law. But there remains a place still, and in some ways an important place, for a volume of this type. It provides a largely dispassionate description of the black letter law. It does not seek to intrude too deliberately upon the reader with any special, personalised approach to the subject. Over-all, of course, there may be proselytism in this, given Wynes own philosophical approach to constitutional law. But this is proselytism within a manageable and understandable compass. This can, for most practical purposes, largely be ignored if the reader wishes, without losing the benefit of Wynes' painstaking scholarship and erudition.

In many ways, however, it is a pity that Dr. Wynes was unable during his lifetime to produce a second, separate and more generalised account of the working of the Constitution which was not a "legal text book". He hinted in his Preface to his second edition that this was a possibility which had once been canvassed. With his deep knowledge of the case law on the Constitution and his wide experience in the service of both the Commonwealth and the State of South Australia this would have been a welcome addition

to the literature on the working of government in Australia. As it was, it says much for Dr. Wynes' capacity for hard work over the years, that he was able to maintain and improve upon the quality of his original work despite the demands of a career which, for a time, kept him out of Australia for lengthy periods. He was admitted to the Bar in South Australia in 1929 and practised here until 1938. During this period he also served for two years as a part-time lecturer in the Law School. In 1938, Dr. Wynes joined the infant Department of External Affairs, as it was then described. He had earlier shown an interest in foreign affairs and international law and had been a foundation member of the Australian and New Zealand Society of International Law. From 1943 to 1947 he was Official Secretary to the Australian High Commissioner to Canada. He was appointed Australian representative on the United Nations Committee on the Codification of International Law in 1947, and was Counsellor in the Australian Embassy at Nanking from 1947 to 1948. After a period then as Acting Deputy Secretary of the Department of External Affairs, he became *Chargé d'Affaires* at the Australian Embassy in Dublin from 1950 to 1952 while acting, during the same period, as a Member of the Foreign Compensation Tribunal. He served as Legal Adviser to the Department of External Affairs from 1952 to 1959 when he took up an appointment in his home State as Parliamentary Draftsman, a position he held until 1969. With this background of public service, Dr. Wynes would have been in a strong position to provide a valuable supplement to his already well recognised work on the Constitution. This was not to be. But his major work on the Constitution has made his name well-known to all concerned with the working of constitutional law in this country in the past 30 years. His reputation is secure as one of the most distinguished graduates of the University of Adelaide and as a scholar who, despite the exigencies of official duties over the years, continued to make a significant contribution to the literature of the law, right up to the time of his death.

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DISCRETIONARY TRUSTS, by *I. J. Hardingham and R. Baxt*, (Butterworths, 1975) v-xxvii, 1-235 pp.

A monograph on a particular aspect of the law of trusts is a very considerable rarity, and the law of discretionary trusts has become an area of great practical significance. This book should therefore be welcomed by teachers, students and practitioners alike for its contributions both to the literature on trusts as a whole and to the understanding of a topic which has undergone considerable changes in the recent past and to which fine distinctions and a relatively high level of abstraction in its basic concepts have often brought difficulty. Practitioners especially should be grateful for the attention paid throughout the work to relating the material to the problems of the tax planner, for this is not simply an academic disquisition on discretionary trusts but a book which takes as its focus the discretionary trust as an estate planning device. It should be said immediately, however, that the work will have particular value for the neophyte estate planner; the specialist in the field is unlikely to find the answers to his more complex and pressing problems here.

The book must, however, be reviewed from an academic viewpoint as well as from that of the practitioner, since most of it (eight chapters out of nine)

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is based upon Dr. Hardingham's doctoral thesis, to which Professor Baxt has added a chapter on taxation affecting discretionary trusts in New South Wales. Apart from chapters on the operation of the Income Tax Assessment Act (Cth.) and of the taxation in Victoria upon discretionary trusts, Dr. Hardingham has deliberately placed emphasis on the conceptual trust law of his subject matter, and the other chapters cover the nature of the discretionary trust, certainty of object, the effect of the rules against perpetuities and accumulations, the control of discretionary trustees and an analysis of interests in the discretionary trust. The account of these topics is always sound and directs attention to most of the basic problems to which the law may give rise. The distinctions between the different kinds of machinery which are covered by the expression "discretionary trusts" are clearly stated; the analysis of the nature of trust powers and of certainty of object since the leading case of *McPhail v. Doulton* ([1971] A.C. 424) is thorough; the basic literature on delegation of testamentary powers is re-analysed and reviewed, and the treatment of the rules against perpetuities and accumulations covers the various statutory amendments to the rules that have been introduced in Victoria, Western Australia, Queensland, New Zealand and the United Kingdom. On all these topics the book can confidently be recommended as a generally reliable account of the existing law and as an introduction to the problems that it raises.

Nevertheless, the book left this reviewer with feelings of disappointment, caused by the author's view of the boundaries of his subject—perhaps brought about by his concentration on the estate planning aspects of it. For example, no sooner was *McPhail v. Doulton* decided than it was noticed that "a framework within which trustees may legitimately exercise discretions is becoming more important than the concept of a trust with attendant and guaranteed consequences", and that this should have consequences for the law governing the reviewability of discretions given to trustees and the rule that they need not give reasons for their decisions (J. D. Davies, [1970] *A.S.C.L.* 189 ff). This theme is barely taken up at all, apart from a single rather perfunctory proposal for reform; and the whole chapter on control of trustees confines itself with too much dedication to the general rules governing the review of the exercise of discretions by trustees before 1970. Similarly, the possibilities seen by Grbich ((1974) 37 *M.L.R.* 643, 654-6) for further developments of the trust concept that might result in the abandonment of the rule that "there must be someone in whose favour a court can decree performance"—possibilities which, if fulfilled, would necessarily lead to changes in some of the positions adopted by the author—are not perceived, or discussed at all. Although the date of publication would have proved too early for the article by C. D. Baker ((1975) 5 *Adelaide L.R.* 103) to have been taken into account the problem that was there dealt with—the effect of *McPhail v. Doulton* and the doctrine of trust powers in jurisdictions which accept a principle prohibiting delegation of testamentary power—is not mentioned. Overall the competence and careful organisation of the book are not matched by a corresponding degree of imagination and sense of the potentialities of the subject matter.

There are, of course, some points which inevitably arise where the author does not convince the reviewer of his position. First, cases in which a person has been given a power of appointment amongst a limited group of beneficiaries give rise to two related difficulties: do the beneficiaries only obtain an interest upon the exercise of the power, or do they take an interest in default of appointment, so that, in effect, they have vested interests subject to divestment by the exercise of the power; and is there any rule of law that creates a presumption

in favour of the latter? Dr. Hardingham answers the second question in the negative, and in principle this seems clearly right, despite the careful way in which Dixon C.J. (in *Perpetual Trustee Co. v. Tindal* (1940) 63 C.L.R. 232, 262) and Windeyer J. (*Lutheran Church of Australia v. Farmer's Executors Trustees and Agency Ltd.* (1971) 121 C.L.R. 628, 657) left the point open. He does not, however, expressly take notice of the greater apparent willingness of Australian courts to imply a trust in default of appointment than, for instance, that of the English courts, though he does at one point indicate an "interesting" comparison between *Queensland Trustees Ltd. v. Commissioner for Stamp Duties (Qld.)* ((1952) 88 C.L.R. 54), where the High Court made such an implication, and such cases as *Re Weir* ([1972] Ch. 145), where the Court of Appeal did not. But in *Tatham v. Huxtable* ((1950) 81 C.L.R. 639, 649) Fullagar J. described the case where the trust is implied in default of appointment as "the normal case", and in the *Lutheran Church* case Barwick C.J. expressed the same view ((1971) 121 C.L.R. 627, 635). Dr. Hardingham's conclusion that any potential problems in this area are best solved by careful drafting of the original settlement and the expression of a gift over is beyond criticism, but further investigation of this problem would have been useful for those who encounter it after this is possible.

Secondly, in his analysis of certainty of object Dr. Hardingham concludes that the suggestion made by Lord Wilberforce in *McPhail v. Douulton* that the beneficiaries must form "a loose class" is justifiable not (as Lord Wilberforce thought) because unless they did so the trust would be "administratively unworkable" but because otherwise "there will be nobody with sufficient standing to enforce the decree", since "any single object would be too remote from the trust to claim its performance". This is, with respect, difficult to follow: if one is faced with a trust having beneficiaries identifiable according to criteria established by the settlor with the requisite degree of semantic certainty and which one conceives to be administratively workable it seems difficult to hold that the trust fails for want of a beneficiary—the problem is rather that there are too many. Later Dr. Hardingham concludes that the same reasoning when applied to mere powers leaves a power that exists in favour of objects who do not form a "loose class" valid, but denies any object the right to require that the donee of the power consider or exercise the power (so that dicta in *Re Manisty's Settlement* ([1974] Ch. 17, 26) are wrong) and so would permit release of the power by the trustee (so that, *inter alia*, *Re Abrahams* ([1969] 1 Ch. 463) is wrong on this point). It is not clear whether or not Dr. Hardingham would wish to say that in a case in which a fiduciary power exercisable in favour of "the residents of Greater London" is exercised in favour of himself or myself no resident of Greater London could object to this, though the persons entitled in default of appointment might do so; if he would, his point is wholly unconvincing. If the "loose class" limitation is to be justified at all (*cf.* McKay, (1974) 38 *Conv. (N.S.)* 269) it must surely be on the ground of practicability of administration; for, as Dr. Hardingham points out, the effect of *Re Baden* (No. 2) ([1972] Ch. 607) is that the basic test of certainty of objects for a trust power requires only "conceptual" or "semantic" certainty; "evidential" uncertainty is irrelevant. The "loose class" criterion, if it exists, must do so in order to bring a desired element of control over a trust having many potential beneficiaries and no explicit or implicit purpose to guide the trustees or the Court in its carrying out of the trust. Indeed, the crucial question at issue in the whole debate over certainty of objects is the determination of the way in which and the extent to which it is desired to give effect to a settlement:

the minority in *McPhail v. Doulton* saw the kind of administration of the trust that they believed essential as leading inevitably to the "list" principle of certainty, and there is a curious echo of their reasoning in Dr. Hardingham's support of the *Re Gulbenkian* ([1970] A.C. 508) test as appropriate for the trust power—for unless there is conceptual certainty in that sense, he says, how can the trustees properly exercise their duty of consideration? Not surprisingly, perhaps, Lord Denning would know.

Thirdly, it is surprising that during the whole of his discussion of general and hybrid powers of appointment, both in the context of a discussion of the rule prohibiting delegation of testamentary power and in that of the rule against perpetuities there is no mention of the principle of construction that in the absence of an express indication to the contrary a fiduciary (or a mere) power held by a trustee is generally not exercisable in favour of the trustee himself—a principle of particular application in the field of discretionary trusts.

The book is well produced and stoutly bound. The publisher's practice of including all case names and references, and references to most statutes and to the periodical literature, in the text, rather than in footnotes, caused its usual disruption to a reading of the book, and its standard quota of pages relatively devoid of text and given over to paraphernalia. There seemed to be few misprints, though a reference to the enforcement of uses by the Chancellor (p.65) seemed to deny Maitland's view of the role of the equity jurisdiction and the appearance of a Free Court in Victoria (p.191) suggested a musical climax to the book.

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CASES AND MATERIALS ON EVIDENCE, by *J. D. Heydon*, (Butterworths, London, 1975), i-xxiii, 1-451 pp.

The object of a casebook is to provide the law student with a set of materials from which he can work out, with the occasional help of the law teacher, exactly how the courts approach the subject under consideration. It is not enough merely to extract the cases; they must be edited and ordered to enable the student to understand the subject, and they should preferably be placed in their context by introductory and concluding comments. Finally, to ensure an enquiring mind, the author should raise questions upon which the student can ponder.

Professor Heydon has done most of this. The cases are carefully selected and edited, and comment abounds—so much so that the book almost doubles as casebook and text-book. As a scholar I find this most useful but it has a drawback in that there is occasionally too much detail to be digested easily by the novice to the subject. Furthermore, Professor Heydon's style is often turgid; this makes it difficult to see exactly what criticisms are being made, and where the author stands in relation to the topic. But others may consider this praiseworthy, since at least it leaves the reader to decide for himself which direction he thinks the law should take. The author certainly provides the arguments for and against particular rules in considerable detail. The sections of the book dealing with corroboration, the privilege against self-incrimination,

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the right to silence, confessions, and improperly obtained evidence are extremely comprehensive. The commentary is taken from the number of detailed articles Professor Heydon has written on these topics.

These sections, placed under the general heading of "The Protection of the Accused", make up the longest section in his book. But it is just this emphasis which compels my main criticism of the book.

Professor Heydon claims to have written a book which is "a full guide to the present law" (Preface, v). The book is intended, as it should be intended, to give the student an overall view of the law of evidence. But an overall view ought to stress the essential themes of the subject and this emphasis is lacking in this book.

The essential themes of the law of evidence are consequences of the judgmental approach to dispute settlement, whereby courts settle disputes by applying preordained norms to the facts as they find them. The law of evidence is concerned with the discovery, the proof, of those facts. The most basic evidentiary rule is that the facts in dispute must be proved by the evidence presented at the hearing, and other evidentiary rules determine whether the evidence presented is capable of constituting that proof. The concept of proof is then one essential theme underlying the subject. But furthermore the common law has developed a unique procedure for determining the evidence upon which any conclusion of fact is to be based—the adversary procedure. This demands that parties present evidence to the court in a particular manner, and this manner is determined by the rules of evidence. Thus another essential theme underlying the subject is the concept of the adversary trial. Any course on evidence should explain how evidentiary rules accord with these two basic concepts of the common law trial.

It is a mistake to look upon the law of evidence as a collection of disparate topics, yet this is what Professor Heydon does. In the Preface he says:

"Evidence is a subject which has proved resistant to rational or agreed organization, and there is even some doubt upon its proper province. What this book contains is a mixture of matters united by one or more of the following links. Some matters are particularly interesting to the modern undergraduate (e.g. the protection of the accused). Some are of fundamental theoretical importance (e.g. the rules about hearsay and the burden of proof). Some matters have received or require the attention of law reformers acting on some consistent principle."

Professor Heydon thus turns to extraneous matters to link together what seems to him disparate topics relating to the law of evidence. Such an approach fails to do justice to the subject. The law of evidence is a theoretical and practical unity. It is concerned with proof on a theoretical and practical level. A lawyer stands in court about to call witnesses to convince the trier of fact that his client's claim should be upheld. His task is to put into operation the concept of proof in the context of an adversary trial. This is the essence of the law of evidence. It determines which facts can be presented, how they must be presented and, indeed, to whom they must be presented.

As has been pointed out, the organization of materials for presentation to the law student is of immense importance. Any materials on the law of evidence should be organized to stress the essence of the subject. Professor Heydon's classification is five-fold (excluding the introduction). He deals, in

order, with: "Burdens and Presumptions", "The Protection of the Accused", "Hearsay", "Witnesses", and "The Course of Trial". Such a classification does not stress either the concept of proof or the nature of the common law adversary trial. Indeed the longest section, "The Protection of the Accused", arguably has more to do with controlling police practices than illustrating the essence of the law of evidence.

But the critic should be constructive. How can the law of evidence be presented to lay bare its essential themes? One way is to divide the subject into three parts, one describing the nature of proof and the evidential rules which flow from applying such a concept, another describing the adversary trial and the evidential rules which flow from applying that concept, and a third part containing those rules not based upon the concepts of proof or the nature of the adversary trial but rather based upon extraneous policies, such as controlling the police. Such a classification stresses that some rules do flow necessarily from our idea of proof by adversary trial, whereas others would exist whatever basic ideas of dispute settlement were followed. One interesting conclusion from such a classification of the subject is that most of our rules of evidence do flow from the concept of proof and the idea of the adversary trial rather than from extraneous policies.

The concept of proof dictates that conclusions of fact must be made by reference to the evidence before the trier of fact. Thayer in his *Preliminary Treatise to the Law of Evidence* has traced the transition of the jury from a body acting on its own knowledge to one acting only on the evidence presented by the parties. From this evidence the facts in dispute must be inferred. As the facts in dispute are past events, they can only be inferred (from the evidence presented) to a greater or lesser degree of probability. They cannot be inferred with absolute certainty. In the concept of probability we find an explanation of what we mean by proof. The concept cannot be analysed here (*cf.* my "The Uncertainty of Proof" (1976) 10 *M.U.L.R.* 367), but in this context it can be noted that the concept explains basic ideas in the law of evidence such as *relevance*, *probative value* and *circumstantial evidence*. The most basic rule in the law of evidence is that evidence must tend to prove or disprove a fact in issue before it can be put before a trier of fact, *i.e.*, the evidence must increase or decrease the probability of a fact in issue. This increase or decrease in probability is the probative value of the evidence. But many items of evidence may bear upon the probability of a fact in issue. The combining of these probabilities to discover the final probability of the fact in issue is really an exercise in circumstantial evidence. Whether the facts in issue are proved or not depends upon whether the evidence establishes their probability to the degree laid down by the law—the balance of probabilities (or reasonable satisfaction) in a civil case and beyond reasonable doubt in a criminal case. The concept of probability thus explains what is meant by the *standards of proof*. But the concept also helps to explain some of the rules of *admissibility*, rules operating to control or exclude the presentation of relevant evidence. Some items of relevant evidence are not very probative, and to prevent triers of fact (particularly, it is said, juries) giving such evidence more probative value than it is worth the law excludes it altogether. Thus evidence of the accused's *bad character* is undoubtedly relevant but usually insufficiently so, so that as a general rule it is excluded. Only if its probative value can be clearly demonstrated will evidence of the accused's bad character be admissible under the *similar facts* exception. The issue is simply one of probative value, as was stressed by the House of Lords in *Director of Public Prosecutions*

v. *Boardman* ([1975] A.C. 421). The general rule excluding evidence of the accused's bad character applies equally in cross-examination unless legislation equivalent to s.1 of the Criminal Evidence Act, 1898 applies. These exceptions are based on exceptional probative value or ideas of adversary fairness (e.g., that the accused must always be able to discredit his accusers). Some items of evidence which are of doubtful probative value are not excluded altogether, as evidence of bad character is excluded, but can only be acted upon if there is other corroborating evidence or if the trier of fact has been directed to carefully assess the probative value of the evidence. So from the concept of proof the rules relating to *corroboration* have grown.

Just as the concept of proof explains these evidential rules so other rules can be explained by the adversary procedure. The procedure demands that the parties control the presentation of evidence to an independent trier of fact, and that each party has the opportunity to comment on the other's evidence. These characteristics explain why the trier of fact cannot act on its own knowledge and explain why special rules must exist, under the heading of *judicial notice*, to allow exceptions to the rule. The adversary characteristics explain the rules relating to *burdens of proof*. The party issuing proceedings must adduce evidence substantiating his claim. If his evidence does not establish a case to answer his claim will fail; if the trier of fact is not persuaded to the requisite degree his claim will fail. In other words, claiming parties must satisfy evidential and persuasive burdens of proof. Rules relating to *presumptions*, which may be based on the concept of probability or extraneous policy factors (e.g., the presumptions relating to marriage and legitimacy), may be considered as merely an aspect of the rules relating to burdens of proof, for the purpose of a presumption is to determine which party bears the burden of proving a particular issue. It can be appreciated that although the concept of burden of proof is made necessary by the adversary procedure, other extraneous matters may be considered in determining the incidence of the burdens.

But most importantly the adversary procedure explains those seemingly technical rules governing the *course of trial* and the *hearsay rule*. The rules regulating the presentation of evidence during the trial are primary to our system of dispute settlement. Professor Heydon relegates these rules to the last disparate chapter in his book. The practising lawyer would undoubtedly be upset by this emphasis, and so should the scholar be. An important characteristic of the adversary trial is that as a general rule evidence should be testimonial, the oral testimony of eye-witnesses subjected to the oath and cross-examination. This explains the complexities of the rules governing refreshing memory, the necessity for rules relating to hostile witnesses, the exclusion of out-of-court statements by witnesses and others. Any criticism of these rules should involve a discussion of the utility of oral testimony on oath subject to cross-examination.

It is surprising how few rules of evidence remain, and of those some, arguably, also have their origins in the adversary trial. For example the *privilege between solicitor and client* and the *privilege in aid of litigation* are unique and must be procedurally justified. How else can one explain the absence of further privileges protecting other confidential relationships such as priest and penitent, doctor and patient, etc.? Even the *privilege against self-incrimination* can be regarded as flowing from the adversary characteristic whereby each party must collect his own evidence without relying upon the forced interrogation, in or out of court, of the other party. Such inquisitorial

methods are generally discouraged by the common law. Aspects of *competence and compellability* have an even more obvious relationship with the adversary trial. The accused cannot be called as a witness for the prosecution and nor can his wife, for at common law man and wife are one. Of course, these days the competence of a spouse would be justified by reference to policies extraneous to the procedural system.

If these arguments are accepted it can be appreciated that few rules are justified solely by reference to extraneous policies. Privileges based upon *public policy* clearly are, as are rules excluding *illegally obtained evidence* in order to control the activities of the police. But such exclusionary rules have been little developed, particularly in England, although there has been a recent tendency in the Full Court of the Supreme Court of South Australia to exclude illegally obtained evidence (see *R. v. Stafford*, judgment delivered April 8, 1976, as yet unreported).

It is difficult to escape the conclusion that the law of evidence exists as a result of the acceptance by the common law of proof by adversary trial. The subject is after all peculiar to common law countries and there must be some reason for that. It is therefore wrong, as Professor Heydon does, to look on the subject as a mass of disparate rules. There is a theoretical and practical unity underlying the entire subject, and any student book should emphasize this unity if the novice is to come away with an understanding of the subject.

Two other criticisms of the work could be made. Firstly, more questions should be posed and illustrations given upon which the student could ponder. The law of evidence is after all concerned with the discovery of facts, and the most difficult skill to acquire is the application of the rules to diverse fact situations. To confront the student with fact situations gives him an opportunity to develop this skill. This leads to a final criticism that, as the law of evidence is concerned with facts, the facts of any case extracted should receive as much emphasis as possible. Professor Heydon has summarized the facts of most cases: despite the accuracy and perhaps because of the succinctness of these summaries, the result is an under-emphasis of facts. But of course failure to summarize facts would result in a case-book of intolerable length. The criticism is made although it is difficult to know how, in the context of a case-book, it can be overcome. Perhaps the skills of applying the rules of evidence to differing fact situations must be taught by other means; perhaps they can only be developed by practise of the law. These problems reflect the fascination of a subject on the one hand based in theory yet on the other constantly demanding practical application.

*Andrew Ligertwood**

PRINCIPLES OF EVIDENCE, by *F. Bates* (The Law Book Company, 1976), i-xix, 1-151 pp.

The title is misleading; those who come to this little book expecting new insights into those fundamental principles underlying the law of evidence will be disappointed. Nowhere in the book are those principles exposed, let alone discussed. The book would be more aptly entitled "A Short Summary of the Technical Rules of Evidence".

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The author is apparently of the opinion that books on legal topics are too long, and he has set out to write a short book, to be read essentially by undergraduates but also, he hopes, by policemen, social workers "and, perhaps, even occasionally [by] the legal practitioner". As Mr. Bates recognises, such a book is not "an easy book to write". It requires an author with considerable understanding of the basic concepts underlying his subject, for brevity and comprehension can only be achieved by distilling the subject to its very essence. It cannot be achieved by taking a formal textbook and summarizing it. Yet this, on the face of it, is what Mr. Bates has done. In all probability his book would place the law of evidence beyond the comprehension of any novice reader, be he undergraduate or layman.

The pity of it is that the law of evidence is not a hotchpotch of technical rules developed without rhyme or reason. Rather it has developed logically from the basic concepts of proof and adversary trial by jury. One must understand the theoretical and practical operation of these concepts to understand the subject. This admixture of the theoretical and the practical makes the subject one of the most fascinating in the law. In this context these matters can only be asserted, not justified, but it is a great pity that Mr. Bates has produced a book perpetuating the myth that the law of evidence is pure technicality.

It is also unfortunate that in writing this book Mr. Bates did not have in mind a most admirable "little book" on evidence—*An Introduction to the Law of Evidence (For Police Officers)* by W. A. N. Wells, now a Judge of the Supreme Court of South Australia. Mr. Justice Wells' work is designed to instruct undergraduates, police officers, welfare workers and practitioners, emphasizing principle, avoiding technicality. The most useful evaluation of Mr. Bates' book can be made by comparing his treatment of various topics with the treatment given those topics by Mr. Justice Wells. As a random example compare Mr. Bates' treatment of "Refreshing Memory" (pp.56-57) with that of Mr. Justice Wells' (paras. 16.57-16.72).

It is impossible to state all the criticisms that the reviewer has of particular topics in Mr. Bates' book but the following list is given of examples of Mr. Bates' treatment. At p.6, he draws the, to the novice especially, unhelpful and confusing distinction between legal relevance (relevant evidence excluded on grounds of policy) and admissibility (relevant evidence excluded for additional legal reasons); at p.9, it is suggested that magistrates need not apply the rules of evidence rigorously as they are less likely to be confused by inadmissible evidence than jurors; at p.12, when dealing with the submission of no case to answer (he fails to distinguish a submission "on the law" and a submission "on the facts") Mr. Bates says election is irrelevant in criminal cases despite the decision in *Brauer v. O'Sullivan* ([1957] S.A.S.R. 185) which certainly is followed in this State; at p.12, Mr. Bates cites *R. v. Abbott* ([1955] 2 Q.B. 497) without citing Victorian decisions on the same topic (*Jones* [1956] V.L.R. 98 and *Anthony* [1962] V.R. 440) which refuse to follow *Abbott*; again at p.12, it is asserted that judicial notice will always be taken of regulations, a controversial assertion to say the least (judicial notice suddenly appears on p.12 without introduction or rationalization); in Chapter 3, after stressing the distinction between evidential and persuasive burdens of proof, he fails to advert to the distinction when discussing statutory exceptions and provisos on p.19; at p.23, he asserts that the civil standard of proof is "on the balance of probabilities" but at p.24 asserts that it is "reasonable satisfaction"; the discussion of presumptions in Chapter 4 fails to emphasize that the

purpose of presumptions is to determine who has the burden of proof (evidential or persuasive) on any particular issue (as Cross points out this provides a logical classification of presumptions, but Mr. Bates rejects rationalization in this area and asserts that "the most satisfactory way to approach presumptions is to treat them as arising out of specific fact situations and as operating in the contexts of such situations"); the section dealing with conflicting presumptions (pp.31-32) could only confuse the novice (and anyway conflicting presumptions can only be explained in terms of who has the burden of proof on a particular issue—normally there is no conflict); at p.35, Mr. Bates says of unsworn statements: "Indeed it is certainly true that such statements seem to serve little purpose since, owing to the absence of cross-examination they are unlikely to be particularly cogent"—many a defence lawyer would disagree that the unsworn statement serve "little purpose"; the two paragraphs on evidence illegally obtained tacked on to the end of Chapter 5 (which is headed "Competence and Compellability") are not only out of place but inadequate; Chapter 6, which deals with corroboration begins not by explaining where and why corroboration is required but leaps straight into the issue of what is corroborative evidence; the technical terms of "corroboration as a matter of law" and "corroboration as a matter of practice" are never explained clearly; at p.42, the question of whether the unsworn testimony of one child can corroborate the unsworn testimony of another is posed but not answered in the ensuing discussion (which is hopelessly and needlessly technical now the doctrine of mutual corroboration has been accepted by the House of Lords); the discussion of lies as corroboration fails to mention the recent case of *Chapman* ([1973] Q.B. 774); and so on.

As can be appreciated from the foregoing account, the coverage in the first forty or so pages is extensive. Mr. Bates has attempted to pack too much detail into this little book, detail which is disjointed, often out of context, and as a result sometimes inaccurate and misleading. It is doubtful whether any novice to the law of evidence could grasp the *principles* of the subject by reading this book.

*Andrew Ligertwood**

DECLARATORY ORDERS, by *P. W. Young* (Butterworths, Sydney, 1975), i-lxiii, 1-205 pp.

On the face of it nineteenth century Benthamite thinking and the legal positivism which flowed at least in part from this helped to create a new order in the Australian and English legal systems. No longer was the innovatory zeal of a Lord Mansfield an acceptable concomitant of the judicial function—and perhaps rightly so. The doctrine of precedent which had begun to evolve in its modern form in the eighteenth century tightened and some would say ossified in the second half of the nineteenth century. But it was one of the ironies of nineteenth century legal history that many of the Benthamite reforms of procedure, culminating in the Judicature Acts, made it possible for a revival of judicial experimentation and innovation in the working of the law. One of the most important examples of this has been with respect to the use of the declaratory order. In the time-honoured fashion of the common

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law a procedural device has become the foundation of many developments in the substantive law.

The modern use of the declaratory order has its origin in the English Chancery Act, 1852. There it was directed, with disarming simplicity, that no suit "shall be open to objection on the ground that a merely declaratory decree is sought thereby and the court may make binding declarations of right without granting consequential relief". Sixty or so years later in *Dyson v. Attorney-General* ([1911] 1 K.B. 410) the declaration took a great leap forward. It became available as a "remedy" in public law. It then became possible, at least partially, to avoid the idiosyncracies of the prerogative writs, the forms of action of public law. These ancient writs, which have so bedevilled the working of public law (even in their modern form as orders) had, inexplicably, escaped the net of nineteenth century reformers. But the declaratory order has been of wide significance, too, in the field of private law. As Lord Sterndale affirmed in *Hanson v. Radcliffe U.D.C.* ([1922] 2 Ch. 490, 507): "The power of the court to make a declaration, where it is a question of defining the rights of two parties is now almost unlimited. I might say limited by its own discretion. The discretion should, of course, be exercised judicially, but it seems to me that the discretion is very wide."

In Australia, the declaration has long been accepted as an important "remedy", not least in the field of Australian constitutional law. Its potential for breaking down barriers to expeditious decision making in this context, as elsewhere, is perhaps best exemplified in the *Pharmaceutical Benefits Case, Attorney-General for Victoria (ex rel. Dale) v. Commonwealth*, ((1946) 71 C.L.R. 237). Its capacity for covering a range of fields, extending even to the fringes of criminal law, is demonstrated in *Cheetham v. McGeeham* ((1972) 2 N.S.W. L.R. 222). There, Street C.J. in Eq. made a declaration on the formula to be used in applying prison regulations relating to the time of a prisoner's release. Over-all, the importance of the declaration in Australia in recent years, and one reason for the publication of this book, is the belated reformatory zeal of the New South Wales Parliament in relation to its court structure. This finally has brought the mother State to a situation of grace in the working of its Supreme Court roughly equivalent to that achieved in South Australia and elsewhere 100 or so years ago. An amendment to the N.S.W. Equity Act in 1965, as Chief Justice Street says in his Foreword, enabled declaratory relief "in the full sense" to become available in that State for the first time. As confirmed by the Judicature Act-style reforms contained in the Supreme Court Act, 1970 supplemented by the establishment of an Administrative Law Division of the Supreme Court in 1973, New South Wales may in fact now, in some ways at least, be in advance of other Australian jurisdictions as regards the use of the declaration. Certainly, in what is probably (both quantitatively and otherwise) the most litigious of Australian jurisdictions, upwards of one third of the matters on the motion list of the Equity Division of the Supreme Court, for example, now seem to be declaratory proceedings.

Basically this first Australian treatise on declaratory orders classifies and summarises the circumstances where declaratory orders may be used. It does not purport to explore in depth the historical influences which have contributed to the growth and wide acceptance of this procedural device. As a consequence, the now out-of-print works by Borchard and Zamir remain required reading for those who seek to explore the lines of development closely. Nor does the author purport, as he says in his Preface, to "go into matters which may well delight

the academic or the historian as Borchard does". Self-effacingly he affirms that he is presenting a "practical guide to the scope of the declaratory order". His book, he says, "is in essence a list of examples over the whole sphere of the law as to how declaratory orders can be used to give speedy justice". All this should not, however, detract from the undoubted value and significance of this work. In much the same way that substantive law may be secreted in the interstices of legal procedure so, too, in this book, much of substance is secreted behind the modestly expressed aims of its author. It is one of the weaknesses of some modern legal scholarship that the intricacies of a peculiar issue may be explored almost *ad nauseam* at times. Too often, the broad ranging importance of a subject may be neglected. In some ways at least, this book is worth a baker's dozen of learned articles on declaratory orders. By exploring and classifying the extensive range of cases on declarations from the preliminaries such as jurisdictional issues and *locus standi*, through to discussions on the use of the "remedy" in both public and private law, the full impact of the declaration on Australian law is exposed. At the same time, this broad-ranging discussion of the Australian position demonstrates that there can be no overseas published substitute for a work like this. This book illustrates the essentially Australian conditions which must be brought into account if the law in this field is to be understood adequately and is to evolve, as it should, in response to Australian conditions. Similarly, the fact that a study appears, as here, in much the same form as a Digest, with propositions stated in a simple, easy-to-follow manner, should not be allowed to detract from its value. Apparent simplicity may often demonstrate, as it does here, that the author, in fact, has more understanding and grasp of his subject than many of those who are inclined to convolution and complexity in their writing.

If, as Learned Hand once affirmed, "justice is the tolerable accommodation of the conflicting interests of society" then the declaratory order has become one potent instrument for this purpose. Admittedly, the judicial experiments and innovations which have marked the evolution of the law in this area may not accord with the highest demands of nineteenth century Benthamite thinking on the limited role to be allotted to courts. Then again, however, the records of legislatures and their administrative offshoots too often have demonstrated a failure to adopt the role of guardians of justice as many nineteenth century reformers wished them to do. In circumstances like this it may not only be forgivable, but even necessary, that courts should be enabled to provide forms of control on the abuse of power in which the declaration can play a significant part. As Young concludes his valuable book: "the history and development of the remedy seem to ensure it a prime place with the procedures to give justice to those who seek it in the latter part of the Twentieth Century".

*Alex. C. Castles**

CONFLICTS OF LAW IN AUSTRALIA, by P. E. Nygh (Butterworths, 3rd edition, 1976), pp. i-xlvi, 1-530. Recommended price: cloth, \$25.00; paper, \$20.00.

It is not often that a new edition of an accepted text book warrants more than the briefest note in a law review. There can rarely be justification for extended assessment of the up-dating required by statutes passed and decisions made since the previous edition, while most that can be said about a book's

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general content and style will usually have been said by reviewers of the first edition itself. More extensive treatment is warranted, however, when an author substantially rewrites his work or when the additions to, or subtractions from, that edition are such as to change its essential nature. It is for the latter reason that Nygh's third edition warrants more than a passing note.

There can be no doubt that Professor Nygh's book is an accepted and well-respected textbook. Like previous editions, the third is both comprehensible and, within its stated limits, comprehensive, displaying once again the author's meticulous care and scholarship. In some respects it will be more valuable than its predecessors since Professor Nygh has added new and informative chapters on Arbitration and Corporations, and has re-arranged some others. The deliberate inclusion of New Zealand statutory and case materials is also a welcome development, particularly in light of the innovative tendencies displayed in that country in relation to such classic problems as domicile and legitimacy. But there are other respects in which the third edition is likely to be considerably less valuable than its predecessors. This is not for any defect in Professor Nygh's excellent work in the field of Conflicts. Rather, it has apparently been caused by escalating publishing costs in a field where the market is notoriously a narrow one. "In order to keep the book within manageable proportions, subtractions and savings became necessary" (Preface, v). Regrettably, the subtractions and savings (the second edition was 808 pages long; the third is only 530 pages, though more tightly printed) are so important as to reduce the utility of the book, both for practitioners and for students. Theoretical discussions were kept within strict bounds in the earlier editions, but have been more narrowly restricted in the third. Federal aspects of the subject have also suffered heavily. The chapter on the history of conflicts law has been omitted altogether. So also have those on the Conflict of Laws in a Federation, Full Faith and Credit, and Federal Jurisdiction and Choice of Law. These latter topics are now dealt with in a cursory manner, mainly in Chapter I, where they occupy less than five full pages. The chapter on Service and Execution of Process within Australia has also been omitted, although its constituent parts have been relocated in chapters on jurisdiction and recognition of judgments. Even so, it is disturbing to reflect on the implications of the inclusion of a discussion of Part IV, Service and Execution of Process Act, in a chapter entitled "Enforcement of Foreign Judgments by Statute"!

Omission of the earlier discussions of full faith and credit and federal jurisdiction and choice of law is particularly unfortunate. While little use has yet been made of the former doctrine in Australia, the judgment of Zelling J. in *Hodge v. Club Motor Insurance Agency Pty. Ltd.* ((1974) 2 A.L.R. 421) indicates the dynamic use which might be made of that concept both in matters of jurisdiction and of choice of law. Moreover, appreciation of the difficulties attendant upon federal jurisdiction and choice of law, both in diversity matters and in respect of suits against the Commonwealth, is clearly essential to an understanding of Australian conflicts law in practice. The omission of Nygh's earlier discussions of these matters can only be regarded as a significant disservice to both classes of the book's established clientele. As a purely economic consideration, the decision to exclude these matters necessarily involves further expense for those who would study the subject at an appropriate level, the obvious addition to fill the gap in Nygh's book being Pryles and Hanks' *Federal Conflict of Laws* (1974), which is also published by Butterworths at recommended prices of \$15.00 (cloth) and \$10.00 (paper).

Without intending the slightest reflection on the merits of that book (reviewed (1975) 5 *Adel. L.R.* 206), one may be forgiven for thinking that a single text on general conflicts law should suffice, and that limitations on coverage, not obviously justifiable by the nature of the subject, should not be permitted to impose unnecessary economic burdens, particularly on University students who must already pay a high price for the literary part of their legal education.

The economic implication is not the only unfortunate one. A reduction in the "theoretical" coverage in a conflicts book inevitably narrows the view of conflicts law which it contains, and contributes, in ways which normally remain quite imperceptible, to a narrowness of vision in both students and practitioners. An impression is given that the subject is simpler than, in reality, it is. Worse, avenues for argument and decision-making remain unexplored simply for a lack of adequate signposting. Specifically federal solutions are rendered most unlikely. What is needed in the Conflict of Laws, whether for student or practitioner, is more theory and more understanding of the specifically federal nature of the problems, not less; more discussion of recent statutory provisions dealing with territorial application, particularly in relation to consumer contracts; more discussion of the utility of an inherited and internationally based system for solving interstate conflicts cases; more discussion of the functional possibilities of a largely Roman law based set of categories for the solution of twentieth century problems like direct recourse against insurance companies and contribution between tortfeasors. One only has to compare the judgments of the Full Court in *Hodge v. Club Motor Insurance Agency Pty. Ltd.* (*supra*) to appreciate the significance of matters like these, and to realise just how practical is theory in the Conflict of Laws. If pruning had to be done, why include new chapters on particular substantive material at the expense of matters basic to the subject as a whole?

The style of the work has also been changed considerably, in line with what appears to be Butterworths current house style. Some readers are likely to find distracting the insertion of case references in the text itself, while the preference for "CLR", "LQR" and "ICLQ" over the traditional "C.L.R.", "L.Q.R." and "I.C.L.Q." may not appeal to everyone on aesthetic grounds. More significant is the deletion of the references to recommended reading found, in the second edition, at the end of each chapter. These were useful, though not indispensable, guides for those who needed ready access to the more important academic literature. Similarly, Professor Nygh has been forced to prune his references to foreign materials, particularly those from the United States. But the changes in style in Nygh's third edition are minor by comparison with those in the book's coverage and it is in respect of the latter that the work will be judged. Some students will be tempted to buy secondhand copies of the second edition, and use library copies of the present one, rather than indulge in the purchase of two books where previously one would have sufficed. If so, the savings made in the present edition may prove, in the long run, to have been self-defeating.

*D. St.L. Kelly**

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POVERTY AND THE RESIDENTIAL LANDLORD-TENANT RELATIONSHIP by Adrian J. Bradbrook. Australian Government Publishing Service, 1975. Recommended price \$3.90.

Mr. Bradbrook's research report for the Commission of Inquiry into Poverty is a significant contribution to the growing discussion in Australia concerning housing generally and the landlord and tenant relationship in particular. Its publication followed the Priorities Review Staff's Report on Housing and preceded the Law Reform Committee of South Australia's report on standard terms in tenancy agreements (thirty-fifth report, 1975).

It is not to damn Mr. Bradbrook's report with faint praise to say that its greatest strength lies in its comprehensive collation of various solutions and approaches that have been adopted in various jurisdictions. As moves have already been undertaken towards reform in this area, it is crucial that the collected wisdom of overseas reformers be available to Australian legislators and those who advise them.

In general, the recommendations that he makes are both reasonable and fair. After advocating the need for advice to prospective tenants the report recommends the abandonment of the fiction of the residential tenancy as the conveyance of an estate in land and its replacement with formal recognition of it as a contract for services. This would introduce into the law of landlord and tenant such principles of contractual law as frustration, inter-dependence of covenants and the obligation to mitigate one's loss. On the other hand it would remove concepts such as *interesse termini* and the distinction between covenants *in posse* and covenants *in esse*.

The recommended reforms include an implied warrant of habitability and an obligation on the landlord to maintain rented premises in a habitable condition; security deposits to be held by an independent body; restrictions on the availability and methods of eviction combined with more effective means of removing defaulting and overholding tenants; and priority housing and rental rebate systems in public tenancies.

Two proposals that merit special attention are the establishment of Residential Tenancies Boards and the means to enforce the obligation to provide habitable accommodation. A Residential Tenancies Board would act as an arbitration tribunal and would have numerous advantages: "proceedings would be cheap and speedy, the rules of procedure would be informal and there would be no necessity for legal representation. It is anticipated that the Board would conduct hearings during the evenings as well as during normal working hours so that neither party would lose wages because of the need to take time off from work" (p.6). The Board would determine disputes relating to security deposits, to liability to effect repairs and to whether the rental was excessive. It would also have jurisdiction to order possession and award damages for breach of covenant. In addition, the Board would "provide and disseminate information concerning rental practices, rights and remedies" (p.9). The Boards would be supplemented by Tenancy Investigation Bureaux. A Bureau would investigate complaints by tenants and matters referred to it by a Board. It would enforce the obligation to maintain rent books, if such an obligation were introduced. A Bureau could represent a tenant before a Board.

The first solution that Mr. Bradbrook recommends (pp.25-26) to the vexed question of enforcing a landlord's obligation to provide habitable accommo-

dation is to give the tenant the right to apply to the Residential Tenancy Board to withhold the payment of rent until the necessary repairs are effected. The rent would be paid to the Board and, should the landlord fail to repair the premises, the Board could authorize the repairs to be performed and pay the cost from the rent paid to it. The tenant would be entitled to quit if the premises were unfit for human habitation.

The fundamental objection to the rent withholding remedy is that it is unlikely that tenants will use it. As has been often discovered in practice, judicial remedies that rely on tenants for initiation have been relatively ineffective in this whole field. The reasons include expense, ignorance, and fear of retaliation by the landlord. While the costs can be reduced by the availability of legal aid, simplifying procedures, strictly limiting the power to award costs and even prohibiting legal representation, no public education campaign will ever be completely successful. Nor will fear of the consequences ever be wholly overcome. No matter how extensive the protection against retaliatory eviction and harassment, legislation will not overcome such indirect threats as, "If you complain, the Welfare will find out you're keeping children in these conditions and take them away from you."

The intervention of an administrative agency capable of acting without having to await a complaint appears to be the only practical answer. Mr. Bradbrook recognizes this in relation to the maintenance of records of rental payments, but in arguing against administrative initiative in respect of repairs he states, "No tenant should be forced against his will into a confrontation with his landlord" (p.25). If the unprompted intervention of an administrative agency can be considered a confrontation between landlord and tenant, why is it permissible in respect of the rental records but not in respect of the condition of the rented premises?

The ineffectiveness of laws that lack administrative support is well illustrated by the fate of the South Australian Excessive Rents Act, 1962, as amended. Not only have the provisions dealing with excessive rents proved ineffectual, but so have provisions of general application requiring receipts for rent, the maintenance of accurate records, and the prohibition of harassment and levying of distress. At least in large part this must be due to the fact that no department or other body has been made responsible for the enforcement of the Act.

It seems difficult to understand why the Residential Tenancies Board, and not the Tenancy Investigation Bureau, should be responsible for public education. This function seems to sit uneasily with the Board's other functions which appear to be clearly quasi-judicial. The advantages of establishing a separate tribunal rather than vesting the appropriate jurisdiction with an existing court also need to be examined. The advantages of specialization and simplified procedures could be obtained by a formal or *de facto* division of judicial personnel and by making appropriate rules of court. One suspects that the administrative costs of such an approach would be less than those involved in the establishment of a new tribunal.

A more important argument remains for integrating the landlord and tenant jurisdiction with the existing courts, however. It is that, if the tribunal hearing a landlord and tenant suit is a court, a full range of legal procedures and remedies are readily available to the parties, for example, counterclaims, set offs and equitable defences. Not even the width of jurisdiction envisaged by Mr. Bradbrook would enable a Board to allow a tenant whose car was negligently

damaged by the landlord to counterclaim or set off the cost of repairs if he was sued for arrears of rent after he instituted an informal set-off procedure. With a separate Board the time-wasting device of stays of proceedings would be necessary. In an integrated system, neither separate enforcement machinery nor the registration of judgments in ordinary courts would be required.

It seems that Mr. Bradbrook would at least implicitly discourage legal representation at the hearing of landlord and tenant matters. Research by Mosier and Soble in Michigan ((1973) 7 *U. Mich. J.L. Ref.* 8) indicates that representation significantly increases the prospects of a favourable outcome for tenants. If an adequate system of legal aid can be provided, any measure to limit legal representation may well be contrary to the interests of the persons it is designed to protect.

To the reviewer the most effective and the fairest means of protecting the poor tenant is to place the enforcement of his or her rights primarily in an administrative agency, which can act either on complaint or on its own initiative. It could make such decisions as whether the rent is excessive, who is responsible for particular repairs, and the proper disposition of the security deposit at the determination of the tenancy. If the agency had power to make decisions, the parties would have the right of a prompt and full review by a court. The court would also have jurisdiction in matters such as orders for possession and relief against forfeiture.

Some irritating factual errors occur in the report. Perhaps the most obvious is on page 5 where it is stated in a footnote that in South Australia "actions may be heard before the local court judge or a special magistrate, or a special magistrate and two justices." Since the vast re-organization of local courts in 1970, jurisdiction in most landlord and tenant cases is vested in local courts of full jurisdiction in which a local court judge presides. Magistrates are usually only involved in actions to recover bonds and arrears of rent after a tenant has vacated the premises. The possibility of a bench comprising a magistrate and two justices no longer exists.

Such criticisms as can be made should not detract from the importance of Mr. Bradbrook's work as a whole. It is a comprehensive and cogent examination of an area of law where reform is urgently needed. A reading of the report is not merely informative and stimulating, but also essential for anyone contemplating law reform in respect of residential tenancies.

*J. J. O'Halloran**

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