does not yet substantiate the common generalization that broken homes are a cause of juvenile delinquency. She calls for a drastic change in the attitude of society to both marriage and divorce and points to the need for a far greater community effort than exists at present for educational programmes on family living and for the extension of community resources to remove the stress which exists in so many marriages. She sums up the philosophy of her paper by stating that man must genuinely aim to become his brother's keeper, and that many human attitudes to relationships must be changed before this happy state is reached.

This brief summary of the papers presented at Monash falls far short of doing justice to any, but several important conclusions emerge. It is most significant that a group of well informed people, all expert in different fields touching the subject under discussion, finds much to criticize in existing divorce laws. A case for drastic reform has been made out. The need for a great deal of careful research has been made clear. The papers delivered at the symposium should provide a valuable basis for that research.

D. M. SELBY*

Matrimonial Causes and Marriage: *Law and Practice* (5 ed.), by the Hon. P. E. Joske, Sydney, Butterworth & Co. (Aust.) Ltd., 1969, 951 pp. ($22.50).

This is obviously intended primarily as a practitioner's book. It is crammed full with useful information but it does not purport to do more than summarise the effect of the maximum number of statutory provisions and and judicial decisions in as concise a manner as possible. Very rarely is there an attempt to discuss decided cases. Indeed cases are not usually mentioned in the text; they are relegated to the footnotes. What appears in the text is a dogmatic statement of what the author considers the law to be on the basis of the statutes and cases listed in the footnotes. One of the few exceptions is the valiant attempt at pages 334 and 335 to lay the long-departed ghost of *Fitzgerald* v. *Fitzgerald*.[1] It is a pity that the learned author did not apply the same energy in the discussion of more recent decisions.

The effect of this approach is a dogmatism which can lead to inconsistency because the author in summarising one case often does not appreciate that it conflicts with his view of a case discussed earlier. Thus, to take an example, at page 349 the learned author states the well-known proposition in relation to desertion that the adoption by a man of a criminal course of conduct which leads to his imprisonment does not of itself afford evidence of intention to desert. On the same page he also states:

> A husband, having killed a man whom he had accused of adultery with his wife, was convicted of manslaughter and served four years' imprisonment; it was held that he was guilty of desertion of his wife which was complete at the end of three years from his arrest and removal from the matrimonial home. The basis of this decision was that there was a separation in fact which resulted from premeditated and wrongful conduct on the part of the husband and that, as such separation was the natural and probable result of such conduct, the intention to bring it about should be imputed to him and he must have contemplated that in all probability it would continue for more than the statutory period of desertion.

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[1] (1869) L.R. 1 P. & D. 694.

This statement is based upon the authority of the New South Wales decision in *Lawler* v. *Lawler*.[2] However, there is no indication in the text that the learned author considers this decision to be inconsistent with the general principle stated earlier; nor does he try to explain, if indeed he does not consider it to be inconsistent, how the distinction should be drawn.

At page 476 of his book the learned author states:

> The essence of connivance is that it precedes the event and generally speaking the material event is the inception of the adultery and not its repetition, although the facts may be such that connivance at the continuance of an adulterous association shows that the party conniving must be taken to have connived at it from the start. It is too absolute a rule to say that connivance can only occur at the inception of adultery; there may be connivance at the continuance of adultery though there has been none at its inception; a complaining spouse must come to the court with clean hands.

Again there is no attempt at reconciliation or analysis of the apparent conflict between these two sentences. The first sentence summarises the effect of the decision in *Churchman* v. *Churchman*;[3] the second summarises the effect of the decision in *Rumbelow* v. *Rumbelow*.[4] The two decisions obviously appear to be inconsistent with one another. At the same time the learned author makes no mention in this connection of the discussion of this problem by members of the High Court in *Haevecker* v. *Haevecker*[5] and *Gale* v. *Gale*.[6]

At other times he simply glosses over differences which undoubtedly exist. Thus at page 452 the learned author first sets out the effect of the decisions in *Judd* v. *Judd*[7] and *Taylor* v. *Taylor*,[8] and later down the same page summarises the effect of the decisions in *Lamrock* v. *Lamrock*[9] and *Painter* v. *Painter*.[10] There is no hint in his treatment of the matter that the first two cases are in reasoning and judicial attitude completely opposed to the last two. From the reading of that page it would appear that all four decisions are today equally valid and that no disapproval has been expressed of the approach underlying the two earlier decisions by the courts deciding the later cases. This is not merely misleading, it is in fact untrue.

Indeed the whole treatment of the topic of separation for five years is most superficial. It is not for lack of judicial authority. Since this ground was introduced there has been a flood of cases on this particular aspect of the Matrimonial Causes Act. Nor is it an unimportant ground; it now ranks third in popularity amongst the grounds for divorce. Yet its treatment in the book is confined to about four pages as compared with the extremely lengthy and detailed treatment which is given to such admittedly more popular grounds as desertion and adultery and to the less popular ground of cruelty. A practitioner who consults this book surely should be entitled to more guidance on this particular point.

Another example of a failure to point out differences between decisions is found at page 703 where the author deals with the topic of applications for leave to present petitions. There is no suggestion on that page that there is any conflict between the decision of the New South Wales Full Court in

[2] (1941) 58 W.N. (N.S.W.) 233.
[3] (1945) P. 44.
[4] (1965) P. 207.
[5] (1936) 57 C.L.R. 639.
[6] (1952) 86 C.L.R. 378.
[7] (1961) 3 F.L.R. 207.
[8] (1961) N.S.W.R. 1025.
[9] (1963) 4 F.L.R. 81.
[10] (1963) 4 F.L.R. 216.

Osborn v. *Osborn,*[11] and the learned author's own decision in *Drzola* v. *Drzola.*[12] Indeed the decision in *Osborn* v. *Osborn* is only referred to in a footnote together with the English decision in *Bowman* v. *Bowman*[13], which the New South Wales Court purported to repudiate in its application to the Australian Act. Indeed the reader is left with the impression that the question of the possibility of reconciliation is the most important aspect to be considered under s. 43 of the Act and that only in some (unstated) cases has this prerequisite been overlooked. There is no suggestion in the text that the Full Court after careful consideration of the English authority in *Osborn* v. *Osborn* held that the question of reconciliation could only be considered after the existence of either exceptional hardship or exceptional depravity had been established. Much as I might sympathise with the author's personal view, he has at least a duty to represent opposing views in what purports to be a textbook for the guidance of practitioners, not all of whom are fortunate enough to practise in the Australian Capital Territory.

The treatment of the topic of constructive desertion is most confusing. At page 380 the learned author proceeds to deal with constructive desertion without any apparent reference to s. 29 of the Matrimonial Causes Act. At page 386 he proceeds to deal with something under the heading of "Unreasonable conduct" and it is only at this stage that s. 29 is introduced into the discussion. The unfortunate reader may go away with the impression that constructive desertion and unreasonable conduct are different matters. It may be of course that the discussion of constructive desertion, apart from s. 29, is inserted exclusively for the benefit of New Zealanders. If this is so, however, it should be made clear in the text. For Australians the law relating to constructive desertion is the law which flows from s. 29 and which the learned author discusses under the heading of "Unreasonable conduct".

The learned author also purports to deal with the conflictual aspects of Matrimonial Causes. Here, one must confess, the author's attitude strikes one as positively eccentric. I cannot describe otherwise a definition of polygamy such as occurs at page 132, namely: "A polygamous marriage is one which does not forbid a plurality of wives and where there has been in fact a plurality of wives". Most of the cases which have arisen before English and Australian courts involving so-called polygamous marriages from *Hyde* v. *Hyde*[14] onwards have been marriages in which there was in fact only one wife. On the same page the learned author makes the quaint remark that "a marriage which takes place in a heathen country, between heathen persons, will be regarded as valid where it is based on Christian notions and is monogamous." In the first place one might respectfully suggest that in this day and age "non-Christian" might be a less offensive term. Secondly, of course, one is left wondering how a "heathen marriage" can be based on "Christian notions".

At pages 293-94 the learned author suggests that the Victorian heresy which originated in *Cremer* v. *Cremer*[15] might still be good law. However, no mention is made of the interesting decision by Mr. Justice Gibbs, then of the Queensland Supreme Court, in *Grummett* v. *Grummett,*[16] where his Honour quite clearly held this heresy, if it ever existed, to be inapplicable to determinations under the Matrimonial Causes Act 1959.

The most disturbing aspect, indeed, of the entire book is the unrepentant

[11] (1961) N.S.W.R. 599.
[12] (1968) A.L.R. 71.
[13] (1949) P. 353.
[14] (1869) L.R.I.P. & D. 130.
[15] (1905) V.L.R. 532.
[16] (1966) Q.W.N. 5.

adherence by the learned author to his view expressed on pages 278-281 that the validity of a marriage both as to form and as to capacity is decided by the law of the place where that marriage is celebrated. This argument was raised before Mr. Justice Selby in the case of *Ungar* v. *Ungar*,[17] and was quite properly rejected by that learned Judge. Notwithstanding the rejection the learned author maintains his views in the present edition, and makes only a slight footnote reference to the decision in *Ungar* v. *Ungar* — which he dismisses on the ground that "the criticism of the text fails to notice that it states 'the general rule' ". I do not quite understand from the text what the author means by "the general rule", and what he means by any exception. From my reading of the text, it is quite clear that the learned author would have applied in a case such as occurred in *Ungar* v. *Ungar* the law of the place of celebration. The only grudging concession he is prepared to make is the possibility that where both parties are domiciled in a country which prohibits the marriage, the marriage should be treated as void. This, of course, was not the case in *Ungar* v. *Ungar*.

Of course, the author is entitled to present his views, however heretical they may appear to be. But it must be remembered that he is writing a textbook for practitioners and that his readers are entitled to have some statement of what the dominant view of the law is. It is an undisputed fact that the view which the author puts forward on these pages has not been the law in England or Australia for more than one hundred years. Nor does he put before his readers the orthodox view. He treats the leading case of *Sottomayor* v. *De Barros* (*No. 1*)[18] as an eccentric decision, which he implies might not be followed today. On the other hand he treats the case of *Sottomayor* v. *De Barros* (*No. 2*)[19] as representing the main rule. In fact, of course, as any student of the law of conflicts knows, the true position is the other way round. It was in fact the second decision which was eccentric and of which the High Court in the case of *Miller* v. *Teale*[20] expressed its disapproval.

The book is most certainly useless as a student textbook. It may have some value for the average practitioner, because undeniably it contains a great deal of useful information. But in glossing over uncertainties and in some cases in fact mis-stating the law, it does the practitioner a grave disservice.

P. E. NYGH*

Rechtsphilosophie, by René Marcic. Verlag Rombach, Freiburg im Breisgau, West Germany, 1969, 312 pp. (Price DM 25).

In a survey of recent developments of German legal philosophy by Karl Engisch (whose English version, prepared by me, was recently published in the *Ottawa Law Review*[1]) the corresponding developments in German speaking countries other than West Germany were not included. It has been my intention to bring some representative works in these areas to the attention of readers by way of book reviews. The present book, by one of the foremost Austrian legal scholars, offers an opportunity to start carrying out this intention.

In the golden years of Austrian legal philosophy, which began in 1910

[17] (1968) 10 F.L.R. 467.
[18] (1877) 3 P.D. 1.
[19] (1879) 5 P.D. 94.
[20] (1954) 92 C.L.R. 406, at 414.
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[1] (1968) 3 *Ottawa Law Review*, 47.