Commercial Law (2nd Australian ed.), by G. J. Borrie & D. W. Greig, Sydney, Butterworths Pty. Ltd., 1978, xxxii + 446 pp. (including index). $21.50 (limp cover), $27.00 (hard cover).

Whether medical students need to make a thorough study of anatomy, so as to be able to recognize and name all the bones, muscles, ligaments, etc., of the human body, may still be a matter of debate. So far as law students are concerned, it probably has never been possible to master the manifold rules of all the topics traditionally encompassed in books entitled Mercantile (or Commercial) Law. University Law Schools in Australia have now largely dropped some or all of Arbitration, Bailment, Bankruptcy, Bills of Sale, Carriage of Goods, Moneylending, Partnership and Suretyship from their umbrella subject. The English version (4th Edition, 1975) of the book under review, which was written originally for students taking Part II of the Law Society's Qualifying Eamination, but which, according to the Preface, it is hoped will be found useful to university law students, still embraces Agency, Sale of Goods, Hire Purchase and Consumer Credit, Negotiable Instruments, Insurance Law, Contracts of Employment and "Contracts with a Foreign Element". The present book continues the reduction in breadth in favour of treatment in depth. It chooses only four topics for consideration, viz. Agency, Sale of Goods, Negotiable Instruments and Insurance Law, which is the most that is manageable in a single course if treated at a level suitable for the intellectual needs of university students. According to the Preface it was intended to include a chapter on Consumer Credit, but the idea was abandoned in view of the complete revision of the law that is likely in this area before long. Meanwhile, however, it must be said that the omission of all reference to hire-purchase and other existing forms of consumer credit does give a somewhat distorted impression of the law of sale of goods. In this connection, it might be noted that at page 220 it is said that the provision in the Consumer Transactions Act 1972 (S.A.), s. 8(4), which exonerates the seller from liability for breach of the implied condition of merchantable quality as regards defects of which he or his agent could not reasonably have been aware "strikes at the whole basis of contractual liability which is not in any way based upon the concept of fault"; the provision might have been explained, though not justified, by reference to its existence in the pre-existing hire-purchase legislation.

The Australian author has expanded the Agency section from 41 (smaller) pages in the English book to 90 pages in this one; Sale of Goods from 90 pages to 190; Negotiable Instruments from 65 pages to 100; and Insurance from 45 pages to 58. In doing so he has skilfully woven the Australian materials into the text, so that the book reads like a completely indigenous product. No important Australian case law or statute appears to have been overlooked. His practice is to cite the Victorian legislation where there are similar statutes in the various Australian jurisdictions, but to draw attention to differences, where they exist, in the

laws of individual States and the A.C.T. The style of writing is elegant, clear and easy to read. All footnotes and endnotes have been avoided and their incorporation into the text has been achieved successfully, without creating a staccato effect. The paragraph numbering system that has been adopted, however, is confusing at times: the initial number indicates the Chapter of the book (1 for Agency, 2 for Sale of Goods, etc.); the following numbers run from 01 to 99, but then change to 001 (instead of 100) on wards. Thus 2039, for instance, comes well after 264, but before 356. Even the author seems to have been confused, since the cross-reference at page 129 to "[107]" should have been to "[2107]".

Professor Greig recognizes in his Preface the further splitting up of Commercial Law into semester units that has occurred in Australian Law Schools in recent years. He suggests that the principal objective of the present book is to provide students tackling two such units with adequate coverage of a number of topics in the same volume, without sacrificing academic value. This might save the purchase of individual books for each course. It is doubtful, however, that this objective has been achieved. Courses on negotiable instruments are also likely to contain a goodly measure of banking law, something this book lacks except where directly related to negotiable instruments. Thus a student taking such a course would probably prefer to buy a book on banking law, which will almost certainly contain a large section on negotiable instruments. Although there is no good Australian student text-book on Insurance Law, the chapter in this book is unlikely to suffice, since, apart from the absence of any model insurance documents, it omits discussion of topics such as the relationship between the proposal form and the policy,[1] government control of the insurance industry, the requirement of privity,[2] arbitration clauses (and their statutory counters) and proximate cause. The treatment of the requirement of insurable interest at common law (at pp. 388-9) is sketchy; it is not pointed out that the Life Assurance Act 1774 (Imp.) applies to events other than life; nor is mention made of the insurable interest in a person's own life. The Sale of Goods chapter does probably contain all that a student would require for a course devoted exclusively to this subject, though even here more on international sales would have been welcome. The author claims no more for the Agency chapter than that it is "a suitable introduction to a university-level study of the subject"; the difficulty with this vital subject is that it can seldom occupy a full or half-course of its own and must be fitted in with others (at the University of Melbourne, it goes with Partnership and Unincorporated Associations). Thus, for those universities that retain a Commercial Law course as such, the coverage of this book is likely to serve the needs of the students well; in other institutions purchasers may find that

[1] See K. C. T. Sutton, "The Contract of Insurance" (1972) 5 *N.Z.U.L.R.* 123.
[2] *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70.

they obtain both more and less than they require.

There is another standard which this book, with all its virtues (and there are many), does not attempt to meet. At the conclusion of his celebrated Hamlyn Lectures, *English Law—The New Dimension* (1974), Lord Scarman refers to "the teachers of the law" as "in the long term the most important" of the three branches of the legal profession (the others being the judges and the practitioners). He says:

> The key to the survival of the rule of law as a living and socially relevant force is legal education. The nature, the purpose, and the implications of a law suited to the requirements of the society in which he will have to practise must be brought home to the student . . . Contract, if studied in abstraction from the many various settings in which a consensus of wills is relevant, is no more than a generalized theory about the nature and consequences of agreement coupled with rules, dangerous if made the subject of abstract study, as to the meaning of words and phrases.

The garish yellow cover of this book bears a picture of the commercial centre of a large city (presumably Sydney). One assumes that the publishers' intention is to show that the content is firmly related to the "real" world of commercial life. However, academic spires would have provided a more appropriate picture, if not quite ivory towers. As one who himself labours in academia and who is aware of the pitfalls of any attempt to study the practical effects of the law, your reviewer hesitates to make this criticism, but he would be failing in his duty if he did not measure the present work against Lord Scarman's ideal.

Thus it must be said that for the most part this book contents itself with deep and sound analysis of case-law and statute, confining criticism of particular decisions for the most part to inconsistency with other authority. This is not always the case; for instance, there is a functionally oriented approach to the criticism of *Jones* v. *Canavan*[3] (pp. 33-5) and *Mayne Nickless Ltd.* v. *Pegler*[4] (pp. 384-7) and the brief comment on *Sorrell* v. *Finch*[5] (pp. 80-1). The succinct statement of the need to relax both horizontal and vertical privity in the interests of persons affected by defects in goods (pp. 236-42) is also a model of what can be achieved in a short compass, even if the difficulties created by the American solutions are rather skated over (for instance, the difficulty of proving whether a defect which manifests itself months later was present at the time when the goods left the manufacturer's possession is the same whether the manufacturer's liability is strict or fault-based; thus the opening sentence of [2157] may be misleading). In contrast, the section on transfer of title by a non-owner (pp. 134-70), which deals with the technical rules with great analytical competence, nowhere makes the point that in every case there dealt with the law had to decide which

[3] [1972] 2 N.S.W.L.R. 236.
[4] [1974] 1 N.S.W.L.R. 228.
[5] [1977] A.C. 728.

of two innocent parties was to suffer for the fraud of a third. The point is recognized at page 376 in the context of contributory negligence as a defence to an action for conversion of a cheque, where the possibility of apportioning the loss is adverted to. One would have expected some discussion of Devlin, L.J.'s similar suggestion in *Ingram* v. *Little*,[6] but his Lordship's dissenting judgment is not referred to, nor is the subsequent report of the Law Reform Committee rejecting the suggestion. Although the author refers (at p. 145) to the nineteenth century battle between the courts and the legislature as to whether the owner or *bona fide* purchaser was to be favoured, attention is not drawn to the fact that in the twentieth century nearly all of the cases have concerned motor cars, generally the most valuable consumer durables, which are also highly mobile, and that the problem has been considerably alleviated in Victoria by the simple expedient of requiring the "owner" of a motor vehicle at the time of registration to insert on the registration certificate the name of any financier with a security interest. Typical is the author's reference to the "unfortunate consequences" of *Mercantile Credit Co. Ltd.* v. *Hamblin*[7] (p. 140) without any indication of the criteria by which this conclusion is reached, other than inconsistency with other cases. So, too, the suggestion (at p. 147) that it is "perhaps less" satisfactory to hold that where goods are entrusted to a mercantile agent for purposes of display, the possession is not in the capacity as such agent, is backed up only by a reference to a *dictum* of Lord Denning. Similarly, while there is an implicit assumption in the criticism of *Car & Universal Finance Co. Ltd.* v. *Caldwell*[8] at pages 169-70, that a *bona fide* purchaser for value ought to be favoured in a dispute with the owner (an assumption that could be justified on the basis that the owner is more likely to be insured against his loss), the only reason given for the criticism is that the "decision was contrary to authority".

At pages 210 and 216 the Second-Hand Motor Vehicles Act 1971 (S.A.) is referred to, but only for the purpose of noting that transactions to which it applies are outside the scope of the Consumer Transactions Act 1972 (S.A.). There is no indication of what those transactions are, nor any discussion of the legislation or its progeny in other States. It is worth recalling that the most valuable commodity sold to "consumers" in Roman markets were slaves. Owing to the unscrupulous behaviour of some slave-dealers, the magistrates in charge of the market promulgated the aedilitian edicts, which eventually gave remedies to consumers for latent defects in all goods sold. In nineteenth century England the similar activities of some horse-traders led to the implication by the courts of the conditions of merchantable quality and fitness for purpose, the most significant breach in the doctrine of *caveat emptor*. The twentieth century equivalent of slaves and horses are second-hand motor cars and the

[6] [1961] 1 Q.B. 31.
[7] [1965] 2 Q.B. 242.
[8] [1965] 1 Q.B. 525.

business ethics, or lack thereof, of some used-car dealers has necessitated specific legislation for the protection of buyers of these comparatively expensive items. Even if in this instance, it has not been given general effect so as to apply to all goods, the legislation is surely important enough to warrant detailed treatment in the chapter on Sale of Goods.

One final point on this theme. At the time when he wrote (p. 284) that "[b]ills of exchange are rarely used now except in foreign trade" Professor Greig did not have the advantage of the article by G. de Q. Walker, "The Australian Revival of the Bill of Exchange" (1978) 52 *A.L.J.* 244. However, he might have been alerted to the untruth of his statement by the *dictum* in *H. Rowe & Co. Pty. Ltd.* v. *Pitts*[9] relating to "the large number of bills of exchange which are circulating at any given time". However, even if the assumption that the use of bills of exchange is confined to international trade was well founded, it would have been far better to explain their use in conjunction with bankers' commercial credits, which do not rate a mention (except cursorily at p. 352), than to spend valuable space on the esoterica of noting and protesting and acceptance and payment for honour (pp. 338-40). Bankers' commercial credits have probably also largely rendered obsolete the learning on stoppage in transitu set out at pages 264-6.

On the technical level the book is a marvel of accuracy. All significant recent cases appear to have been picked up at the appropriate places. However, the following suggestions are offered for the possible improvement of the text in any later edition. In the context of the liability of the owner of a motor vehicle for the negligent driving of it by another (p. 7) some reference should be made to *Soblusky* v. *Egan*[10] (noting also that the application of principles from the horse-and-buggy era to an ill-thought out statutory scheme of compulsory insurance led to the shifting of part of the loss from a good loss distributor to an individual incapable of spreading it further). Although (at p. 21) ratification is distinguished from estoppel on the ground that it is not necessary to show any detriment, the requirement of detriment — particularly as expounded in cases such as *Thompson* v. *Palmer*,[11] *Newbon* v. *City Mutual Life Assurance Society Ltd.*[12] (referred to in another connection at p. 388) and *Grundt* v. *Great Boulder Proprietary Gold Mines Ltd.*[13] — is not dealt with at all in the treatment of ostensible authority. The remedies available to a principal whose agent accepts a bribe dealt with at page 50 will have to be amended in the light of *T. Mahesan s/o Thambiah* v. *Malaysia Govt. Officers' Co-operative Housing Society Ltd.*[14]

There is a grammatical slip at page 97 which gives the wrong impression of the position in Queensland and the A.C.T. with regard to

[9] [1973] 2 N.S.W.L.R. 159 at 170.
[10] (1960) 103 C.L.R. 215.
[11] (1933) 49 C.L.R. 507.
[12] (1935) 52 C.L.R. 723.
[13] (1937) 59 C.L.R. 641.
[14] [1978] 2 W.L.R. 444.

the Statute of Frauds in its application to sales of goods. On the same and the following page the simplicity of the test for distinguishing between a contract for the sale of goods and one for work and labour adopted in *Lee* v. *Griffin*[15] is exaggerated; it needs to be qualified in cases where the raw material is supplied by the "buyer" and in cases such as a solicitor drawing a will. Nevertheless, the author's criticism of the alternative test in *Robinson* v. *Graves*[16] is valid and his proposed solution (at p. 99) is sound. The bald statement (at p. 136) that the transfer of a bill of lading "creates rights in the transferee whatever the standing of the transferor" also needs qualification; a bill of lading, though transferable, is not negotiable, so that a thief or finder can transfer no better rights than he himself has. The view (at pp. 159-60) that as a result of the right conferred by the Hire-Purchase legislation to return the goods at any time, the buyer under a conditional sale contract is outside the scope of the "buyer in possession" section of the sale of goods legislation is also open to question. A surprising omission from the discussion of the implied conditions in a contract of sale is all reference to Sir John Salmond's textbook-like judgment in *Taylor* v. *Combined Buyers*[17]. Contrary to what may appear from page 187, 1974 (Cth.), of the Trade Practices Act, it is only Division 1 of Part V (referred to on the previous page as "Part 5") that is subject to criminal sanctions, not Division 2. *Arcos Ltd.* v. *E. A. Ronaasen & Son*,[18] the facts of which are given at page 193, might also be cited at page 195, since the buyer unmeritoriously took advantage of an immaterial breach by the seller to escape a contract entered into before the market fell. There are two errors in a single sentence at the top of page 196: the relevant section of the Goods Act is section 19, not 18, and it is *not* a requirement for the implication of the condition of fitness for purpose that the sale be a sale by description. The cynicism displayed towards some of Lord Reid's "words of wisdom" at page 197 also appears to be misplaced: a buyer may indeed need protection when he purchases shoddy goods from a cheap discount store, but so long as the requirement of reliance on skill or judgment remains in the Act it is not unreasonable to distinguish, as Lord Reid did, between a "good" retail shop and an inferior one. Lord Pearce's remarks in the same case[19] on the meaning of "reasonably fit" might have been cited with advantage at pages 205-6.

At pages 213-4 it might have been observed that if goods are held to satisfy the test of merchantable quality as readily as in *Cehave N.V.* v. *Bremer Handelsgesellschaft m.b.H.*,[20] and there is no express term such as there happened to be in that case, the buyer will be left remediless. Obviously the courts are reluctant to hold that minor defects make

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[15] (1861) 30 L.J.Q.B. 252.
[16] [1935] 1 K.B. 579.
[17] [1924] N.Z.L.R.627.
[18] [1933] A.C. 470.
[19] *Henry Kendall & Sons* v. *William Lillico & Sons Ltd.* [1969] 2 A.C. 31.
[20] [1976] Q.B. 44.

goods unmerchantable because the consequence of finding that the goods are unmerchantable is to create a breach of condition, with its drastic right of rejection. But what is the buyer of a new car to do if there is a dent in the bodywork, or one window does not wind down, or the ashtrays are broken, other than to rely on the manufacturers' warranty? The better solution would be to amend the Act so as to provide for an implied *term* that the goods are of merchantable quality, leaving it to the courts to decide whether the extent of the breach justifies rejection or merely qualifies the buyer for damages. In this respect the traditional Dixon test of merchantable quality[21] should be retained, rather than the modern statutory definition (which is related to the fitness of the goods for their ordinary purpose), since buyers of new goods with minor defects would not, if they had knowledge of the defects, normally buy them without a reduction in the price, notwithstanding that the goods are fit for ordinary use.

The author's treatment (at pp. 228 ff.) of *Suisse Atlantique*[22] is in line with the English Court of Appeal's approach to that decision, which has tended to ignore the whole tenor of the speeches and to rely on isolated *dicta*. Further support for this approach is to be found in *Wathes (Weston) Ltd.* v. *Austins (Menswear) Ltd.*,[23] not cited in this book.

In the facts of *Wertheim* v. *Chicoutimi Pulp Co. Ltd.*[24] as given on page 275 there is an inaccuracy in the statement that the buyer "later" resold; some of the resales were made before the contract sued on. The discussion of the applicability of the equitable remedy of rescission to contracts for the sale of goods (at p. 278) overlooks *Goldsmith* v. *Rodger*,[25] where relief was given to a seller induced to enter into a contract by the misrepresentation of the buyer.

The reason for the failure of the defence in *Arab Bank Ltd.* v. *Ross*[26] was because the defendants failed to prove the fraud alleged and failed to plead other fraud on which they sought to rely; it is wrong to say (as is said at p. 319) that the only defences raised were personal ones, not available against a holder for value without notice of the fraud. On the next page it might have been noted that days of grace may be avoided by the addition of the word "fixed". The reference to "the bank's title" to the negotiable instruments in *Vagliano's Case*[27] (at p. 297) and in *Greenwood's Case*[28] (at p. 326) may be misleading; in each case the question was whether the banker had complied with the customer's mandate (see pp. 352 ff.) and whether the customer was estopped from denying such compliance. Once again, the Australian cases on the re-

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[21] *Australian Knitting Mills Ltd.* v. *Grant* (1933) 50 C.L.R. 387 at 418.
[22] [1967] 1 A.C. 361.
[23] [1976] 1 Lloyd's Rep. 14.
[24] [1911] A.C. 301.
[25] [1962] 2 Lloyd's Rep. 249.
[26] [1952] 2 Q.B. 216.
[27] *The Governor and Company of the Bank of England* v. *Vagliano Brothers* [1891] A.C. 107.
[28] *Greenwood* v. *Martins Bank, Limited* [1933] A.C. 51.

quirements of estoppel should have been adduced. *Bank of Australasia* v. *Erwin*[29] is cited at page 329 (where the important word "accepted" is omitted as a result of a printing error) without any consideration of whether it can stand with *Scholfield* v. *Londesborough*,[30] discussed at page 355. In emphasizing the trend in recent English cases to consider more sympathetically the claims of collecting banks to have acted without negligence in converting lost or stolen cheques (pp. 371-4), the author may perhaps have played down too far the requirement of the Privy Council in *Commissioners of Taxation* v. *E.S. & A. Bank*[31] that antecedent circumstances must be taken into account in deciding whether there was negligence in collecting a particular cheque. In any event, one wonders why English and Australian banks need the statutory protection at all, when Canadian and United States banks seem to operate satisfactorily without it, no doubt distributing the losses through their charges to their customers, which from the reviewer's limited personal experience do not seem to be any higher in consequence.

A statement at the beginning of the chapter on Insurance Law may wrongly imply that individual underwriters re-insure, whereas insurance companies do not. In any event it should be noted that the Insurance Act 1973 (C'th.), s. 21, prohibits a person other than a body corporate or a Lloyd's underwriter from carrying on insurance business. On the same page the reference to compulsory third party motor vehicle insurance should be confined to liability for death and bodily injury. The question of the intention of an insured with a limited interest to insure the interests of other persons is overlooked in the discussion on page 392. Earlier on the same page it should be observed that the decision in *Ziel Nominees Pty. Ltd.* v. *V.A.C.C. Insurance Co. Ltd.*[32] demonstrates the inefficacy of section 47 of the Property Law Act 1958 (Vic.). Consideration of the question of the respective knowledge of the insured and his agent at page 399 appears incomplete without a reference to *Saunders* v. *Queensland Insurance Co. Ltd.*[33] The accusation at page 413 that *Kazacos* v. *Fire and All Risks Insurance Co. Ltd.*[34] wrongly ignored *Condogianis* v. *Guardian Assurance Co.*[35] is unjustified, since it is clear from the report in the High Court[36] that in that case the proposal was incorporated into the contract by the policy itself. In view of subsequent developments *Smith* v. *Jenkins*[37] can no longer be accepted as unqualified authority for the statement (at p. 427) that protection does not extend to an injured party who participates in an offence. The doubts expressed (on p. 436) about the application of contribution where the policies do not

[29] (1864) 1 W.W. & a'B. (L.) 70.
[30] [1896] A.C. 514.
[31] [1920] A.C. 683.
[32] (1975) 7 A.L.R. 667.
[33] (1931) 45 C.L.R. 557.
[34] (1970) 92 W.N. (N.S.W.) 397.
[35] [1921] 2 A.C. 125.
[36] (1919) 26 C.L.R. 231 at 235.
[37] (1970) 119 C.L.R. 397.

cover the same subject-matter, though they do cover the same risk, are hardly worth raising in view of the clear decision of the High Court in the *Albion Case*[38] set out immediately before and after.

Although it may appear formidable, the above list is not entirely exhaustive of the points of minor disagreement between the author and the reviewer. It should nevertheless not be permitted to obscure the very real contribution that this book makes to the teaching of Commercial Law at university level in Australia. It should be stressed that, given the chosen approach to the subject, there is vastly more with which the reviewer agrees than with which he disagrees and he stands in admiration at the enormous number of cases the author must have read in order to cover so much Australian material.

It has become less customary than it once was to conclude a review with a reference to printing errors. However, it should perhaps be said that this book is fairly liberally sprinkled with them, though mostly they do not affect the sense. An exception occurs at page 6 where a whole line has dropped out and been replaced by a line which is repeated three lines later. Judges' names seem to have suffered particularly. Would the judicial Street family have been as prolific if they had all been called "Strut" (p. 55)? Confusion between the former Lord Justice Ormerod and the present Ormrod, L.J. is always on the cards — it occurs here at page 289 — but it was hardly necessary to turn the latter into "Ormond L.J." at page 214. Bridge, L.J. is pluralized at page 257, while Diplock, then L.J., is demoted at page 203. At page 172 "the Lordships" should presumably have been "their Lordships". Victorian judges Sholl and Crockett, JJ. also have liberties taken with the spelling of their names. To some readers these mistakes may simply cause amusement; others may find that they hold up the smooth flow of the author's prose.

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The International Court of Justice, by J. K. Gamble, Jnr. and D. D. Fischer, Massachusetts, Lexington Books, 1976, 157 pp. $18.50.

The International Court of Justice has been the subject of some intensive studies over the last decade, and it is with something of a sigh that a reviewer turns to yet another one, hardly daring to hope that it will have some new proposals to make on the Court. This book has a new approach: it is self-consciously "sociological", but it is nonetheless disappointing, for it throws very little new light on the Court, its internal working or on States' attitudes towards it.

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[38] *Albion Insurance Company Limited* v. *Government Insurance Office of New South Wales* (1969) 121 C.L.R. 342.

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