BOOK REVIEWS

Bills of Exchange in Australia, by B. B. RILEY, Q.C., M.A. (Oxon.) Barrister-at-Law. 2nd ed. (The Law Book Co. of Australasia Pty Ltd, 1964), pp. i-xx, 1-307. Price £3 3s.

In the second edition of Riley, *Bills of Exchange in Australia* the alterations to the text are minimal, the book being brought up to date by reference in the footnotes to some forty-six new cases and recent literature. The fact that so little change was considered necessary by the author or in fact required is testimony to the quality of the first edition.

F. P. Donovan when reviewing the first edition[1] said 'This remains essentially a legal practitioner's work of reference. There is little that is new or original and it follows fairly closely the lines of its predecessor.' I endorse this opinion. The unsuitability of the book as a textbook for students is one which is imposed by following what is unfortunately a common pattern in books dealing with negotiable instruments, that of setting out the sections of the Act in numerical order followed by a detailed commentary. So many of the sections are inter-related that if this subject is to be made comprehensible to the student the book should be divided into chapters each dealing with a particular topic such as 'Capacity', 'Signature', 'The Holder'. Excellent examples of this approach are Falconbridge, *Banking and Bills of Exchange*[2] and Cowen, *Law of Negotiable Instruments in South Africa*.[3]

The commentaries which follow each section are detailed and comprehensive and the index is an excellent one, it being difficult to think of any topic which is not adequately dealt with.

References to authority are restricted to Australian and United Kingdom ones. This parochial approach is to be regretted. In contrast Cowen frequently quotes Riley and refers to some of the leading Australian cases, such as *Durack's* case.[4] That reference could with profit have been made to South African material appears from the detailed commentary on the book which follows.

There is an introductory chapter dealing, *inter alia*, with choses in action and their assignment. The expression 'the assignee takes subject to all equities', is explained by a quotation from the judgment of Dixon J. in *Southern British National Trust Ltd* v. *Pither*[5] (page 4). This is an unsuitable choice since the extract from the judgment stating

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[1] (1954) 6 *Res Judicatae* 407, 408.

[2] 5th ed. 1935.

[3] 3rd ed. 1955. A new and revised edition is about to appear.

[4] *Durack* v. *West Australian Trustee Executor & Agency Co. Ltd* (1944) 72 C.L.R. 189.

[5] (1937) 57 C.L.R. 89, 108.

that the quoted expression has as one of its meanings 'that every assignee takes subject to *all defences*[6] available as between the original parties to the obligation' does not make clear if there is any limitation on the kind of defences which may be raised, for example, a personal claim for damages in tort against the assignor unconnected with the contract the subject matter of the assignment. The author does however qualify this quotation by reference to *Salmond and Williams on Contracts*.[7]

Mr Riley states that an instrument drawn in the form of a specified amount plus bank charges which are later ascertained, noted on the bill of exchange and the bill then accepted for a fixed amount, is not strictly a bill (page 38). In *Perry & Co. Ltd* v. *Nelco Floors Ltd*[8] Keeper J. of the South African Supreme Court held that after the instrument had been accepted for a definite figure it became a negotiable instrument; this case is criticised in an article by Millner in the *South African Law Journal*[9] on the basis that if its acceptance for a fixed amount converts the instrument to a negotiable instrument, then a document could for some portion of its life be a non-negotiable instrument and later be converted to a negotiable instrument. It is submitted that the view expressed by Riley and Millner is correct.

In dealing with inchoate instruments no reference is made to the various problems regarding onus which may arise. Readers could have been referred to Cowen[10] on this point.

The commentary to section 26 dealing with delivery deals with the difficult question of parol evidence and negotiable instruments. No reference is however made to *Wigmore on Evidence*[11] and to the fact that the application of the parol evidence rule to negotiable instruments is conditioned by certain features which are peculiar to that special kind of contract. As regards actions between immediate parties no attempt has been made to distinguish—

(i) a parol agreement which directly contradicts the express terms of the instrument, for example, an agreement by an acceptor of a bill that he is to be regarded merely as an agent and that his principal (who has not signed) should be liable—which is inadmissible; and

(ii) those agreements which merely define the nature of the party's liability on the instrument *vis-à-vis* certain immediate parties in a manner that is not inconsistent with the express terms of the instrument, for example, an oral agreement to show that the maker or acceptor was only an accommodation party.

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[6] Italics added.
[7] (2nd ed. 1945) 472-476.
[8] 1956 (2) S.A. 711.
[9] [1956] S.A.L.J. 367.
[10] *Law of Negotiable Instruments in South Africa* (3rd ed. 1955) 164-167.
[11] (3rd ed. 1940) 2443-2445.

This problem is dealt with generally in an excellent judgment by Trollip J. in *Von Ziegler* v. *Superior Furniture Manufacturers Ltd*[12] and also in an article by Hepple in the *South African Law Journal*.[13]

Section 27 deals with the capacity of a party to incur liability on a bill and Riley, commenting on the conflict of laws problem as to which law is to govern the question of contractual capacity, states that it is still unsettled whether it should be the *lex domicilii* or the *lex loci contractus*. In support of this statement he refers, *inter alia*, to Dicey[14] at pages 769-774. A more appropriate reference could have been to pages 843-845 where negotiable instruments are specifically dealt with and where the view is expressed that the *lex loci contractus* should govern questions of capacity. The authority quoted by Dicey is *Bondholders Securities Corp.* v. *Manville*[15] where it was held that the capacity of a married woman domiciled in Saskatchewan who made a note in Florida is governed by the law of Florida.

Dealing with a corporation's power to accept bills or make notes (page 96) Riley states ' such a power must be given by the express terms of the constating instruments or of statute or by necessary implication. This section [27] does not give rise to any such implication; nor does any Companies Act '. This is incorrect, for section 19 of the Uniform Companies Act read with paragraph 15 of the Third Schedule specifically provides that the powers of a company shall include, unless expressly excluded or modified by the memorandum or articles, the power to draw, make, accept, endorse, discount, execute and issue promissory notes, bills of exchange, bills of lading and other negotiable or transferable instruments.

There is a reference (page 97 note 13) to section 349 of the Companies Act 1936 (N.S.W.). This Act has been repealed by the 1961 Act and the section was not re-enacted, the nearest equivalent being section 35 in the 1961 Act.

In commenting on procuration signatures Riley suggests that section 30 of the Bills of Exchange Act is perhaps limited in its application to the case of agency on behalf of a private person since a corporation can sign only by an agent. On this problem Cowen[16] citing *Insurance Trust and Investments (Pty) Ltd* v. *Mudaliar*[17] expresses the opinion that the phrase ' procuration signature ' would include some signatures for companies by agents, for example, where an agent purports to sign in terms of a power of attorney granted to him by the company.

The discussion on the liability of a third party who backs a bill appears on page 181-186 and all the relevant cases are referred to, but it is suggested that greater clarity would have been achieved if more emphasis

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[12] 1962 (3) S.A. 399.
[13] [1962] S.A.L.J. 362.
[14] *Conflict of Laws* (7th ed. 1958).
[15] [1933] 4 D.L.R. 699.
[16] *Law of Negotiable Instruments in South Africa* (3rd ed. 1955) 139.
[17] [1943] N.P.D. 45, 53.

had been placed upon the judgments in *Durack's* case [18] and if the distinction between the two possible bases of liability, that is, under section 60 (2) and section 61, had been clearly drawn.

Reference to pages 199 and 203 reveals a contradiction as to the meaning to be attributed to the definition of payment in due course in section 64. It is submitted that the first passage is correct and that for payment to discharge the instrument it must, apart from the circumstances dealt with in section 86, be payment to a holder and not to a mere possessor, for example, a person holding an instrument through a forged endorsement. Riley suggests that the words 'without notice that his title is defective' would make payment to a mere possessor payment in due course provided the payer did so in good faith and without notice that the possessor's title to the bill is defective (page 203). It cannot be said that in these circumstances a person's title is defective—he has no title at all.[19]

The commentaries on the various sections to Part III dealing with cheques drawn on a banker are both comprehensive and lucid but it is perhaps unfortunate, though understandable, that publication of the second edition was not delayed until any amendments to the Act arising from the Report of the Committee appointed to review the Bills of Exchange Act 1909-1958 had become law and could have been included and commented on.

D. L. PAPE*

[18] (1944) 72 C.L.R. 189.

[19] Chalmers, *Bills of Exchange* (13th ed. 1964) 201.