BOOK REVIEWS

Cases and Materials on Australian Family Law, by DAVID HAMBLY, LL.B. (Melb.), LL.M. (Harv.), and J. NEVILLE TURNER, LL.B. (Manchester). (The Law Book Company (Australia) Ltd, 1971), pp. i-xxiii, 1-656. P/B $10.50, Cloth $13.50.
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For a long time teachers in family law have complained about the absence of a suitable student's textbook in their subject. For this reason alone the authors are to be commended for bringing out a case-book on Australian family law.

This book breaks new ground in that it is not confined to a presentation of the statutory and case law in what the authors call "orthodox expository passages", but tries to present family law in its proper social setting. Substantial extracts from sociological writings allow the student to see how the law actually works, whilst the inclusion of proposals and recommendations for the reform of family law may lead him to consider how it can be altered.

The sociological material is most effective when it presents information in the light of which the current law can be evaluated. Almost all of the material which the authors have collected meets this test. Thus, it is most valuable to see the statistics presented on the result of applications under sections 12 and 16 of the Marriage Act 1961-1966 (Cth) at page 56, and again at pages 130 and 131 on grounds on which divorces were granted. The law of judicial separation is reduced to its proper insignificance by the tables at page 349.

Chapter 1 raises the moral dilemmas every legal practitioner must feel when dealing with questions of family law. Should he merely carry out his client's wishes or should he assume a mediating role in family disputes? It is a question of individual morals on which no teacher can or should supply an answer. But the student should read the material for himself and make up his own mind. The second part of Chapter 1 which deals with the dilemmas arising out of the present law on compulsory disclosure of adultery, collusion and condonation is perhaps too intricate for those who are not yet familiar with the difficult legal questions involved.

Very interesting also is the information supplied in Chapter 10 on the social background of deserted wives in Victoria. It was also an excellent idea of the authors to include a statement on the forms of public relief available. Again in Chapter 13 dealing with adoption, the few decisions on the topic are supplemented by extracts from articles and monographs showing the criteria applied by the agencies involved in adoption. This is most useful and helps to make the hitherto rather vague topic of adoption a subject which can be taught in a law course.

On the other hand the authors may have gone too far when they included in Chapter 11, at pages 497-507, material on the question of whether a mother should retain her illegitimate child. This material will be interesting for the student to peruse, but it cannot do more than make him aware of certain problems. For a law course the material is clearly peripheral.

It is also important that students should ponder the reasons why a certain rule exists. Why is parental consent required in the case of marriage of minors, and is such a rule justified? Should there be a restraint on hasty marriages? Should there be damages for adultery? Should the action for breach of promise of marriage be retained? The authors give the students plenty of food for thought.

In law reform there is a tendency to be on the side of the angels too much. It is easy to say that the existing law is wrong and should be reformed but it is much more difficult to draft an amendment of the law which will avoid new faults of its own. As a member of a committee which has recently considered the question of the abolition of the action for breach of promise of marriage, I am aware of the difficulties involved in a wholesale abolition of the action. There is certainly no justification for the retention of general damages in such an action, but should a person who has incurred financial commitments in reliance upon a promise to marry, such as a woman who has paid her fares to come out to Australia in order to marry her fiancé, be deprived completely of the right of recovery? It would be interesting to ask students not only why they think the law is wrong, but also how they would draft the necessary amendments. As the student has his draft subjected to criticism, he will come to realize that the road of the law reformer is tough and arduous.

As to reform of the grounds upon which a divorce is granted, again as a member of the Family Law Committee of the Sydney University Law Graduates' Association, which drafted the proposals set out at page 320 of the book, I am aware of the difficulties involved. To say that the sole ground should be breakdown of marriage is not enough. It is obvious there must be some objective sign of breakdown. In using the old concepts of adultery, cruelty and desertion as such objective signs, the English Divorce Reform Act 1969 has been criticized for re-introducing old fault concepts in new disguise. A separation ground of two years which requires the consent of the other spouse is useless when the other spouse is vindictive. Five years' separation without such consent is too long and unfair where the breakdown of the marriage is obvious and one spouse has established a new *de facto* relationship. I am surprised that the authors have made no mention of the new Californian divorce law,[1] which has taken the breakdown of marriage proposal to its logical conclusion in requiring only that the petitioner state his sincere opposition to the continuation of the marriage.

[1] Family Law Act 1969; Cal. Civ. Code § 4506 (West Supp. 1969).

It is therefore to be applauded that the suggestion of the possible introduction of a system of community property at pages 400-404 is handled in a way which illustrates the difficulties of such an introduction and gives the student some inkling of the choices open before a legislator.

So far as the choice of case-material is concerned I realize that each teacher has his own prejudices as to which cases are most suited and is therefore easily led to criticize others for not including his own choices. With that qualification I do have some criticism to offer.

On the question of the standard of proof in adultery cases, I would have liked some discussion on how the "reasonable satisfaction" test operates in practice. It is grand as a formula but does it have any meaning at all? I have found the decisions on the facts of *Murray* v. *Murray*[2] and *Wearne* v. *Wearne*[3] useful. Here, regrettably, the authors are not as critical as they have been elsewhere.

In relation to desertion I would have preferred *Pulford* v. *Pulford*[4] over *Tulk* v. *Tulk*,[5] and *Potter* v. *Potter*[6] over *Johnson* v. *Johnson*,[7] as cases which more clearly illustrate the relevant points on the facts decided.

The difficulties of consent in desertion are to my mind best illustrated by comparing *Spence* v. *Spence*[8] with *Tyson* v. *Tyson*,[9] and asking students where the line between these two decisions lies.

As to habitual cruelty I would have preferred *Nicholson* v. *Nicholson*[10] to *Sheldon* v. *Sheldon*[11] as illustrating the difficulties involved in holding refusal of sexual intercourse to amount to cruelty.

Insanity is dealt with very shortly indeed. There is no mention of *Whysall* v. *Whysall*[12] as an exposition of the meaning of "being of unsound mind".

A much more substantial criticism is the short treatment which the authors have given to section 28(m) of the Matrimonial Causes Act 1959-1966 (Cth) (separation for five years as a ground for divorce), despite the fact that it has given rise to some very interesting legal problems. Thus the meaning of "separately and apart" is hardly dealt with at all. *Main* v. *Main*[13] is not mentioned, and of *Crabtree* v. *Crabtree*,[14] it is said very simply:

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[2] (1960) 33 A.L.J.R. 521.
[3] (1963) 4 F.L.R. 283.
[4] [1923] P. 18.
[5] [1907] V.L.R. 64.
[6] (1954) 90 C.L.R. 391.
[7] [1964] V.L.R. 604.
[8] [1939] 1 All E.R. 52.
[9] (1954) 90 C.L.R. 206.
[10] (1966) 9 F.L.R. 414.
[11] [1966] P. 62.
[12] [1960] P. 52.
[13] (1949) 78 C.L.R. 636.
[14] (1963) 5 F.L.R. 307.

> The New South Wales Full Court held that proof of destruction of the consortium throughout the required period is sufficient to establish the ground of separation, even if the parties have, during that period, lived under the same roof. (Page 236.)

This may well actually summarize the end-result but it overlooks the tortuous reasoning of the Court which has been a delight of law teachers to criticize. The excellent analysis by Mr Marks of the problems involved[15] is not referred to.

I would have considered the statement of the law of condonation in *Cramp* v. *Cramp*[16] to be a useful and classical exposition of that law, and as such, worthy of inclusion in the text.

Again, *Rumbelow* v. *Rumbelow*[17] raises not merely the question of connivance by apathy but whether there can be connivance of a course of adultery already begun, contrary to what was said in *Churchman* v. *Churchman*.[18] Again this issue of principle is obscured by the way the case-book is framed. In the note to *Godfrey* v. *Godfrey*[19] reference should have been made to the South Australian decision in *Fenwick* v. *Fenwick*[20] which applied a less stringent test in determining whether the effect of connivance was spent.

Perhaps the authors were impatient of the legal technicalities raised by such issues and wished to take a broader view of the law as it actually operates. In my view it is equally important to look at the legal language through which these results are achieved. Students must not be encouraged to overlook the problems of construction and proper legal reasoning.

It seems a bit illogical on the part of the authors to include material on succession generally, and the testators' family maintenance Acts in particular, in so far as it affects illegitimate children. There is good reason for thinking that succession as a whole belongs within the scope of family law but usually it is taught elsewhere as a separate topic. In that case it would seem better to leave the position of illegitimate children in relation to succession to be dealt with as an integral part of the general topic of succession. If this material had been omitted, the authors could have been a bit more generous in the inclusion of case law material in relation to the grounds for divorce.

It is strange that in relation to custody disputes the authors have taken a predominantly "legal" approach. There is only passing reference to the psychological problems involved. Perhaps the hostile attitude of the courts to expert psychological evidence as exemplified by Begg J. in *Lynch* v. *Lynch*[21] renders such inclusion useless.

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[15] (1965) 5 *Sydney Law Review* 137.
[16] [1920] P. 158.
[17] [1965] P. 207.
[18] [1945] P. 44.
[19] [1965] A.C. 444.
[20] [1960] S.A.S.R. 67.
[21] (1966) 8 F.L.R. 433.

The criticisms offered by me which primarily reflect differences of policy and emphasis do not detract from my overall opinion that this is an exciting case-book which will be welcomed by teachers of family law.

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Principles of Australian Administrative Law (4th ed.), by D. G. BENJAFIELD, LL.B. (Syd.), D.PHIL. (Oxford), Professor of Law, University of Sydney, and H. WHITMORE, LL.B. (Syd.), LL.M. (Yale), Professor of Law, Dean of the Faculty of Law, School of General Studies, Australian National University. (The Law Book Company (Australia) Ltd, 1971), pp. i-xxxviii, 1-377. P/B $8.75, Cloth $10.75.
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The latest edition of this very useful work does not depart in mode of arrangement from its predecessor. This means that it is still subject to what this reviewer regards as considerable structural defects.

The treatment of natural justice before the general discussion of the nature of review tends to suggest that a natural justice inquiry is a *special* kind of review—neither parliamentary, administrative nor judicial, within the meaning of Chapter VIII—occupying a new kind of dimension. Whilst review on the ground of breach of natural justice has to a large extent freed itself from older conceptualistic fetters, the place to deal with this would seem to be after, not before, a section dealing with the concept of review in general.

The allocation of a separate chapter to delegated legislation is also open to considerable criticism. There is, it is true, a considerable thread of unity between subordinate central governmental legislation, by regulation, Order in Council and proclamation and local authority by-law. However it is undeniable that legislative quality should also be attributed to certain other activities, for instance the award-making powers of Australian industrial tribunals and price-fixing orders whether effected by tribunals or not. Here however similarities cannot confidently be predicated thus for instance *Arthur Yates & Co. Pty Ltd* v. *Vegetable Seeds Committee*[1] shows that, granted a legislative-type authority, the question to what degree its decisions may be attacked on the score of lack of good faith depends very much on the status of that body.

Granted that administrative law is still chaotic, it is yet desirable to have some systematized plan of treatment. It is suggested that the historical distinction noticed in Brett & Hogg, *Administrative Law Cases and Materials*[2] between the invalidity based on *ultra vires* and the invalidity based on lack of jurisdiction, provides an empirically meaning-

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[1] (1945) 72 C.L.R. 37.