BOOK REVIEWS

A Text-Book of Jurisprudence, by G. W. PATON, Kt., B.A., B.C.L., Hon. LL.D., Hon. D.C.L., M.A., Vice-Chancellor of the University of Melbourne, 3rd ed. by DAVID P. DERHAM, M.B.E., B.A., LL.M. (Oxford, at the Clarendon Press, 1964), pp. v-xv, 1-553, Index of Cases pp. 555-569, Index pp. 570-600. Price £4 2s. 6d.

The first edition of Paton's *A Text-Book of Jurisprudence* was extremely well-received by reviewers and by teachers of law. Almost the only doubtful note was that struck by Cahn, who reviewed the book in 1947: 'To say . . . in short, that it is an exceedingly good book . . . is not enough. It is indeed good, but good for whom?'[1] Reading the third edition by Professor Derham, eighteen years after that first publication, and with memories of a period during which I myself used the book as the text-book in a course in Jurisprudence, I find myself compelled to echo Cahn's comment. It is not the book that I would now choose as a text-book for a course in Jurisprudence. But it is a book which should be in the hands of every law student, bought at an early stage in his career and kept by him for additional reading throughout his time at the Law School and beyond.

I am well aware that in saying this I am perhaps saying more about my own views on the teaching of jurisprudence and about the ideal content of a text-book on jurisprudence than about the book being reviewed. Paton himself, in the preface to his first edition, anticipated and disarmed criticism of this kind by saying that 'it would not be easy to discover two persons who would solve in the same way the problem of what a text-book on Jurisprudence should contain'. Nevertheless, it seems to me that the proper time for a student to read, for example, Chapter 15, on Criminal Law, or Chapter 17 (which, though headed, 'Rights Created by a Juristic Act', is devoted almost wholly to Contract), is the time when he is studying these subjects, and that a large part of the book would be most fruitfully used in this way. But for those who disagree with this view and whose courses in Jurisprudence stick more closely to the traditional English pattern, with heavy emphasis on the analytical side of Jurisprudence, the book continues to be the best available.

The task of editing an established text-book is never easy. It is a measure of the skill with which Professor Derham has carried it out that it is not easy without making a line by line comparison with the second edition to detect what parts are his and what parts are *Ur-text;* and this is so even in those sections which the editor tells us in his preface he has substantially re-written. This preface reveals that with very few exceptions the principal changes in the book were dictated by the need to take into account the influence which the work of Professor H. L. A. Hart has had on jurisprudential thought. One exception is the new Section 10 on the Scandinavian Realists, which is no more than a potted summary (with one or two shrewd criticisms) of some of the ideas put forward by Hagerström, Lundstedt, Olivecrona and Ross. Possibly little more was possible within the framework of the book as it stood; but the summary, besides looking like a gift to the kind of student (all too common, alas!) who is eagerly hunting for a few brief sentences to learn by heart concerning a great name, hardly does the Scandinavians justice. There is, however, one

[1] (1947) 47 *Columbia Law Review* 521.

later reference to Lundstedt, and there are also a number of useful references to Ross' ideas.

Fortunately, Professor Derham has been too wise to attempt to give his readers a potted version of Hart's theories. But one feels at times that, notwithstanding the pervasive influence of Hart's thought on the editor's new material, too little attention has been paid to a number of important aspects of his thought. There is only the briefest of references to Hart's concept of law as 'the union of primary and secondary rules', and that looks more directly to his earlier formulation in the introduction to Austin's *Province of Jurisprudence Determined* than to the later work, although this is referred to *passim* in the foot note (note 3 on page 76). No reference is made, in the section on Natural Law or elsewhere, to Hart's important discussion of the elementary truths concerning human beings (a concept reminiscent of Gény's *données réelles*) and their influence in dictating a minimum content of law. And one is disappointed that the treatment of the important topic of causation has not been expanded in the light of the very full treatment that it has received at the hands of Hart and Honoré in *Causation in the Law;* except for the addition of a reference to the book in question, and references to the *Wagon Mound*[2] and two of the many articles which that decision provoked, this small sub section remains unchanged from the former edition.

The section on Precedent has been largely re-written. The new exposition takes almost no account of the theory put forward by Goodhart in his 'Determining the *Ratio Decidendi* of a Case' (*Essays in Jurisprudence and the Common Law,* 1); it was discussed for almost a page-and-a-half in the second edition (pages 160-161), but it is relegated to a sentence in the new. I wonder whether there are others who will regret this disappearance of an old friend. The theory itself was no doubt incomplete as a theory of precedent, and suffered other defects besides; but if it was wrong, it was illuminatingly wrong, and it provided valuable pegs for student discussion, as well as a useful springboard to a wider discussion of the multiple 'going-ways' of precedent. In its place, however, one finds among other things an important new discussion on the importance of judicial decisions as providing in the everyday life of the courts a great many precise answers to precise questions, not only on points of statutory interpretation but also on points of common law. Professor Derham observes that 'practitioners' textbooks are full of classified and indexed answers to just such specific questions'; he might perhaps usefully have added that for every such question so answered there are at least an equal number arising in the course of everyday practice which, to the chagrin of the users of such books, are not so answered.

Perhaps the most interesting piece of new writing is in Chapter 22 on 'The Concept of Possession'. The opening sections of Paton's text are left relatively untouched. (One wonders, incidentally, whether with the virtual disappearance of Roman Law from the curricula of law schools, the references here and elsewhere to Roman rules and doctrines are not becoming a source of mystification to the average student, as they appear to presuppose in many cases a fair acquaintance with the background.) Professor Derham then introduces a new section 124 with summaries of the facts and holdings in a large number of the leading cases, followed by eleven examples (which he says could be extended almost indefinitely

[2] [1961] A.C. 388.

and which the better students using the book will no doubt be stimulated to extend) of propositions about possession which could be extracted from one or a combination of these cases. He follows this with a re-written section headed 'Analysis of Possession' (much of the material included under that heading in the second edition having been re-arranged under the heading 'The Struggle of Convenience and Theory'). In the course of this he suggests that the key to understanding the apparent confusion in and inconsistency between the manifold propositions about possession which, as he has earlier shown, it is possible to extract from the cases, is to be found in the recognition that possession in the law always involves legal relations between persons, and that those relations may come into dispute in a variety of situations in which different and sometimes competing values will have to be considered in the process of settlement. Thus, in the larceny cases,[3] where there is the desire to see 'that people who take things to which they have no justifiable claim shall not escape retribution', the answer to the question, who is in possession of certain chattels, may be different from that given in a finding case, in which the task facing the court is really 'to allocate rights to physical control and enjoyment of things where no such control existed before in the parties concerned'. Derham concludes that the idea, however vague and imprecise, which colours and gives a 'family relationship' to all the uses of the word 'possession' in the law is 'the recognition of a relation between persons where one has taken or has control of a thing and is to be protected in his enjoyment of it unless more is shown'; to search for anything more precise, certainly for anything approaching a unitary 'concept' of possession, he concludes with Hart, would be profitless. The difficulty with this exposition of the 'family relationship' running through all the uses of the word 'possession' is that it seems to imply that the ideas of 'taking' and 'control' are themselves unitary concepts, whereas the sense in which either of these words is used in a given case may depend upon the circumstances; perhaps it would have been better to have said '. . . where one may be said to have "taken" or to have control of a thing . . .'.

In addition to the nine or ten substantial sections of re-writing, some of which have been noted above, Professor Derham has made a large number of interstitial alterations, and has brought all the references up to date, inserting as he indicates in the preface, over two hundred new references. For some reason he has not expanded the rather terse style of Paton's own periodical references, which in general omit altogether the title of the article referred to, though in the references he has added he prefers the fuller style (see, for example, note 1, page 527; note 3, page 546). He has, however, added the initials of the writer to almost every reference: at first sight one wonders why, but presumably this is intended to assist the student who will require to consult a comprehensive library catalogue in order to find his books. One would have thought it might have been worthwhile in many instances to have added the date of publication of books referred to; but this appears only rarely, and one suspects, *per incuriam*. For example, in note 3 on page 11, dates of publication are given for Hart's *Definition and Theory in Jurisprudence* (the reference is to the reprint, but would it not have been more generally useful to have given the reference to 70 L.Q.R. (1954), 37?) and *The Concept of Law*, but not for Hart and Honoré's *Causation in the Law*.

[3] Such as *Hibbert v. McKiernan* [1948] 2 K.B. 458.