BOOK REVIEWS

The Law of Securities, by EDWARD I. SYKES, (3rd ed., Sydney, The Law Book Company Ltd, 1978), pp. i-lxxxix and 927.

"Bis!" "Encore!"

An Australian Opera Singer, making her debut at La Scala and protesting, amid the clamour for more, that the Opera should continue and that she should not be required to sing a third encore, was disconcerted to hear an Aussie voice from the gallery: "Yuh'll keep on singin' it till yuh *get it right!*"

Sykes on Securities goes on from strength to strength. It is now in its third edition; and, whilst it would be churlish and incorrect to suggest that the third is no better than the second, or the second than the first, Sykes is no struggling prima donna: his first edition was a mighty work of scholarship in its own right. Today the book is a monumental and essential portolano for every Australian lawyer who seeks to warp the waters of security over real and personal property.

The first edition was a revised version of the author's doctoral thesis at the University of Melbourne. In spite of the revision, it still bore the marks of a thesis in its refusal to leave any avenue unexplored or stone unturned in the area delineated by the author as the proper compass of property security. This fault was expunged from the second edition which presented a much more professional and well-structured treatise on the law of securities. The third edition is very much the second edition brought up to date from June 1972 to January 1977 and revised accordingly.

Sykes is a scholar and a perfectionist; and this book is not for beginners. It is still a detailed and comprehensive work on property security, and readers will need to know something of the structure and concepts of this branch of the law before approaching this work. Sykes has never baulked at a problem on the ground of its complexity; nor does he have a reputation as a simplifier; but for true, diligent, accurate, persistent, and perceptive scholarship he can rarely be bettered. So, this book also is not a mere practitioner's compendium, providing lists of references and authoritative and dogmatic guidance on the range of points that may arise in legal practice. Sykes rightly claims to have written much more than this. He has provided a scholarly structure and analysis, and a systematic characterization and presentation of a generally uncoagulated mass of doctrine and authority. What might so easily have been a heap of sawdust, becomes in Sykes' hands an organic and comprehensible tree. In particular, his chapters on Priorities are classic statements of this most perplexing of topics.

Of course it is possible to quarrel with Sykes if one is sufficiently intrepid. This reviewer in particular has been concerned that Sykes is obsessed with the structural symmetry of the formal edifice of security, and insufficiently concerned with the functions and dynamics of the system of securing finance from various sources for different classes of borrowers for a variety of purposes. Sykes' retort would undoubtedly (if he could forgive presumption) be that he has written a book on security over real and personal property, and has left to others the task of depicting the law of credit and the techniques of financing. The reviewer, however, is sceptical that this distinction can be maintained.

For instance, legal purism drove Sykes in his first edition to ignore the topic of hire-purchase or any aspect of security based on title retention, on the ground that a person cannot take security over property he already owns and that devices based on title reservation might serve the function of security but nevertheless were not

securities as defined by Sykes. In the second edition he abandoned this standpoint although under protest. The third edition does contain a chapter of some 20 pages on hire-purchase and conditional sale, and another chapter also of 20 pages on the defects of chattel purchase credit techniques and on proposals for their reform. These concessions are most welcome but, at the risk of tweaking the lion's tail, this reviewer has heard it told in Gath: "but what about leasing?".

Lady Rumour also hath it that Sykes has declared an intention to retire and that the third edition will be his last. The third edition purports to state the law as at 1 January 1977, yet in 1980 we have seen substantial amendments to the *Bankruptcy Act*, proposed far-reaching amendments to the *Uniform Companies Acts*, and the continued stagnation of the proposed legislation to give a much diluted effect to the Molomby Committee Report.

The intellect of Sykes to systematize and explain the changes, and the caustic pen of Sykes to exhort the laggard legislator to better or indeed to any activity, can not be spared.

Sykes retire? ——— Never!
Bis! Encore!

D. E. ALLAN*

Evidence, Proof and Probability, by SIR RICHARD EGGLESTON, (London, Weidenfeld and Nicholson, 1978), pp. i-xiv, 1-226.

If the law of evidence is to be understood in context, then leaving aside questions of policy, it must surely be in the context of the law of probability. One need only to glance at the index of any work on evidence with headings such as Circumstantial Evidence, Degrees of Proof, Presumptions, Similar Fact Evidence, Judicial Notice and Expert Evidence, to realise the existence of a close interrelationship between the disciplines of law in this area and mathematics.

Judges and juries are daily engaged in what is referred to as a fact finding process which really amounts to finding what is more likely than not to have occurred, or what had occurred beyond a reasonable doubt. To that end, the fact finding tribunals are constantly engaged in the drawing of inferences and considering reasonable hypotheses which are said to be consistent or inconsistent with given factual situations.

In the criminal courts, juries are told that the Crown must prove its case beyond reasonable doubt, that those are plain English words which mean what they say and that any further exposition of their meaning is unnecessary and indeed can be confusing. The more daring judges have added that beyond reasonable doubt means something more than balance of probability, but less than mathematical certainty.

Despite this, the English and Australian Courts have resisted attempts to deprive judges or juries of their traditional role in the fact finding or fact predicting process which is considered sufficiently fulfilled by the exercise of judgment based on experience and intuition.

Is this traditional approach valid? Can such judgment be relied upon in all cases or should experts and computers be invoked at least to assist? What does the future hold for the application of the probability theory in the Courts?

Those and many allied questions are the subject of Sir Richard's original and delightfully readable book, which is very appropriately one of the series entitled "Law in Context".

After dealing with the meaning of probability generally, and as a basis for decision making, the book examines the judicial process and a number of underlying assumptions upon which it proceeds. It goes on to deal with specific areas of the law of evidence such as relevance and admissibility, the burden and standard of proof, similar fact evidence, credibility and prediction, and examines the extent of the relationship between the assumptions underlying those rules and the law of probability.

* Professor of Law, Monash University.

A number of aspects of this book stand out clearly. The first is the skilful use of cases, judgments and examples to illustrate the many and varied misconceptions upon which the judicial process in its application to the rules of evidence proceeds.

The second is the obvious experience and depth of understanding by the author which enables him to discuss his topic in a realistic way making the rules of evidence comprehensible in the context of what they are really designed to do.

The third is the interesting use of the combination of mathematical equations and homely examples which are then related to practical evidentiary problems constantly encountered.

Sir Richard claims to have found that many of his colleagues stop reading the book when they come to the first equation. This is a sad reflection on lawyers and the perpetuation of an inadequate general and legal education system. It may also be an indication of the rather quaint but unfortunate attitude of some lawyers which makes them wary and suspicious of other disciplines particularly if those disciplines appear to encroach on what the lawyers think is entirely their province.

Having made out a case for the need to examine the fact finding process and thus the rules of evidence in the context of what the mathematical realities are, Sir Richard concludes that:

> "The truth is, that in the long run, the Courts will only give adequate weight to theoretical argument about probability when they are themselves sufficiently instructed in the matter to understand what the experts are talking about. At present, little attention is devoted in standard courses in law to the education of lawyers in matters of this kind."

This book is a good beginning towards such understanding.

Whatever the future, it is exciting to be able to read about evidence in an interesting and very relevant context not merely having to learn the rules and apply them in practice.

This book makes it all come alive and makes one think again.

GEORGE HAMPEL*

Cases and Materials on Evidence, by P. K. WAIGHT AND C. R. WILLIAMS, (Sydney, The Law Book Company Ltd, 1980), pp. i-liii, 1-860.

The authors, who are Senior Lecturers in Law at the Australian National University and Monash University respectively, have produced a substantial work which, as its title suggests, is a collection of cases and materials. Although the authors have included a considerable amount of text of an introductory, explanatory and thought provoking nature, it is not and does not purport to be a text book.

As is to be expected the book consists predominantly of extracts from the reported cases on the law of evidence. In addition, the authors have included relevant and appropriate extracts from various reports of Law Reform Commissions, from relevant legislation in the different jurisdictions and from textbooks on the law of evidence. Each section concludes with a note on the cases in that section and with references to a wide selection of further reading material. The result is a valuable collection of materials together with a comprehensive reference to other works relating to individual aspects of the subject.

One of the major attributes of the book is the coverage which is given to the variations in the law of evidence between the Australian jurisdictions. Throughout, statutory references are given to each of the Australian jurisdictions. Where the law varies, these variations are explained and discussed. Extracts from almost 300 reported decisions are included and the authors have selected cases from every jurisdiction in Australia as well as from England and other countries.

* Q.C.

The book is divided into 19 chapters and no purpose would be served in listing the chapter headings in this review. However, it may be worth noting that "Similar Fact Evidence" is dealt with in a different chapter to that dealing with "Disposition and Character" and that five separate chapters deal successively with the area of out-of-court statements, viz., Ch. 14 "Hearsay: The Exclusionary Rule"; Ch. 15 "Hearsay: The Common Law and Statutory Exceptions"; Ch. 16 "Admissions, Confessions and Statements made in the Accused's Presence"; Ch. 17 "Illegally Obtained Evidence and Confirmation by Subsequent Fact" and Ch. 18 "Res Gesta". Those four chapters occupy some 210 pages.

Discussion of the chapters into which the book is divided leads to the first criticism. The two touchstones of the law of evidence are relevancy and admissibility. All material which can properly be relied upon must have those two characteristics. The question as to whether or not a particular piece of material does or does not possess one or other of those characteristics is at the heart of the dispute as to whether it can be relied upon. Thus matters considered under the heading of Res Gesta and Similar Fact Evidence depend essentially on the issue of relevancy. Matters dealt with under the headings of Privilege, Opinion Evidence and Confessions depend essentially on the issue of admissibility. The authors do not appear to adopt that approach either in their introductory passages or in the order in which the material is presented.

The approach taken by the authors seems rather to be that stated by the American writer Maguire and quoted on p. 2 of their book:

> ". . . from the very beginning a student of evidence must accustom himself to dealing as wisely and understandingly as possible with principles which impede freedom of proof. He is making a study of calculated and supposedly helpful obstructionism."

Such an approach is likely to mislead the student into regarding the law of evidence as a collection of independent and separate rules and not as a cohesive body of principle.

There will always be differences of opinion as to what should be included or excluded in a collection of materials of this kind. Generally speaking the authors have done well in selecting illustrative cases but some omissions seem to be surprising. For example there is no mention made of *Carlton and United Breweries Ltd* v. *Cassin* [1956] V.L.R. 186 in the section relating to entries in public documents as exceptions to the hearsay rule. Similarly *R.* v. *Algar* [1954] 1 Q.B. 279 would seem to be involved in any discussion of competence of a spouse and *Senat* v. *Senat* [1965] P. 172 might have been mentioned at various points.

With some reservations as to the appropriateness of their inclusion, the authors (p. 138 ff.) deal with cases relating to the maxim *res ipsa loquitur*. However, the whole topic of estoppel has been omitted. It may be said that estoppel is better regarded as a matter of pleading or substantive law rather than as a matter of evidence but one would have thought, having regard to other matters covered in the book, that the subject might have warranted some mention.

In the area of typography there are some obvious mistakes that will no doubt be corrected in following editions. There are other improvements which the authors might, with advantage, effect. In some instances following reference to a particular case, there is an indication that that case is dealt with "supra" or "infra" without any indication being given as to precisely where the relevant extract appears. In some instances the editing of the extracts could be improved. For example, at p. 468, in the course of setting out an extract from a judgment of Viscount Dilhorne in *Selvey* v. *D.P.P.* [1970] A.C. 304 this passage appears:

> "I do not think it possible to improve upon the guidance given by Singleton J. in the passage quoted above from Jenkins, 31 Cr. App. R. 1."

However, the passage from Jenkins has been edited out of the judgment of Viscount Dilhorne. In the Table of Cases those cases which are reprinted at length are distinguished by bold type as is the page at which the extract is reprinted. It would be of advantage if the same approach was adopted in relation to the Table of Statutes. It would also be of assistance when, if more than one extract of a particular

case is reproduced, a reference was given to the location of the other extract. This practice has been adopted in some, but by no means in all, instances. The Index should be substantially expanded. The Index in the present edition fares badly in comparison with the excellently prepared Table of Cases.

Practitioners will find this work of value in initial research because of the extensive collection in the one volume of extracts from many of the relevant cases together with the text of relevant statutory provisions. It will also be a convenient volume to have at hand in Court when issues arise as to the admissibility of particular testimony. The book should be of assistance to lecturers, students and practitioners alike.

J. T. HASSETT*

Criminal Procedure: Truth and Probability, by T. KIRALY, (Budapest, Akadémiai Kiadó, 1979) pp. 208.

The preface makes two assertions concerning a criminal justice system. The first would be generally accepted by Western lawyers—"the judgment of the criminal court is an act of outstanding importance in the administration of justice". The second, that "truth is one of the central issues of criminal judgment", is the theme for analysis in most of the text.

The author's arrangement is as follows:

1. A short summary of the modern history of the doctrine of truth in criminal procedure.
2. Cognition in criminal procedure.
3. Truth in criminal judgment.
4. Probability and certainty in criminal procedure.
   Some applications of probability.
5. The monopoly of the courts in establishing the truth.

Irrespective of the initial level of interest, the Australasian reader will require great perseverence. The English text is the product of the efforts of three translators, and occasionally one wonders about the desirability of a fourth. To those unfamiliar with the Hungarian criminal justice system the absence of a general overview is a further obstacle to a full appreciation of the work.

The author's statement of perspective:

> "I study this topic not only from the legal but also from the epistemological and logical aspects, throwing occasionally a glance upon the fields of other branches of science and art:"

suggests a wide-ranging and comprehensive treatment. Certainly, the author touches on a great variety of subjects and the references to other authors are voluminous. There are more than 340 references in the notes, and the bibliography runs to almost ten pages. There are, however, few new insights. Just when one expects some novel treatment (e.g. on p. 100, where the "validity table . . . of implication" is set out), the discussion fades away, and one is left in doubt as to the author's understanding of the topic—a doubt which is reinforced on p. 126, when he gives his blessing to the following syllogism:

> "All acts p are thefts.
> The act of the accused is not p.
> Consequently the act of the accused is not theft."

* Barrister-at-Law, Prosecutor for the Queen, Victoria.

For an English or Australasian reader, the main value of the book will be found in Chapter 1, which contains a short historical summary, and, in particular, in the section dealing with Hungarian law.

RICHARD EGGLESTON* AND FRANCINE V. MCNIFF**

Reshaping the Criminal Law, edited by P. R. GLAZEBROOK, (Stevens and Sons Ltd, London, 1978), pp. xii and 492. Recommended price: £12.50 (U.K.).

This collection of essays has been compiled to mark the retirement of Dr Glanville Williams from the position of Rouse Ball Professor of English Law at the University of Cambridge. The book contains a total of 25 essays from a variety of well known criminal law scholars. The essays are well researched, carefully written and highly scholarly pieces of work. This is, quite clearly, an ambitious book, and a fitting tribute to one of the finest legal scholars of this century.

The book begins with some personal memories of Professor Williams by Professor R. Y. Jennings, and concludes with a complete bibliography of Professor Williams' published writings. The former contains some fascinating snippets of information. It records that the classic work, *Learning the Law*, which has been the first book about the law read by many thousands of English and Australian students since it was first published in 1945, was in fact written in a weekend. Recorded also is the story of Professor Williams' invention of, and delight in playing, a card game based on the Law of Contract—the object being to collect in one's hand a complete and flawless contract which is then laid down as a trick. Equally fascinating is the bibliography—a lesson in humility for all legal academics. Certainly no English speaking legal academic of this century has produced a greater volume of high quality work than Professor Williams.

In so far as the essays have a central theme, it is that almost all of them relate to problems which will require consideration if the English criminal law is to be codified or radically reformed. Perhaps one criticism that may properly be made of the work is that several of what are clearly the most important areas of controversy concerning the criminal law are not touched upon. In our modern society plagued, *inter alia*, by the two growing evils of terrorism and drugs, two of the most important and controversial areas of the criminal law are the defences of duress (a defence frequently raised by members of terrorist organisations) and intoxication. Both of these defences have been the subject of important recent judicial decisions and much public and academic debate. Surprisingly, however, neither of these defences is the subject of an essay.

Little point would be served by outlining the subject matter of all the essays. It is, perhaps, worthwhile merely noting several which the present writer found particularly interesting. The second essay by Professor Sir Rupert Cross, is an historical account of the Reports of the Criminal Law Commissioners (1833-1849), and the resulting abortive Bills of 1853 designed to codify the criminal law. Mr D. G. T. Williams presents a discussion and criticism of the overly wide *Official Secrets Act* 1911 (U.K.). This essay records the delightful statement, by a former Attorney-General, that the Act "makes it a crime, without any possibility of a defence, to report the number of cups of tea consumed per week in a government department" (p. 160). Professor M. L. Friedland presents a carefully documented account, with particular focus on Canada, of the role played by pressure groups in the development, both legislative and judicial, of the criminal law. Mr J. R. Spencer presents a history of private libel prosecutions against the press in England. Professor Michael Zander raises a

* Chancellor, Monash University.
** Lecturer in Law, Monash University.

convincing argument, backed by empirical data, that the right to remain silent in the police station is in fact largely illusory, and that the furore over the recommendation for removal of this right, made by the Criminal Law Revision Committee, was largely concerned with an issue of little practical significance. Professor L. Ll. J. Edwards contributes an essay which highlights, in the light of the Watergate scandal in the United States, the dangers of political influences being brought to bear on the conduct of criminal prosecutions. Professors Michael H. Tonry and Norval Morris present an analysis of proposed reforms in methods of sentencing in the United States.

Any such wide ranging collection of essays must contain some which present arguments with which an individual reviewer will disagree. Mr A. T. H. Smith presents a qualified argument in favour of the *actus reus/mens rea* dichotomy, suggesting that the primary justification of these terms is "as aids to exposition" (p. 107). The present writer cannot agree. The concepts are based upon 18th century philosophy, and collapse when subjected to any sort of rigorous analysis. Far from aiding exposition, they seem rather designed to add a level of confusion. Dr A. J. Ashworth argues against the doctrine of transferred malice, suggesting that in such cases the accused should be guilty of attempting to commit a crime in respect of the intended victim only. However, at the same time he argues that attempts should be punished in exactly the same way as completed crimes. Thus his argument, whatever the merits of the logic involved, is one which, if adopted, would have no practical consequences at all.

This book is, without qualification, recommended for anyone with an interest in the English and Australian criminal law.

C. R. WILLIAMS*

Australian Criminal Reports, (Sydney, Law Book Co. Ltd), Vol. 1, No. 1, 1980, (Annual subscription for six parts per year plus bound volume, $54.50).

The Law Book Company has published a new law report series devoted entirely to the decisions of federal and state courts of criminal appeal. This series, under the editorship of Fiori Rinaldi of the Australian National University, is obviously modelled on the English Criminal Appeal Reports which commenced in 1909, in response to the passing of the *Criminal Appeal Act* 1907. In Australia, the right of offenders to appeal against sentence or conviction has an almost equally long history. With the later introduction of Crown appeals against sentence and, most recently, the concept of "academic" appeals against acquittal which in Victoria, under *Crimes Act* s. 450A, permits a ruling to be obtained, without prejudice to the accused, on matters decided in trials resulting in an acquittal, the number of cases reaching courts of criminal appeal are increasing rapidly.

The introduction of this new specialist series is particularly timely, so far as this state is concerned, because of the frequently expressed criticism that the existing series of authorised reports offers too inadequate a coverage of matters decided in the criminal jurisdiction. The growth of the covert market in unreported decisions, both in sentencing matters and substantive criminal law, had reached such substantial dimensions that the Victorian Bar regarded it necessary, in Autumn 1980, to supplement its *Bar News* with a special listing of unreported Victorian criminal appeals. While this did something to reduce the risk of being ambushed by an unknown case, it was hardly a satisfactory alternative to a comprehensive reporting service. Though the editorial basis for selection of cases in this new series is not self-evident, whatever

* Senior Lecturer in Law, Monash University.

its scope it will do much to alleviate the frustration of counsel in gaining access to criminal cases of importance.

The value of any published information depends upon its accessibility to users and, in this respect, the indexing of *Australian Criminal Reports* is open to criticism. The index offered in the first part consists simply of a verbatim reprinting of the catchwords of each case thus, for the first nine cases in Part I, there are merely nine sets of catchwords ordered alphabetically in accordance with whatever happens to be the first word or phrase in the sequence. Even then, seven of the nine failed to identify the jurisdiction in which the matter was determined. Busy practitioners will demand more than this; they need a systematic analytical index; a table of statutes; and a list of cases judicially considered. Needless to say these should be cumulated with each part.

Unless the series is to be confined to cases not otherwise appearing in authorized reports, its utility as a specialist service will depend significantly upon how expeditiously it is published. In this first part, which bears the date August 1980, cases are reported which were decided in August and September of the preceding year. Though this may be an advance on the rate of authorized reporting in some of the smaller states, it falls behind the speed with which reports of cases are in the hands of subscribers to services such as the *Australian Law Reports*. No doubt this infant series must endure its teething problems, but criminal law practitioners throughout Australia will welcome its birth.

RICHARD G. FOX*

Obscenity, by GEOFFREY ROBERTSON, (London, Weidenfeld and Nicholson, 1979), pp. i-xv, 1-364. $31.95.

One of the tests of liberal democracy is the extent to which it allows minorities to find happiness in behaviour of which the majority disapprove. The limits of acceptable public sexual expression are constantly changing and obscenity trials provide the forum in which the imponderable "current standard of morality" is redefined from time to time. The last two decades have seen a major shift from a struggle to protect established literature from peevish Puritans to an aggressive assertion that pluralism and permissiveness preclude restraint. The alleged distinction between pornography and literature and between public good and public corruption has been found to be much more elusive than imagined. The "soft core" journals appealing to both higher intellect and lower instinct and the underground press using the celebration of sex as a means of baiting establishment prudes have tested the limits of the law much more severely than any time in the past. So often books about obscenity, particularly those published in the United Kingdom in recent years, have turned out to be little more than partisan accounts of their author's moral certitude that they know what is good for others and an attempt to invoke the criminal process to enforce their value judgments on those whose taste in erotic material they deplore.

This book does not fall into that class. It is a calm and balanced account of the censorship laws and their enforcement in England and Wales. It was written by a London barrister who has appeared in a number of major censorship cases. A man of catholic reading and marked literary skills, Robertson not only analyses the legal components of the definition of obscenity under the *Obscene Publications Act* 1959 but he anatomises the obscenity trial itself examining trial tactics, the role of counsel, the course of evidence and the courts' sentencing policies. But the work goes further in that it provides details of police routines, the conduct of publishers for whom prosecution is an occupational hazard, the history and nature of the pornographic market

* Reader in Law.

place itself and the law's reaction to it. While all this is set in the mother country, its relevance to Australian audiences is that, in 1977, when the author was a visiting lecturer in law at the University of New South Wales, he became favourably impressed with the systems of administrative control of obscene publications which were introduced in all states of Australia, except Queensland, in the mid-1970s. These followed the first full debate in the federal parliament on Australian censorship policies in 1970 and the Labor government's adoption, in 1973, of the policy that "adults be entitled to read, hear and view what they wish in private or public and that persons (and those in their care) be not exposed to unsolicited materials offensive to them".

The key to the Australian state classification schemes was the abandonment of any idea that the overworked system of criminal justice could adjudicate, with any satisfactory degree of fairness, efficiency, or consistency, those periodic flashpoints at which drawing a line between moral outrage and individual freedom was required. Instead, they combined decriminalisation with a liberal classification system designed to permit adults to decide and to seek out what they wished to read or view but, at the same time, by a process of classification, totally prohibited access to such material by those under 18 years and controlled, in varying degrees, the display, advertisement and public sale of such material. The justification for the law's intervention had changed from the prevention of moral corruption to the abatement of public nuisances, a move which Robertson thinks could usefully be emulated in England and Wales. Though the Australian arrangements are not without their own difficulties, particularly in their propensity to expand the range of classified material to non-sexual material or to publications only marginally objectionable, Robertson sees them as vastly preferable to England's continued reliance on the *Hicklin* depravity and corruption formula as entrenched in the *Obscene Publications Act* 1959, a test which is both meaningless in itself and predicated on concepts that are incapable of proof.

For those who seek a dispassionate exposition of the current law in that country as it relates to the control of obscenity, indecency and assorted rudery, Robertson's book provides as comprehensive and entertaining a text as one could want.

RICHARD G. FOX*

Fajgenbaum and Hanks' Australian Constitutional Law, by P. J. HANKS, (2nd ed., Sydney, Butterworths, 1980) pp. v-xxxv, 1-724.

The 1972 edition of *Fajgenbaum and Hanks* is now seen to have anticipated some of the developments and issues of the constitutionally active years 1972 to 1975, particularly in its discussion of prerogative power, responsible government and ministerial responsibility. In his preface Peter Hanks lays firm claim to the 1980 edition: ". . . this second edition is an individual effort. I planned it and wrote it." Arguably the result is not merely the second edition of *Fajgenbaum and Hanks' Australian Constitutional Law* (there is an apostrophe on the title page but not on the cover), for this title gives a semblance of continuity to work more aptly described as the first Hanks edition. The sub-nomination of the previous work as "Cases, Materials and Text", is deleted, but this remains the form of treatment of the subjects now dealt with in the new edition. The publishers' announcement is that this is a work which everyone interested in politics and the parliamentary process should read. This may be so, but its primary purpose must be for introductory study of Australian constitutional law by law students. The study should be augmented by the Constitution itself, reports of the leading cases and other of the materials referred to in the text.

* Reader in Law, Monash University.

Hanks has consciously tilted the balance of discussion away from an examination of Australian constitutional law as a whole. He has chosen to deal with a selection of related topics, and in doing so he has drawn particularly upon the judicial and non-judicial developments and discussions intervening since 1972. This change of emphasis is directly apparent in Chapter 1, which constitutes an original discussion of Parliament itself and is based upon recent decisions of the High Court on qualification of members *Re Webster* (1975) 132 C.L.R. 270, the franchise *King* v. *Jones* (1972) 128 C.L.R. 221, and the distribution of seats *A.-G. for Australia ex rel. McKinlay* v. *The Commonwealth* (1975) 135 C.L.R. 1 and *A.-G. for New South Wales ex rel. McKellar* v. *The Commonwealth*, now reported (1977) 139 C.L.R. 527. This leads to chapters on legislative power and procedures, parliamentary control of revenue and on to consideration of the Executive, the Crown and its Ministers. The scope of the book now leaves no room for an examination of the judicial power of the sort essayed in the 1972 edition. Likewise in respect of the judiciary, doctrines of separation of powers and the assessment of the role of the High Court as the arbiter of the Australian governmental structure.

In his farewell speech as Chief Justice, Sir John Latham said "When I die, section 92 will be found written on my heart" (1952) 85 C.L.R. ix. Sir John would have been disappointed with the mere passing reference to s. 92 comprised in this book. The obvious point sought to be made by Hanks is that the book stands not as a cursory examination of the whole of the subject embraced by the title, but as a guide to initiate from a particular viewpoint which consciously emphasizes the legislative process. This approach also justifies the limitation of the treatment of the raw heads of Commonwealth power to Chapter 9, dealing with the trade and commerce and corporations powers only.

The 11th November 1975 is a date which looms large in the author's perception, and he skilfully builds upon the foundation of the chapter on the Crown and its Ministers furnished by the first edition to open up for consideration issues of compelling interest arising from the dismissal of the Whitlam government. The passion of the author's views is barely suppressed. One recurring difficulty for an author is to balance modesty with a proper bibliography. Should one refer to one's own writings in the text? Perhaps it is necessary for completeness, but paragraphs such as 6.077

> [6.077] On the other hand, Kerr's critics have referred to his deception of his ministers, to his partisan preference for a solution urged by one side (the opposition) in the dispute, to his dubious political assessments for which he bore no accountability to the electorate, to his rejection of specific advice from his ministers, to his premature intervention, to his confused vision of responsible government and to his failure to play a more constructive and conciliatory (rather than Gordian knot-cutting) role. The Governor-General's critics include *Sawer* (1977), *Emy* (1978), *Hall and Iremonger* (1976), *Cooray* (1978) and this author.

and 6.078, which goes on to critical discussion in the first person ("I have found"; "I believe"; and "as I have said"), are somewhat jarring. However the forceful expression of the author's view is consistent with his preface: his edition stands as an individual effort.

This book, as a Butterworths publication, picks up recent cases by reference to the Australian Law Reports, to the exclusion of the Australian Law Journal Reports. The relevant Commonwealth Law Report references have not always been given when available: for example *McKinlay's Case* at p. 45 should have been cited (1975) 135 C.L.R. 1, and at 430 it is given an incomplete C.L.R. reference. *Pearce* v. *Florenca* is also reported in 135 C.L.R. at 507, but the A.L.R. reference only is given at paragraph 4.085.

The Hanks edition stands in a position of unqualified pre-eminence as a handbook for the questioning examination of the topics selected for discussion. It will be necessary for a teacher proposing to prescribe the work either to tailor his course to this subject matter or to pass beyond its confines to consider others aspects of Australian constitutional law. Within Hanks' logical guidelines, a law student should appreciate the advantage of being introduced to the subject by pathways mapped out

by the author's response to the constitutional developments of the last decade. His access to the subject through the 1980 edition must be envied by teachers and law students of the past generation; for them Australian constitutional law was made of apparently drier stuff.

GAVAN GRIFFITH*

Justice, edited by EUGENE KAMENKA AND ALICE ERH-SOON TAY, (London, Edward Arnold, 1979), pp. viii and 184.

This book is part of the series *Ideas and Ideologies* whose General Editor is Professor Eugene Kamenka. It is based on papers presented to a world congress of the International Association for Philosophy of Law and Social Philosophy held in Sydney and Canberra in August, 1977.

The book, consisting of seven essays, covers a very wide range of issues. Professor Eugene Kamenka's opening essay, "What is justice?", sets the scene and makes brief references to the other essays. But apart from this, the essays in this collection are independent and self-contained. Kamenka gives a broad survey of the different contexts in which demands for justice arise. In the narrow sense justice is associated with the law. Kamenka mentions three functions of law in society—peace-keeping and social harmonizing, conflict resolution, and resource allocation—and discusses the theories of justice associated with each function. He goes on to refer to justice as an intellectual activity of weighing competing interests and considerations, and then arriving at a judgement which cannot be simply deduced from the premises. This view that "judgements of justice" involve a "creative leap" is shared by Professor Alice Erh-Soon Tay in her account of justice in the Common Law. She argues that the concepts used in the Common Law are open-ended, and in deciding a case the judge has to strike a balance between a variety of considerations. This takes him beyond the system of black-letter law to the moral sentiments of the community and various social expectations.

Professor J.A. Passmore defends what he calls "the principle of civil justice" against rival principles of justice. Civil justice recognizes competence as the sole basis for preferential treatment. The promotion of civil justice will enable desirable activities to be conducted at the highest possible level. Passmore asks whether civil justice justifies restrictions on immigration, and his interesting discussion shows that this is a much more complex issue than is commonly assumed. He also defends civil justice against the claims of social justice which seek to give preferential treatment to disadvantaged persons. The issue of reverse discrimination, or discrimination in favour of disadvantaged groups, is also taken up by Professor Julius Stone. Stone discusses recent American cases like *DeFunis* and *Bakke*, and argues that the court's application of the Equal Protection Clause in the Constitution invokes values other than equality. This is used to support the general point that justice is not to be equated with equality.

Marxist views are presented in two papers—one by Professor Wieslaw Lang entitled "Marxism, liberalism and justice", and a joint paper by Dr Ferenc Feher and Dr Agnes Heller. Lang explains that the two principles of justice, "from each according to his capacities, to each according to his work" and "from each according to his capacities, to each according to his needs", are applicable to different phases in the development of society. The latter principle can only be fully realized in a classless communist society. But both principles are subordinated within Marxist theory to the principle of actual equality of opportunities. The Marxist theory of justice is not merely concerned with the distribution of goods but also, and more importantly, with the ownership of the means of production. Lang connects the

* Q.C.

theory of justice with Marx's account of alienation, pointing out that meaningful work will only be available when producers have full control over the conditions of work and over the way in which the goods produced are to be utilized. He then proceeds to expound and criticize what he calls "conformist theories" of justice. He classifies them into various types, but they all share the feature that they directly or indirectly accept the capitalist economic system of private ownership of the means of production. He discusses in a concise and generally lucid manner the views of Hayek, Nozick, and Rawls. But forceful as they are, his comments are too general to fully convince those who do not already accept the Marxist framework within which they are made. The thinkers he discusses have detailed arguments which it is obviously impossible for Lang to confront within the scope of his otherwise illuminating paper.

Feher and Heller expound and defend a model of what a social system should be which they contrast with both the capitalist model, in which there is a conscious acceptance of inequality, and the model of primitive communism which accepts equality but at the cost of the levelling of needs. Their own model seeks to create "man rich in needs". They distinguish between two aspects of property—ownership and appropriation. Appropriation refers to the satisfaction of production needs (like the need to develop one's ability through work), and to the exercise of some control over the production, distribution and consumption of goods. Ownership refers to possession, to the *exclusive* satisfaction of needs and the control over what one owns. It thus presupposes a degree of appropriation. Under capitalism ownership completely determines appropriation. But Feher and Heller argue for a form of social organization in which appropriation becomes largely independent of ownership.

Professor Brian Barry's excellent paper, "Justice as reciprocity", is rich in detailed arguments. He analyses the principle of justice as reciprocity showing that it has three independent aspects—justice as requital which involves making a fair return for benefits received; justice as fidelity which requires the carrying out of the terms of a contract one has voluntarily entered into; and justice as mutual aid, or playing one's part in a non-contractual practice of mutual aid. Barry shows how justice as mutual aid can be used to account for certain systems of compulsory redistribution. He then argues persuasively that our obligations to poor countries and to future generations are not derivable from the principle of justice as reciprocity. Justice as reciprocity must therefore be supplemented by another principle which he calls "justice as equal opportunity". The latter is concerned with the initial distribution of natural resources, a matter on which justice as reciprocity is silent. Justice as equal opportunity requires that countries poor in resources should be given equal access to the world's resources. Similarly, it places an obligation on us not to deprive future generations of a fair access to resources.

Barry believes that justice as equal opportunity is a principle that is complementary to justice as reciprocity. But justice as equal opportunity is applicable not just to the relations between countries and between generations, but also to those between individuals or groups within the same country. Barry does not discuss whether there is the possibility of a conflict between the two principles of justice. This possibility arises because justice as equal opportunity cannot be confined to a determination of the initial distribution of natural resources. Exchanges of goods in accordance with justice as reciprocity after the initial distribution may lead to very unequal access to resources. Is justice as equal opportunity to operate only when justice as reciprocity is silent, as Barry's discussion of international and intergenerational justice suggests, or does it act as a side-constraint on the application of justice as reciprocity? Or perhaps is it the case that justice as reciprocity will generate sufficient redistribution to ensure that no great inequalities will develop?

C. L. TEN*

* Senior Lecturer in Philosophy, Monash University.

Law and Politics: The House of Lords as a Judicial Body 1800-1976, by ROBERT STEVENS, (London, Weidenfeld and Nicholson, 1979), pp xviii and 701.

The book has two themes. First, it uses the tactics of the American realist movement in an examination of the relationships of law and politics in England (Prologue xvi): The book begins with a quote from "The Path of the Law". Secondly, towards the end of the book, another theme is discernible. There is a dynamic analysis of the processes of judicial reasoning in appellate courts in an attempt to establish a rationale for second tier appellate decision making. In my opinion, Stevens does not take either theme far enough.

The First Theme: Realism in England

Stevens is influenced by American theory. His particular design is to analyse the changing role of the judges by incorporating "the persona of the law lord, his attitudes and predispositions and the development of the law" (Prologue xvi). This type of analysis is essential to the revitalization of the analytically rigorous but dangerously redundant conservative and formalist analysis of judicial behaviour that is fashionable in England. But Stevens' book is hardly an answer to the tradition of conservative analyses in which the declaratory theory of law still presupposes that interpretation rather than creative choice is the primary, if not the only, judicial activity. In the face of this tradition, a book which concentrates on law rather than on politics,[1] as Stevens does, supports gradual change of techniques of analysis and commentary rather than the dramatic, fully-frontal though politically naive assault of realism.

A realist revolution will only occur in England with a strong attack on entrenched orthodoxy and with favourable conditions in the discipline. The factors that created realism in the United States do not appear in England. American judges themselves admitted realism; Holmes believed in instability and inconsistency in the law; Cardozo extolled judicial choice and Jerome Frank was a central figure in alternative analysis. The tension between Columbia and Yale on the one hand, and Harvard on the other, generated realism as an attack on established orthodoxy, legal scientism and closed professionalism. The intellectualization of legal theory by excluded academic law teachers was part of their search for vulnerable points in the formalist tradition. The raison d'être of realism was to undermine the ascendency of professionals who controlled practice. In England there are no similar forces capable of generating a significant attack on formalism. On his own, given his restraint, the most Stevens can achieve is a healthy, and none too early, broadening of analysis of judicial behaviour in the American tradition.

The Second Theme: Styles of English Judicial Thought

The basic approach of the book is biographical. Stevens takes the personalities of the judges and accounts for each in terms of a judicial style. Since the English bench is particularly uniform in its approach when compared with the Supreme Court of the United States, these differentiations are in essence, degrees of conservatism, and are hardly likely to yield a significant range of judicial styles, at least without Lord Denning. (In fact one of the best parts of the book is its fair and balanced discussion of Lord Denning, who is one of the major contributors to judicial technique that England has produced.) With the possible exceptions of Lords Atkin and Wright, who are discussed in terms of Llewellyn's "grand style of judging",[2] the book is an encyclopedic account of English judicial restraint: Judges demonstrated limited consciousness of non-legal events; they assumed British institutions were transportable[3]

[1] Pp. 303-4 contain a brilliant amalgamation of law and politics in the discussion of Lord Parker.
[2] *The Common Law Tradition: Deciding Appeals* (Boston, 1960).
[3] The account of the striking down of the Canadian new deal legislation provides a good example (p. 241).

and felt little need to borrow from other national experiences. Insularity was supreme and isolation highly contrived. The supporting theoretical basis for these restraints was judicial formalism.

Stevens' book contains valuable historical insight into the development of formalism and the consequential and dramatic withdrawal from articulated policy based reasoning of the upper English Bench. At its early stages formalism was a political expedient and a survival tactic, strongly linked to English ideas of utilitarianism, liberalism and laissez faire.[4] It arrived coincidentally with a separate and defined group of professional law lords whose function was clearly different from that of their parliamentary brethren. It was related to Benthamite philosophy which saw law as requiring judicial science,[5] and not judicial creativity [69]. Stevens credits Dicey with the most systematic exposition of formalism, citing his denial of judicial creativity and notion of a passive judiciary which became "intellectual orthodoxy for the following decades" [108]. Stevens diagnoses the real sin of formalism as allowing the conservatives to give effect to inarticulate major premises without having to spell out what these were. He describes the predominant analysis as the declaratory theory which enabled the Lords to contain conservative policy decisions behind a mantel of inevitability and righteousness in particular instances.

There is, however, another aspect of the story, one that Stevens does not emphasize. By denying overt creativity in the bench, formalism enabled the judiciary to pursue *class interests* without having to accept any direct responsibility for the way things were [260]. On any political analysis, the story of the House of Lords is a story of rampant elitism [176]. Formalism and professionalism became superlative legitimation processes. Between them, they created one of the amazing myths of the twentieth century: the myth of objective and apolitical judicial action. Even with Stevens' insights into the gestation of the institution and the ascendancy of the common lawyers, there remains considerable mystery about how and why this myth came about. He leaves the nexus between judicial rhetoric, institutional function and the stages of capitalist development unclear. Instead, he attacks Weber's interpretation of formalism as "decision making by the judiciary as a means of facilitating capitalism by entrenching vested interests in established doctrine". Nevertheless, in a complete account, formalism must be accounted for in both the intellectual traditions *and its political impact*. It grew out of and supported an entrenched class-ridden capitalism just as surely as it grew out of English ideas. Because the book concentrates on law, it plays down the political realities and finds itself in a tradition of thwarted political analysis of judicial activity. This is not to suggest that Stevens fails to realize that protection of property is significant: he demonstrates how this is a consistent stultification of the development of administrative and tax law.[6]

If Stevens had drawn more on the contrast of the Supreme Court of the United States, the political consequences of formalism would have come directly to the surface. He would have presented a living alternative model of decision making that demonstrates the inherent paucity of judicial argument in England and which justifies the separate existence of a second tier appellate court.

The themes of the book are summarized at the end of each part. The generalizations are entirely consistent with the detail which is rich in information and fascinating for anyone who has the slightest interest in law. The disappointing thing is that after so much research and writing, these conclusions are unarguable. The book suffers from the very conservatism in style of analysis of judicial behaviour that Stevens would like to see abandoned by those on the bench. Despite the limited theoretical horizon, the book is innovative. It is eminently readable. The author's voice is always explanatory and never strident. Direct critical attack is missing, even

[4] Page 69. By 1861-67 *stare decisis* had reached its formal peak: the House could not overrule itself: it was no longer a legislature.

[5] This should not be confused with Langdellina legal science in the U.S.

[6] See especially 148-51 and 160-1. Materials on tax and administrative law figure heavily in the second part of the book.

when it might be thoroughly acceptable as in the case of the child trespasser rule,[7] or the thalidomide case.[8] But there are some marvellous wry comments that are strong, sharp and clever. The book begins by saying the most noticeable thing about the House of Lords in 1977 is that it appears exactly the same as it did in 1901 with two minor differences—"electric light" and "less elegant dress". And one of the best explanations of the doctrine of formalism appears in an aside "Other law lords were firmly committed to the notion that they must not take into account anything so extraneous as the effect of their decision" [375]. In this alone the contrast between the United States Supreme Court and the House of Lords, is dramatically expressed.

The book should be widely read.

JUDE WALLACE*

Australian Wills Precedents, by THE HONOURABLE FRANCIS CHARLES HUTLEY WITH MICHAEL W. INGLIS, (3rd edition, Sydney, Butterworths, 1980), pp. i-xiv, 1-113.

The first edition of this book, published in 1970, was described on its title page as "the Australian Edition of Parkers Modern Wills Precedents". Its preface, with more accuracy, spoke of the precedents as having been "revised and recast for use by New South Wales testators". The second edition (1974) was furnished with annotations to enable the precedents to be used in other States and in the A.C.T.

The principal differences between the 1980 edition and its predecessor arise from two groups of legislative changes: first, the abolition of Commonwealth Estate Duty as from 1 July 1979 and the recent exemption from similar State duties of property passing to the surviving spouse; and, secondly, recent State Acts removing the legal disabilities of children born outside wedlock.

A book of precedents must surely be judged under three heads: the accuracy of its law, the practicality of its forms and the felicity of its language.

There is more commentary than precedent material in this book—and no one will complain about that. Some 130 decided cases are referred to, though their effect is often indicated only briefly. We are tantalised at p. 59 by the statement "a vivid illustration . . . is provided by the case of . . ." without any details; and baffled at p. 35 by the injunction to "compare the decision of Holland J." in a case which turns out to be unreported.

The notes to enable the forms to be used outside N.S.W. seem adequate, though those for South Australia are noticeably more elaborate than those for other States. The notes to Chapter 12, on provisions governing the payment of death duties, might usefully have referred to *Bones* v. *Union-Fidelity Trustee Co. of Australia* [1971] V.R. 368 and *O'Donoghue* v. *Gilpin* [1976] V.R. 410. Citations of Victorian statutes incorrectly include a second date.

In places, the reader is not sure whether the text of legislation is actually being set out or merely being paraphrased. Rule 16 of Part 78 of the Supreme Court Rules (N.S.W.) is accurately set out in full on p. 98, but the style in which that is done does not differ from the style in which s. 7 of the *Wills, Probate and Administration Act* 1898 is summarised, not very precisely, on p. 96.

The forms of precedents cover the more common needs of clients and are grouped conveniently. It seems appropriate to consider more closely the language of the precedents, because of the importance attached to this by the authors and the English writers they are following.

7 P. 242.
8 *Attorney General* v. *Times Newspapers Ltd* [1974] A.C. 273.
* Senior Lecturer in Law, Monash University.

The expressed aims of Parker's *Modern Wills Precedents* (1969)—like those of his *Modern Conveyancing Precedents* (1964)—were, in summary, to provide a comprehensive collection of effective precedents, in a style shorter, less confused and more comprehensible than many traditional precedents. According to the preface to the 1980 edition of *Australian Wills Precedents*, the authors have "sought to keep the precedents stripped of all surplus verbiage".

There is no doubt that the authors have achieved a notable simplicity and shortness of language. The reader may however find the language odd in places, a little abrupt, sometimes lacking in balance. Given the aims of the book, that is not surprising nor really a matter of criticism. But there are a good many places where the order of words is inappropriate.

Form 1 on p. 18 provides that an executor who practises a profession is entitled to be paid fees etc., "and shall be entitled to apply to the Court for commission for his pains and trouble in addition". The reader's impression that the executor has trouble in adding up figures would be avoided if the words "in addition" (or better "as well"?) came after "shall" or "entitled".

Again, on p. 94, a power is given to the executor "to sell any asset of the estate not specifically given to himself at the price being the value accepted" etc. Clearly, the words "to himself" are in the wrong place; and it would not be sufficient simply to put them after "sell" because there would then be a difficulty about "given at the price".

Other disconcerting passages which could readily be improved are: "excluding consumable stores as if I were an intestate" (p. 27); "at my death during her widowhood" (p. 28); "being unable to read this will" (p. 100); "in this will who are referred to as 'my executors' " (p. 104); "if the preceding trusts fail to pay the capital" (p. 106); "to invest and change investments as freely as if they were beneficially entitled" (p. 108).

Some surplus verbiage still remains: "at this date of the execution of this my will" (p. 66); "shall be entitled to" (better "may"?) (p. 18); "this my testamentary disposition" (p. 107). And despite the strictures in the preface to Parker's *Modern Wills Precedents* on "said" and "same", these words are not entirely avoided in the Australian version: "said" is used four times on p. 28, four times on p. 29 and twice on p. 74; "same" is used on p. 42 and, slightly differently, on p. 66.

Sometimes it seems that the shortening of the language has gone too far. The forms on pp. 80-82 deal with the child or other beneficiary who dies "leaving children". The draftsman with his mind on the job will instinctively say to himself: "Is that phrase going to be adequate if the beneficiary leaves only one child?" Even if the draftsman knows of a case in point, or can afford the time to find out whether there is one, he will probably say to himself, "I'd better put in 'leaving a child or children' ". He knows that the will may one day need to be administered: the problem he has foreseen may cause difficulty and expense and the correct solution may be overlooked.

The form on p. 32 directs the executor not to seek to recover death duty on notional property from those liable to pay it and continues "and I therefore give to such persons legacies equal to the amount of such duty". As the authors say (p. 31), such a direction ordinarily operates as a legacy—but may not the words in inverted commas be misconstrued as giving a legacy in addition to the benefit of the direction? The draftsman may think it wise to omit those words and to provide instead something along the lines of "my executor shall pay the duty assessed or reimburse the assessed person for any payment made by him".

The visual appearance of the book is reasonably good and there are very few misprints. The eight line footnote on p. 7, in identical terms to a footnote on p. 6, may be a printer's error or, less likely, an unsuccessful economy in effort on the part of the authors.

PETER BALMFORD*

* Senior Lecturer in Law, Monash University.

The Law of Wills, by I. J. HARDINGHAM, M. A. NEAVE AND H. A. J. FORD, (Sydney, The Law Book Company Ltd, 1977), pp. i-xxxiii, 1-295.

Control over the disposition of one's property after death remains a significant feature of our law of property, and one vehicle through which this right may be exercised is the will. The law of wills is an important part of property law; yet there is no up to date Australian text which covers this area—until now. *The Law of Wills* is an Australian text which takes into account New Zealand and English legislation in addition to that of the Australian States and Territories. The emphasis, however, is firmly on Australian and New Zealand decisions.

The authors stress that the book involves an in-depth study of the law of wills rather than the law of succession and thus the law relating to the administration of estates is excluded. Students endeavouring to obtain a knowledge of the law relating to wills will find this book conducive to their needs, for the law is presented in a clear and concise manner without unduly dwelling on the jurisprudential aspects of the law. However, those undertaking a course in succession will be required to supplement this book with further readings; for example, the scope of the book does not extend to intestacy.

In addition to discussing some of the more mundane aspects of wills, the book covers the areas of secret trusts, failure of testamentary gifts, satisfaction and equitable ademption, contracts relating to wills, and a useful chapter on testator's family maintenance. Trust law impinges on many of these areas but an understanding of it is not essential to be able to grasp the legal concepts pertaining to wills.

Hardingham and Ford are accredited with being the chief contributors to the book, bearing responsibility for eleven of the thirteen chapters between them. In the two chapters for which Neave undertook the primary research and writing a noticeable change in style is detected. Whereas throughout most of the book the law is presented in a rather straightforward manner with a brief mention of the relevant authority, Neave includes comparatively lengthy extracts from judgments, inviting readers, it would seem, to provide their own analysis. Despite her slightly different approach, Neave's contribution to the book is excellent in that she states the law with as much clarity as the law itself allows.

The law of wills is an area of law which unlike many other areas is not rapidly developing. Many of the legal principles date back centuries and for the most part the law is reasonably well settled. It is this fact which has allowed the authors to present a well researched and clearly presented treatise on the law of wills. Where proposals for reform are afoot they have been adequately presented, where criticisms of the law are warranted they are unhesitatingly made, and where uncertainties exist they are fully explained. However, in all such cases the treatment is brief rather than comprehensive, and does not form an integral part of the book.

It is difficult to find any substantive criticism of this book. The fact that there is no chapter on intestacy may be disappointing to some, but the authors justify this exclusion (albeit not expressly) by maintaining that the book is intended to cover wills only and not succession generally. Some may find this book not sufficiently comprehensive but for most students it will be more than adequate to meet their needs in this field. Practitioners too may find this book a useful guide in their work; the lucrative nature of this area ensures that interest in it amongst the profession is not dying.

CHRIS C. FARRELL*

* B.Ec.

Trade Practices and Consumer Protection, by G. Q. TAPERELL, R. B. VERMEESCH AND D. J. HARLAND, (2nd ed., Sydney, Butterworths, 1978), pp. xxxv and 732.

There has been no Federal legislation ever enacted which has had such a dramatic effect on the Australian business world as the *Trade Practices Act* 1974 (Cth.). This legislation is not novel either in its principles or aims, for it is preceded by the *Australian Industries Preservation Act* 1906 (Cth.), the *Trade Practices Act* 1965 (Cth.) and the *Restrictive Trade Practices Act* 1971 (Cth.). The first of these statutes met with serious problems as to its legitimate ambit which was restricted by the Commonwealth Government's legislative power under the Constitution, and there are less than a dozen reported cases under this Act. The 1965 Act was prescriptive in nature, in that, rather than prohibiting certain conduct, it required examination by the Trade Practices Commission of certain conduct and agreements, and the making of "cease and desist" orders. As the examination and hearing of the large number of registered agreements was a slow procedure, this Act was, like its predecessor, virtually ineffective. Moreover, this Act was considered by the High Court in the *Rocla Concrete Pipes* case in 1971 to be an invalid exercise by the Commonwealth Government of its constitutional powers. Finally the 1971 Act, proclaimed on February 1st, 1972, lasted only 30 months before the 1974 Act became operative in August 1974. It was due to the change in the judicial climate after the *Rocla Concrete Pipes* case that the Government made a concerted effort to provide legislation with teeth both insofar as constitutional validity and the provision of substantial penalties were concerned.

Whilst the *Trade Practices Act* 1974 (Cth.) has undergone three very substantial amendments, (the first in 1977, which dealt with the restrictive trade practices sections in Part IV of the Act; the second in 1978 which introduced wider reaching manufacturers' liabilities under Division 2A of Part V of the Act; and the third in 1980 dealing with secondary boycotts in sections 45D and 45E of the Act), it has also survived challenges to its constitutional validity and has forced Australian industries as a whole to re-evaluate their trade practices to conform with an Act, each breach of which can result in a penalty of up to $250,000 being imposed on a corporation and up to $50,000 on an individual, and which continues to be a major force in the Australian business world of the 1980s.

The first edition of this text was published in 1974 and was, in the words of the authors, "written primarily to explain the operation of the Act to the layman". Although the second edition follows the style and format of the first, it seems to be directed more to students and practitioners than to laymen. This may however, be due more to the increasing complexity of this area of the law than to the text itself. The second edition was published in 1978, in the wake of the sweeping 1977 amendments, and forms the basis of the Butterworths' *Trade Practices Reporter*, which is in loose-leaf form, enabling it to be continually updated. It is in relation to this that readers of the second edition should be warned: this text, in the edition currently available, is now very much out of date, especially in view of the 1978 and 1980 amendments. Whilst a reference is made in the preface to the second edition to the existence of the loose-leaf service, no adequate indication is given to the unwary of the text's insufficiencies. Although each legal text is faced with the problems of keeping abreast of new developments, it is suggested that a valuable addition to this text, especially one which deals with consumer protection, would be to add a short loose supplement to it, drawing to the reader's attention the new legislative amendments since the second edition was published, and the fact that the loose-leaf edition deals exhaustively with these and with all new developments in the area.

Subject to the above, this text deserves commendation as a very detailed and comprehensive treatment of the *Trade Practices Act* 1974 (Cth.). As those who have had any dealings with the Act, in particular with Part IV, will know, this area of the law is heavily dependent on detailed statutory interpretation, and this text devotes the substantial portion of a large chapter to familiarising the reader with complex

concepts, such as 'competition" and market definition. Traditional lawyers' isolationism is avoided, and the economic background to the Act receives a thorough treatment, a very useful facet of the text, especially for practitioners newly venturing into this Federal Court jurisdiction and who find themselves dealing in an unfamiliar language. The text also gives the Act's constitutional foundations an intensive examination. The constitutional limitations are strongly emphasized, which should serve to warn practitioners of the functional limitations of the Act and to alert them to the oft-ignored provisions in section 6 extending the operation of the proscriptive sections contained in Parts IV and V of the Act.

The style of the text is well suited to an area of law so dependent on statutory interpretation. The seven major chapters, (5 to 11), each deal with one section of the Act, (Sections 45 to 51), give a brief outline, introduction and history of the sections, recite them in full, and then analyse them phrase by phrase, or term by term, as is appropriate. As stated above, this edition was published soon after the 1977 amendments were enacted, and the authors were faced with the daunting task of writing a commentary on a virtually unexplored (from an Australian point of view) Act. In the "un-updated" text, the authors examine each and every section, detailing how the courts, the Trade Practices Tribunal and the Trade Practices Commission have interpreted them, or offering various alternatives based on the United States antitrust and the United Kingdom restrictive trade practices experiences, for those sections not as then considered by the courts, Tribunal or Commission. Some of the text's suggested interpretations have been remarkably accurate predictions, as with the sections in Chapter 14 dealing with misleading or deceptive conduct, and with promises and predictions in particular.

Another criticism of the text is that its treatment of the common law history of the trade practices area is scrappy. It ignores all background prior to the nineteenth century, some four hundred years of laws dealing with restraint of trade. A more substantive criticism is that the exemptions provided by section 51 of the Act deserve far more detail than they are presently attributed. The subject-matter of this section, and in particular those paragraphs dealing with intellectual property could well be the topic of a lengthy exposition exploring the theoretical limits of the exemptions. However, whilst the authors have shown a good understanding of the problems associated with the paragraphs concerning patents, copyright, designs and trademarks, the text deals with this problematical area in a very cursory fashion which is quite out of character with the thoroughness of the rest of the text. Similarly, the text manages to ignore Part X of the Act, which deals with Overseas Cargo Shipping. Whilst few laymen or practitioners would have occasion to refer to the provisions contained in this Part, a text which purports in all other respects to be a comprehensive review of the *Trade Practices Act* 1974 (Cth.) should, at the very least, set out the provisions of this Part, rather than ignore them and hope that their absence will not be noted. A final omission from this text is a consolidated text of the Act. Whilst the various sections are usually included in the chapters which deal with them, the text needs a complete Act, even if only for ease in reference. On the other hand, the list of further reading materials included at the conclusion of each chapter is a helpful addition, especially useful for students.

In summary, the thoroughness of this text recommends itself to practitioners and students as a valuable guide through the relatively rough and unchartered (as at 1978) waters of the Act. The authors' comments in the preface that the text was written "primarily . . . (for) the layman" seem a little puzzling in view of the difficulty experienced by most lawyers in grasping the complexities of the legislation.

STEPHEN STERN*

* B.A., LL.B. (Hons); Barrister and Solicitor of the Supreme Court of Victoria.

The Law and Practice of Company Accounting in Australia, by T. R. JOHNSTON, M. O. JAGER AND R. B. TAYLOR, (4th edition, Sydney, Butterworths, 1979), pp. 672.

For nearly twenty years in both Australia and New Zealand, successive editions of this text have provided the most complete and comprehensive treatment of the Law and Practice of Company Accounting. If any accounting textbook can be called authoritative, it is surely Johnston, Jager and Taylor. Its influence, both as a textbook for students and as a reference work for practitioners, has been widespread and much of the present conventional wisdom of the accounting profession owes its origin to the early editions of this work. In many ways it can be fairly described as the accountants' Dr Spock.

This new edition follows in the footsteps of the previous editions by seeking to provide "a remarkably comprehensive treatment of the law relating to and affecting company accounting and reporting, including such aspects of practice as are necessary to interpret this law and explain its significance and application". Besides references to cases decided since the previous edition, the major development incorporated in the fourth edition is the vastly increased reference to the Statements of Accounting Standards and Statements of Auditing Standards published by the two professional accounting bodies in Australia. In addition, reference is made for the first time to the requirements of International Accounting Standards.

Familiarity with an oft consulted old friend and respect for its authority, however, should not blind us to its increasingly apparent faults and failings. First and foremost, it is a book on the law of company accounting. It seeks to explain what the law requires and what the law allows. Curiously enough, however, for an expository text it lacks a concern for underlying principle, doctrine and concept. Notions such as accountability, stewardship and disclosure have long been at the heart of company accounting and provide much of the impetus for development within company law and company accounting. Although such underlying concepts are referred to, their significance and meaning is largely ignored. Perhaps the best demonstration of this failing is to be found in the chapter on "Audit and Investigation". The static common law duties of auditors are comprehensively and clearly identified but the dynamic nature of those duties is not revealed.

In *Pacific Acceptance* v. *Forsyth* (1970) 92 W.N. (N.S.W.) 29 a case to which the authors pay close attention, Mr Justice Moffit was at pains to point out that the function of the auditor was to protect the interests of the shareholder and that his duties could only be understood in the light of this function. By failing to refer to this dynamic, the discussion of the common law duties of auditors is made curiously bloodless.

The emphasis on law, which for so many years was the strength of this book, is now, however, in danger of becoming its major weakness. The relationship between company law and company accounting has always been complex. On the one hand, company law has imposed the duty to account and to report; on the other hand, judges have long said that it is the responsibility of the accounting profession to give operational content and meaning to the requirement that accounts must provide a true and fair view.

In recent years, with the publication of an increasing number of accounting standards and with the development of an increasingly useful body of concepts and theory, it is now possible to argue that accountants turn to a largely independent body of knowledge for answers to their problems and explanations for, and justification of, their actions. To be fair to the authors, they do refer at length to relevant professional pronouncements, but more often than not they are merely content to uncritically reproduce this material. The point that I am making is simply this: in the past it was appropriate to examine accounting practice in relation to the law, the time has now come, however, when the law must be examined in relation to accounting practice and accounting theory.

Only three points remain to be mentioned. It is surprising that no reference is made to the decision of the New Zealand Court of Appeal in *Scott Group Ltd* v. *McFarlane* [1977] 1 N.Z.L.R. 553 which one would have thought provided the most relevant and most important elaboration of the *Hedley Byrne* principle. It is also about time that the authors recognised on page 487 that the *Companies Act* 1967 (U.K.) did implement the Jenkins Committee's ideas on the auditor's right to be silent on matters such as the obtaining of all the information and explanations that he required, provided he was satisfied in regard to them. Similarly, it is time that the authors re-examined their argument that the auditor occupies a quasi-judicial position. A number of recent cases have made it clear that such a notion does not correctly describe the auditor's position or his function. Such a notion highlights the importance of the independence of the auditor, but nothing more.

Despite these failings, the book remains what it has always been; a clear, concise and comprehensive treatment of its subject. The problem that faces the authors is a problem not uncommon in successful expository legal texts. After twenty years the original conception and organizing principles begin to run out of steam as the development of the subject matter gathers pace. What is required, therefore, is not an update, but a re-examination of the authors' aim and their approach to the subject.

DONALD M. GILLING*

"Lawyers in Commerce?", by ROSEMARY HOSKINS, (Sydney, The Law Foundation of New South Wales, 1978), pp. 157. $4.00.

For those law students and graduates hopeful of obtaining employment in commerce the following guidelines emerge from "Lawyers in Commerce?":

If you are male; have a combined law/commerce qualification (preferably with above average results); are strong in analytical and communication skills; are profit oriented and possess decision making ability then you have prospects of obtaining a job and succeeding as a lawyer in commerce. You are more likely, however, to succeed as a corporate lawyer than as a lawyer employed by a corporation in other roles, but if employed in the latter category you are most likely to find yourself in industrial relations, corporate planning or finance. You are likely to find it difficult to obtain employment in commerce because potential employers believe you probably have expectations of entering private practice (and will therefore be short term); because potential employers feel threatened by your specialised knowledge and the aura of status and prestige surrounding the legal profession; because potential employers see you as elitist, conservative, legalistic and inflexible and because potential employers anticipate that you will have difficulty in adjusting to the commercial environment.

Reports of statistical surveys generally do not make easy reading, but because the findings and conclusions in "Lawyers in Commerce?" are set out in a readily accessible manner, it will prove a useful book for law students and graduates considering employment in commerce. Indeed as the first professional approach to the problem in Australia the book should be included in the reference library of every secondary school careers teacher and it should be recommended reading for those involved in curriculum making decisions at universities and for those responsible in the legal profession for advising on and regulating admission to practice.

Readers in States other than New South Wales (where the survey was carried out) are warned, however, not to assume that the conclusions automatically apply in their State. Most of the conclusions are probably relevant to all large commercial centres

* Lecturer in Accounting and Finance, Monash University.

in Australia, but there are regional differences such as the availability and content of university courses.

The chief objective of the survey, which is clearly stated at the beginning of the book, was to explore the attitudes of employers in the commercial sector towards the employment of law graduates. In terms of data and analysis the author undoubtedly achieves her objective and, although she reaches some firm conclusions, the reader is, in the end, left somewhat dissatisfied. I would have found the book far more satisfying if it had been rounded off with some editorial comment, some comparison with overseas experience and possibly some projections as to the future. For instance there is a deal of information relating to the roles played by lawyers in Australian corporations, but no comparison with the practice so well known in corporations in the United States of using the in-house lawyer as a "negotiator" of contracts, not merely as an adviser on contracts. This then raises questions of comparative training; e.g. is there more emphasis in United States law schools (compared to New South Wales law schools) on commercial subjects, the practicalities of business, profit orientation, etc.? These aspects no doubt go beyond the scope of the survey and the book, but it is obviously a measure of the book's worth that it stimulates such questions and prompts the reader to desire further information.

There are few surprises in the conclusions, but many are interesting and certainly instructive for those law students or graduates intending to seek employment in commerce. With the great surge during the last decade, of legislation generally affecting corporate life (trade practices, prices justification, foreign takeovers, taxation etc.) there has been a significant increase in in-house legal services. It is therefore surprising to find from the report that future growth in in-house legal services is likely to be limited. A number of reasons for this are submitted in the book and although it is a complex question, it does appear that the greatest barrier arises from the breadth and complexity of the legislation mentioned above and the likelihood that one legal officer (or a small corporate legal department) woud be unable to provide the specialist advice required.

The other surprise which emerges from the report is the lack of awareness in the corporate world of the availability of combined law/commerce courses, the qualification apparently preferred by corporations interested in employing law graduates. This is probably in line with the lack of knowledge displayed by respondents to the survey of course content generally and suggests there is room for improvement in methods adopted by universities in marketing their product!

Apart from the lack of wider discussion on the implications of the survey I have only two specific criticisms of the book, one substantive, the other merely of form. Considering the substantial increase in recent years in the number of women both enrolling and graduating in law (I believe that during the 1970s women enrolling in law in Australian universities increased steadily to over 30% of all law enrollments) it is a pity there were no questions directed to employers (or corporate lawyers) as to their attitudes towards women lawyers in commerce. It is interesting to note that of law graduates employed by corporations who responded to the survey, only 11% were women and of those employed by those corporations as corporate lawyers only 8% were women.

My criticism as to form is a small quibble, but on a number of occasions, whilst absorbed in the many tables and classifications set out in the appendices, I could not quickly find the relevant reference in the main text. Cross references at the head of each table or classification would have been helpful.

Overall there is much that is constructive and informative in "Lawyers in Commerce?" not the least of which are the reports on the in-depth interviews with 12 corporate lawyers and the tables headed "profile of lawyers in employer organizations".

In my view the success of the book arises from the fact that the survey questions were framed intelligently and flexibly thus giving room for a wide range of responses on topics which are simply not capable of being sorted into positives and negatives. The variety of answers to some questions therefore makes the reading of this book interesting and at times entertaining; for example in response to a question directed

to company policy about the remuneration of law graduates one cynical company executive ventured the answer that the survey would not have been carried out unless law graduates were not being adequately remunerated!

ALAN KIRSNER*

Managing the Partnership Office, by DAVID HARROWES, revised for Australia by H. M. HEARN, assisted by G. COWLEY, (Sydney, Butterworths, 1979), pp. i-vii, 1-128.

In his introduction to the book the English author David Harrowes says: "This is a practical book for busy people. It is quite short, and written to help professional men and women to run their offices effectively. It contains examples and check lists that are meant to be used as management tools. The book has been designed so that it can be read through to gain an insight into the philosophy of management and be treated as a work of reference." This I believe to be an accurate assessment of the scope and use of this book.

The book discusses the selection of, and provides a guide to the laying out of, office premises, discusses the use and selection of office equipment and gives valuable guidance on the selection and employment of staff. Overall I consider it to be a useful work for a solicitor, or for that matter any other professional person, who is either expanding an existing office or planning to move into a new or larger office.

In my experience solicitors set out their offices and organise their office systems in a fairly haphazard manner and any practitioner reading this book will be given a useful perspective on the problems involved in these areas.

In recent years solicitors have been able to avail themselves of the Management Advisory Service of the Law Institute of Victoria. However there are still many firms of solicitors practising in this State who have not yet taken this step and the author of this book has provided for them a useful discussion of many matters requiring attention in a partnership practice.

As this book is easily read and is not of such length and complexity as to deter its readers, I would recommend it to any professional person who is interested in gaining some knowledge and perspective in the area of office layout and management and procedures. I regard it as a useful reference work to be read and then re-read from time to time for the purpose of reviewing an existing office structure and administration with a view to improving its efficiency and its overall operation.

ROWLAND J. BALL*

Cases and Materials on Industrial Law in Australia, by R. C. MCCALLUM AND R. R. S. TRACEY, (Sydney, Butterworths, 1980), pp. xxviii, 652.

Over recent years the popularity of subjects in the areas of industrial and employment law has steadily risen as more and more students have become interested in learning about the legal problems behind the mosaic of Australia's industrial relations systems and practices. This phenomenon may possibly be attributed to a general increase in community interest and awareness concerning industrial relations. It may also reflect the increase in the number of offspring of working class, trade union orientated people who have been able to afford to attend law school since the abolition of tuition fees in 1973. Whatever the reason for the increase in the popularity of the

* LL.B. (London); Barrister and Solicitor, Supreme Court of Victoria.
* Senior Lecturer in Law, Monash University.

industrial law area, this book fulfils a great need by providing an up-to-date, comprehensive case book on matters affecting federal arbitration law and the law governing industrial accidents. Indeed, seven years have elapsed since H. J. Glasbeek and E. M. Eggleston published their original *Cases and Materials on Industrial Law in Australia*. As is suggested by Sir Richard Eggleston in his foreword to the 1980 *Cases and Materials*, this latter book is indeed a worthy successor to the 1973 casebook.

Part 1 of McCallum and Tracey provides an excellent treatment of the scope of the industrial power in the Federal Constitution and the implications of the narrowing or broadening of that scope. One is alerted to the rationale behind the various watershed decisions, e.g. in the section "arbitrable matters", the importance of the individual value judgments of High Court judges is alluded to.

Adequate attention is given to problem areas which may confront the industrial law practitioner and the workers' compensation expert and/or common lawyer. There is valuable discussion of the problem of "contracting out" of employment relationships in Part 1, and of the problem, referred to in Part 2, of which employer to name as a respondent in a workers' compensation case which involves an industrial disease. Whilst focusing on the traditional litigious areas the book also deals with new developments. For instance, the section dealing with the introduction of trade practices considerations into industrial law is both helpful and well written. Interestingly, in their postscript to their treatment of section 45D of the *Trade Practices Act 1974* (Cth) the authors suggest appropriate law reform. To the credit of the authors, the suggestions made were taken to heart by the legislature (see the *Trade Practices Boycotts Amendment Act* 1980).

Another issue in industrial law which is taking on an increasingly significant importance for the practitioner is that of the requisite standard of proof in award breach cases. This has significant consequences for award enforcement and hence the success or otherwise of industrial regulation. It is to their credit that the authors have included a discussion of this topic in their work; however, it should be pointed out that their last word on this area has been reversed by the decision of the Full Court of the Federal Court of Australia in *Gapes* v. *The Commercial Bank of Australia* (1979) 27 A.L.R. 87.

The main criticism of the book that may be made is that there is insufficient consideration of the industrial regulation systems of the states. As the book is largely geared to assist students it would be helpful for them to have some basic working knowledge of the various state systems, particularly if they intend to become industrial relations practitioners. For example, it would be of invaluable assistance for a Victorian student to know something of the workings of the Industrial Appeals Court. It would also have been helpful, particularly to the practitioner, if some attempt were made to deal with the effect of the current wage indexation principles and in particular the workings of principles 7(a) (work value), 7(c) (anomalies), 7(d) (inequities) and 8 (allowances). The above four topics clearly constitute the greater part of activity for most people who are currently working in the industrial relations field. Unfortunately, no attempt has been made to come to grips with the practical effect of the decisions of the Conciliation and Arbitration Commission on the above issues.

Part 2 of the book is slightly less colourful than the first part. Perhaps this is because the topic of industrial injuries is more mundane than the topic of industrial regulations. However, this does not detract from the articulate manner in which Part 2 has been written and the systematic and concise analysis it presents. It successfully unravels many complex policies behind workers' compensation legislation and exposes problems and inadequacies. The treatment in the final chapter on the evaluation of workers' compensation systems is most thought provoking.

I would recommend this book as compulsory reading for any person who wishes to adequately understand the stimulating and expanding field of labour law.

SHANE MARSHALL*

* B.Ec., LL.B. (Hons.) (Monash).

Family Law in Australia, by H. A. FINLAY, (2nd edition, Sydney, Butterworths, 1979), pp. xxxii, 365.

Almost two years have elapsed since the author completed *Family Law in Australia* for publication. In that period of time there has been considerable legal reform and significant changes to the law so that in a number of instances the book is already outdated. This to a large extent was foreshadowed by Finlay who throughout the book dealt at length with historical background and the social context in which the many aspects of family law have changed. As family law is now experiencing a time of "considerable and accelerating change" (p. 1) this is not directed as a criticism of the author, but highlights the need for a work of this nature to be regularly brought up to date.

By its very title, the expectation of the reader is to be confronted with the problems principally facing the "family" in legal conflict. The problems in the main presented to the practitioner, and ultimately to the Court upon marital breakdown relate to children, maintenance and property. However, the author has given only limited attention to these significant topics which in the totality of its purpose reveals an unfortunate weakness. The author's hopes that the book would—"appeal to . . . practising lawyers who are looking for a summary of the law and a discussion of some of its problems" (preface x) is therefore not realized. The practice of the law by family law practitioners and the kaleidoscopic variety of problems arising in their practice are not greatly assisted by this book. The author in addition expressed the hope that to non-lawyers the book would serve ". . . a possibly even more worthwhile purpose than as a legal textbook" (preface x). Had the author provided more detailed analysis of the problems relating to custody, access, property and maintenance no doubt this end would have been achieved. However, the book, albeit excellently researched and accurate, deals in the main with legal technicalities, statistics and the social development of family law so as to make reading for non-lawyers difficult and uninteresting.

The chapter relating to constitutional limits of Australian family law has much to recommend it not only as to the scholarly research and the background relating to certain constitutional problems arising from *Russell* v. *Russell* (1976) 50 A.L.J.R. 594 but to the challenging issues raised by the author. His critical analysis of this decision is summarised effectively by him as focusing

> "On the constitutional shortcomings of the Australian legal system which permits, indeed requires a fragmentation of a homogeneous area of law according to criteria which completely fail to take into account any consideration of family welfare or community interest in such vital matters affecting the entire community" (p. 47).

He demonstrates with clarity the "fragmentation" of Australian family law by reason of the distribution of powers under the Australian Constitution inviting constructive and academic debate. The amendments made as a result of *Russell's* case have not eradicated the serious constitutional problems that still unhappily impede the progress of family law. It may be that the door is not entirely closed to further reform, for, as was suggested by the author there are hints in some of the judgments to indicate the Commonwealth could have gone further, "but the government of the day decided that discretion was the better part of valour" (p. 125).

The author alludes to the dichotomy where certain legal aspects of a "family" are retained within the State jurisdiction when all practicality and common sense dictate that they should be dealt with as part of the complex of laws given to the Commonwealth. The questions posed by the author for the future, that is unification or fragmentation, are clear and lucidly explain to the reader the alternative measure for future development.

The chapters relating to marriage and its formation and the legal consequences of marriage are well researched, and of use to the student by way of background. In each instance as in other chapters, the author gives consideration to society's role over the years pointing out that considerable social changes have been taking place. He says that: . . . "these changes are gradually beginning to find expression in the law

of the family. But that process is a gradual one that has not yet gone very far" (p. 67). But in reality, is the process of change as gradual as the author speculates? The book throughout emphasises the social pressures and the changing sociological attitudes through time. Indeed, the author stated in the preface that

> "Law is an instrument for the adjustment of human relationships in a social environment. Changes in that environment must be followed by changes in the law, if the law is to do its job of offering to the people whom it serves the opportunity of realising to the full their potential of personal development and happiness" (Preface ix).

This theory pervades the book and achieves the dual purpose of broadening the student's depth of knowledge by way of legal background, and linking it to the sociological changes affecting society. However, it may well be argued that in fact it is the judicial interpretation of the *Family Law Act* 1975 (Cth.) that is changing the face of society and determining its social mores. Until recently lesbian and homosexual parents were denied custody, and indeed, adultery was argued as a bar to custody. The development of family law has, since the publication of this work, moved with considerable rapidity and the anticipated "period of stability and consolidation" (preface ix) has not occurred. The Honourable Elizabeth Evatt, Chief Judge of the Family Court, wisely postulated that the

> "Question is whether the Family Law Act arises from, or reflects changes in attitudes towards marriage and divorce or whether it will itself lead to such changes" (Foreword vii).

As a result of a number of legal decisions since the proclamation of the Act it may well be argued that indeed it is the law that now leads to these social changes so that society itself, like a mirror, reflects the view of the law as it has developed.

The chapter relating to the legal position of children, whilst dealing with basic concepts of family law so far as the practitioner is concerned, fails to develop into the areas more common to his practice. For example, it fails to consider child abduction, and the weight given to homosexual conduct in custody disputes. It discusses the appropriate law and in that regard maintains the reader's interest throughout. As pointed out however, the effluxion of time can work against a book of this nature as the law is rapidly changing. For example, the author's assertion that joint custody in contested situations is ". . . no longer possible, nor is it likely that a Court would as a rule seek to perpetuate joint custody where the family has broken up, unless there are exceptional circumstances" (p. 180) has since been further considered by the Full Court of the Family Court as inappropriate: (see: *In the Marriage of Chapman and Palmer* (1978) F.L.C. 90-510, page 77,677).

The principle area of weakness in the book is the chapter relating to family maintenance and property. This is not withstanding the author's recognition that it provides ". . . the casus belli, as well as the ammunition for keeping up prolonged hostilities, in which the final chapter in a relationship of two people who once loved one another is fought out" (p. 211). Both these important topics are treated in a superficial manner notwithstanding that to the practitioner they bear a considerable volume of his work. The writings in relation to property omit to deal with a number of important aspects (for example, superannuation) and the nine pages in all given to this topic are of little assistance to the layman, and indeed the student. The author raised the arguments relating to the admission of evidence of "conduct" and considered some inconclusive authorities. He then posed the question: ". . . It will be interesting to see how the Full Court of the Family Court of Australia views these questions if and when they come before it" (p. 221). Thus he realised the limitations of a book of this nature particularly when written during the infancy of the Act, and was wise in not prognosticating the future. The question of "conduct" has since been laid to rest so that it bears no relevance in property proceedings so long as it has no economic consequence: (see: *In the Marriage of Ferguson* (1978) F.L.C. 90-500).

For the student however, the author's account of the historical background and emergence of women's rights to property from their lowly and prejudiced beginnings is informative.

In "Families without Marriage" the author gives an interesting historical analysis of the law, its attitude to de facto relationships and the problems arising therefrom. While suggesting that ". . . As the law stands at present, however, it is still technically at the point where it does not encourage cohabitation, or the procreation of children outside marriage" (p. 286) he develops arguments that suggest change by social legislation is imminent. That the Courts have already abandoned some of their "traditional objections" is well concluded. He discusses the developing and vexed question of "cohabitation contracts" (p. 297) and with considerable skill demonstrates the need for major reformulation in this area. As to children born outside marriage, the author descends into a statistical and statutory survey of children's rights, legal implications and upon whom maintenance obligations rest. The effect of the *Status of Children* legislation is considered, and in this regard is of assistance to the practitioner. Similarly with adoption, the author successfully makes excursion through the process of adoption thereby reducing to concise form a difficult topic.

Whilst criticism may be levied in certain areas, there does emerge, overall, the fact that this book uniquely weds an historical survey of "family law" problems to the sociological changes that emerge with the passage of time. It covers a wide variety of topics in a scholarly manner and on the whole is exceedingly well written. Whilst it fails to lend itself usefully to the practitioner its strength lies as an excellent general reference work for the student. It is well indexed, and the table of cases and statutes lends itself to easy location of points sought in research.

PAUL M. GUEST*

Making Fathers Pay: The Enforcement of Child Support, by D. L. CHAMBERS: with a Methodological Appendix by T. K. ADAMS, (Chicago, University of Chicago Press, 1979), pp. xiv, 365. $U.S. 25.00.

Making Fathers Pay is a record of an investigation, undertaken by Professor David Chambers of the University of Michigan Law School, of the enforcement of child support orders made against non-custodial parents in twenty-eight counties of the State of Michigan. Three counties were dealt with in depth; two of which were illustrative of aggressive child support enforcement systems and the third showed mild enforcement efforts. The book also contains general information on the financial problems of the divorced families concerned and on the effect of jailing on default. Whilst the majority of support orders in Michigan are made against the father, some mothers, as non-custodial parents, are subject to support orders, but only the former are described in the book.

The ultimate penalty resulting from non-payment of a child support order in Michigan is the imprisonment of the defaulter, for default is treated as contempt of court. In the two main counties discussed, on apprehension of the defaulter, one year's imprisonment is the standard sentence. The father can seek an early release if he pays all, or most, of the amounts due. But in these counties it is almost automatic for the defaulter, either consequent on one only or sometimes several written cautions and requests for payment, to be sent to jail.

In the two "jailing" counties, Professor Chambers observed natural justice was not obtrusive; indeed

> "No judge ever recognised, or tried to read into the statute, a defense that men need not pay at all, even if working, unless they earned enough to meet their individual basic needs for subsistence." (p. 179)

And

> "Had these cases been tried as criminal cases, the prosecutor would have borne the

* Barrister-at-Law.

> burden of proving beyond a reasonable doubt that the man had been working or, if not working, that he could have been. In the contempt proceedings as they were carried out in fact, the defendant, once shown to have failed to pay in full, had the burden of 'showing cause' why he should not be found in contempt and thus of demonstrating his total incapacity to pay. He then had no resources available to him to make his defense—no lawyer to marshall witnesses, no witness to support his story." (p. 181)

Most judges are more concerned to "get food into the children's little stomachs" and "boots in the wintertime" than with considering the effects, both economic and mental, of jailing on the father and the reasons for non-payment.

Perhaps the focal point of the book is not concerned with the "jailing" judges nor with the non-paying parent but with an organization called the Friends of the Court. And a fascinating group it is.

In 1917 the judges in Detroit appointed a lawyer as a Friend of the Court. His sole duty was to collect support for minor children where an order had been made against a non-custodial parent. In 1919 the Michigan legislature authorized other counties to appoint such an Officer and in 1921 the Legislature gave a mandate to do so.

The "Friend of the Court" is the term used for both the agency and the title of the head of that agency. In some counties of Michigan the agency is small with the only staff being a part-time lawyer; in other counties the agency is well-staffed with lawyers and social workers. In 1979 there were sixty-three officials entitled Friends of the Court. On every divorce in Michigan in which children are involved, the Friend of the Court starts a file which contains a repository or "treasure trove" (p. 13) of information on the family, for example the ages of the parties, the parents' occupations and earnings, the reasons for divorce etc. The Friend of the Court oversees all official matters relating to divorce and paternity, advises the Court on child custody, access and the appropriate quantum of support, receives the support payments and remits these payments to the custodial parent or guardian.

The main function of the Friend of the Court with which the book is concerned is that of pursuing and apprehending the defaulting parent to seek payment or to bring him before the Court on a charge of contempt for non-payment. Unfortunately in some counties this duty seemed to be aggressively enjoyed.

The Federal and State welfare programme has a role in child support. If the parent long defaults in payment the State will provide welfare for the child. The State's entitlement to Federal funds for this purpose largely depends on its efforts to collect the support payments from those against whom an order has been made. Collected amounts are dispensed either to the custodial parent or to reimburse the State. The Friend of the Court partakes in this activity by pursuing the defaulter.

It is of interest that often the economic situation of the custodial parent and child is better on welfare than it is when dependent on the support awarded, as the former is usually a larger amount. The fact that the support payments of long-overdue defaulters when obtained go to the State rather than to the child, is significant in the parent's desire to pay in many cases.

Professor Chambers notes that despite the fact that jailing is effective in achieving the payment of child support, albeit temporarily in most cases, yet

> "the offense is an intrafamily one with complex emotional roots; jails are debilitating institutions—they exceed rather than fit this crime; jailing in this setting is difficult, nearly impossible, to administer in an even handed manner; when widely used, the prospect of jailing may well affect adversely the relationship between children and the parent under an order of support, even when the parent pays with unflagging regularity." (p. 253)

As alternatives he offers inter alia garnishing wages, insurance plans either voluntary or compulsory, or the expansion of social welfare. He does not select any one of these as the appropriate method. But he does suggest that future amelioration of the economic distress of the custodial parent and children might well rest in the shared custody of the children so that no support funds change hands but that custody of the child alternates between the parents.

Two depressing features, not uncommon to the families researched, which emerged in the book were (a) the fact that the defaulting parent usually belongs to the lower socio-economic group where the parent had had little formal education, had married at an early age, and was employed in semi-skilled or unskilled work; and (b) that both parents usually remarried thereby insuring that the same problems would occur again and, sometimes, again, viz., issue of the second union, divorce, the non-custodial parent defaulting in support payments and the children (after an unhappy, impoverished youth with little education) themselves marrying young with divorce looming large in their futures.

The saga of the re-occurring grimness of the lives of mother, children (and indeed father) and succeeding generations is depressing and seemingly insoluble. Add to it the attitude of the defaulter father to his children—starting perhaps with uninterest through to dislike on his jailing—and the situation seems perpetually enduring.

One criticism on the format of the book is the presentation of data obtained from interviews with one particular family, interspersed with the commentary.

This is a confusing treatment of the topic in that one tends to relate the findings of the project to that particular family. In addition interspersing commentary with data breaks the concentration so that some of the value of the commentary is lost.

I found the topic depressing in that it seems to prove that few, if any, divorced couples can be entrusted to consider the welfare of their children before their personal wishes. Equally sad was the fact that many fathers, on dissolution, simply lost all interest in their children. One experiences in family law the bitterness and childishness of parents fighting over custody of and access to the children. This book shows the opposite side where one parent is apathetic to the child's welfare and whereabouts. Rarely is there a middle road.

Perhaps the study shows that family planning should be more prominent in early marriages—rarely were there less than two children concerned—or perhaps some training to mature all married couples so that on dissolution children do not suffer.

The book is to be recommended. The role of the Friends of the Court is an important one and bears consideration in other jurisdictions. The jailing of defaulters is a practice worthy of avoidance. Professor Chambers, apart from the minor criticism of format, has written well on an interesting and topical problem. The book might seem to be of marginal interest to the lawyer, except that it shows the day-to-day problems of the client following his or her "day in court" on dissolution. Probably it is of greater relevance to the sociologist. The methodological appendix is of value to the lawyer seeking to set up such research.

JUDITH SIHOMBING*

Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769, by WILLIAM BLACKSTONE, (Chicago, University of Chicago Press, 1979), Volumes 1-4. Cloth set of 4 Volumes $80.00, limp $8.95 each.

It is apt that on the bicentenary of Blackstone's death the University of Chicago Press has published paperback and cloth facsimiles of the first edition of the *Commentaries* thus enabling students, historians and lawyers to purchase the volumes individually and cheaply. The value of these facsimiles cannot be ignored. A first edition is currently priced by an antiquarian bookseller in Chicago at $2,750. These facsimiles are photographic reprints of the first edition, permitting the reader to savor the original Blackstone. Each volume is introduced by a scholar with special competence in its subject matter.

* Lecturer in Law, Monash University.

Though the list of his honours and activities is long, Sir William Blackstone was undoubtedly a dull man. He had little success at the bar and his judicial career, which ended with his death in 1780 at the age of fifty-seven, was blotted by a reputation of being a notably poor trial judge, more frequently reversed on appeal than any of his peers. Thus his fame lies in his considerable contribution to his alma mater, All Souls College, Oxford, and in his authorship of this very great, albeit contentious, book.

The first volume, written in 1765, deals with what Blackstone called "the rights of persons". In his Introduction, Professor Katz of Princeton University outlines Blackstone's legal and academic career, his purpose in writing the *Commentaries*, and provides the reader with a short guide through Book I. This book concerns what contemporary readers would identify as constitutional law and public administration. It is here that Blackstone espoused his legal positivism fired by a whiggish perspective of English history. The entirety of Book I, therefore, is spattered with the Blackstonian conception of Parliamentary supremacy, remembering, of course, that in Blackstone's time legalists perceived the legislature as the King in Parliament. It may be surprising to modern readers to find that Blackstone devoted relatively little space to statutory law. The explanation is found in the fact that it was not until sometime after the end of the eighteenth century that public law began to furrow its structure in statutes. Book I, nevertheless, remains vital reading for any student of public law. It not only provides historical justifications for the basis of many contemporary principles but also contains an important lesson in legal exposition. To echo Blackstone, what the academic writer is concerned with is to provide "a general map of the law, marking out the shape of the country, its connections and boundaries, its greater divisions and principal cities . . ." (Book I, p. 35).

Book II is entitled "Of the Rights of Things" and contains Blackstone's discussion of property law. While his account of the law of real and personal property is of remarkable merit, it is in his opening discussion of the theory of property rights that one gains an insight into the thought of Blackstone's time.

> "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; . . . And yet there are very few, that will give themselves the trouble to consider the original and foundation of this right" (Book II, p. 2).

As Professor A. W. Brian Simpson remarks in introducing this volume, such questions are not a common part of legal study today (p. iv). The enthusiasm Blackstone had for the origin of property rights probably reflected the overall dominance of property law at that time. Thus his dealing with contract law in this volume appears "unsatisfactory" (p. xiv). Professor Simpson also criticises Blackstone for neglecting the development of contract law which, while not at the dominance it would attain in the nineteenth century, was still more sophisticated than as portrayed by Blackstone.

Book III, written in 1768, concerns what Blackstone described as "private wrongs", that is, although it seems a misdescription, what modern students would call civil procedure. An Introduction by Professor Largbein of the University of Chicago succinctly examines Blackstone's account of jurisdiction and procedure, jury trial, equity and the uneasy Blackstonian attitude toward the celebrated legal fictions of English civil procedure. Book III provides a lucid guidebook to a system which has almost vanished yet that still, according to Maitland, rules so much of our thinking from its grave. Further, it should be noted that Book III contains much legal history, Blackstone's weakest point, in particular when it concerns the origins of particular courts. Blackstone's intellect, however, can never be ignored for it is in this Book that he erects his vision, by way of pretence, of the fusion of law and equity, an event which occurred a century after the *Commentaries* were written.

Book IV concerns crime and criminal procedure—"Of Public Wrongs". It is introduced by Professor Thomas A. Green as being "the least original of the four" because it draws heavily on earlier treatises by Hale and Hawkins. In his chapter on offences against the Law of Nations (Ch. 5), Blackstone prefaces his discussion with

a statement about international law which often escapes present day lawyers. He says that the law of nations is:

> "a system of rules, . . . established by universal consent among the civilised inhabitants of the world" (p. 66).

This well illustrates the continuing influence of such writers as Blackstone on legal thought. It also raises the question as to why a *facsimile* edition—with its often stilted English and old spelling—was published at this time. Is it that presently we see the past more for its nostalgic value and entertainment rather than as a possible source of solutions to present day problems? (See Christopher Lasch: *The Culture of Narcissism*). It is hoped that this reproduction does not obscure the worth of Blackstone's thought today.

ROBERT J. SADLER* AND BRIAN H. SIMPSON**

* B.Ec.
** B.A.