(9) *The Crown.*

In default of the above listed relatives or a surviving spouse the Crown takes the property as *bona vacantia.* The Crown may, out of property devolving upon it provide, in accordance with existing practice, for dependants whether kindred or not of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.[45]

It has already been mentioned that under the New South Wales Act the Crown takes to the exclusion of first cousins and their issue, whereas in England these classes of relatives are preferred to the Crown. The mitigating effect of the Crown's power, under the legislation, to make provision for relatives and others has also been mentioned. It may not be inappropriate to add in conclusion a reference to the implications in the sphere of Private International Law of the description of the Crown's rights as arising because the property is *bona vacantia.* On the authorities a right to take as *bona vacantia* is strictly territorial, so that other common law states will not enforce the rights of the New South Wales Crown in respect of property within the jurisdiction of that other state. If on the other hand the Crown claimed as successor on intestacy other common law states would recognise the Crown's rights in respect of all New South Wales domiciliaries. And the difference between a Crown taking as successor and one taking property as *bona vacantia* seems to be one largely of words.[46] The result may be that thanks to the choice of language in the Act property may devolve on a government outside New South Wales which has no powers to dispose of it in the equitable manner envisaged by the New South Wales proviso. It may be suggested that closer consideration could profitably be given by draftsmen to the private international law aspects of proposed legislation.[47]

W. L. MORISON *

THE AUSTRALIAN "OBSCENE PUBLICATIONS" LEGISLATION OF 1953-55

EDITORIAL NOTE: This Note is intended merely to summarise the main points of the recent Australian Acts. The policy aspects seem too important and controversial for discussion in a Legislation Note, and we hope to have a leading article on this and certain other aspects from Mr. Iliffe in a later issue.

Up to the changes of 1953-55 the legislation in the States dealing with obscene publications was mostly of the "Vagrancy" or "Police Offences" pattern.[1] Nearly all the Acts had their roots in the Imperial Statutes[2] or English decisions of the 19th century and were more concerned to create extra offences such as "being in possession apparently for the purposes of sale" and more efficient machinery for the suppression of what the Courts might find "obscene", than to deal with the problem as fully as possible. Again, both in the Acts and decisions, the word "obscenity" was used primarily in the physical sense.

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[45] Wills, Probate and Administration Act, 1898-1954, s. 49 (1) (b).

[46] See generally *Re Maldonado* (1953) 2 All E.R. 1579.

[47] The above note does not seek to deal with the provisions of the Administration of Estates Act, 1954 inserting new sections in the Testators' Family Maintenance and Guardianship of Infants Act, 1916-1954, the Public Trustee Act, 1913-1954 and the Conveyancing Act, 1919-1954.

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[1] Apart from provisions in the Criminal Codes the earlier legislation in the States, not all of which has been repealed, or even amended by the new legislation, is as follows:— Obscene and Indecent Publications Act, 1901 (N.S.W.); Police Offences Act 1928 (Vic.) Part V (particularly as amended by Police Offences (Obscene Publications) Act 1938 (Vic.); Vagrants, Gaming and Other Offences Act, 1931 to 1949 (Q'land) ss. 12-17; Police Act, 1936-52 (S. Aust.) ss. 86, 108; Police Offences Act 1935 (Tas.) Div. IV. So far Western Australia has made no alteration or addition to the Indecent Publications Act, 1902 (W. Aust.) nor to the Police Act, 1892-1952 (W. Aust.) s. 66.

[2] E.g. Vagrancy Acts of 1824 and 1838 (5 Geo. 4, c. 83; 1 and 2 Vic., c. 38) and Obscene Publications Act, 1857 (Eng.) (20 and 21 Vic., c. 83).

Speaking generally, it might be said that the State Legislatures had established the following propositions:

(a) For the purposes of the Acts the Court was *custos morum.*

(b) The question of "circumstances" was left virtually untouched; that is to say the Acts gave little indication whether matter obviously obscene could be published without sanction in certain circumstances, for example, by way of research.[3]

(c) Medical works were free of the Acts and, in a vague fashion, the Courts were envisaged as capable of assessing the artistic or literary merit of publications. To this end a loophole was provided for works in which the actual obscenity or indecency might be said to be a genuine part of the literary or artistic objective of the work.

(d) The common law definition of "obscenity" was to be retained under the Acts.[4]

The new Acts, therefore, represent what may fairly be called a modern approach to the problem even though they retain much of the previous law and do not make an entirely fresh start. We may (I) briefly state the features of each Act in chronological order, then (II) make some points of comparison between them.

I.

(a) POLICE OFFENCES ACT, 1953 (SOUTH AUSTRALIA) No. 55, ss. 33-6.

Whereas in the original Act s. 86 (1) (f), treated offering for sale and attempts to dispose of obscene representations as offences according to "vagrancy" formulae, and s. 108 was concerned with indecent advertisements, s. 33 of the new Act treats the whole matter under the one heading, "Publication of Indecent Matter". The basic adjective in the three sections is "indecent" but "indecent matter" includes "any . . . matter of an indecent, immoral or obscene nature". Section 33 also introduces a revised version of the common law test, namely a direction to the court to look to the persons whom the matter would probably reach and the tendency of the matter to deprave such persons, even though other persons might not be affected.

(b) OBJECTIONABLE LITERATURE ACT OF 1954 (QUEENSLAND) 3 ELIZ. II No. 2.

Besides saving other offences, the Act introduces the new term "objectionable", thus giving prominence to the more varied species of literature over which control is sought. The main feature of the Act is the establishment of a Literature Board of Review to "Examine and review literature with the object of preventing the distribution in Queensland of literature which or any part of which is objectionable;", exempting "public news, intelligence, or occurrences, or political or religious matter." This provision has had the effect of relieving the courts of the duty of acting as *custos morum*, and the whole Act is concerned with the powers of the Board to prohibit the sale or distribution of literature and the powers and duties of the Police Force in assisting the Board.

(c) POLICE OFFENCES (OBSCENE PUBLICATIONS) ACT 1954. No. 5779. (VICTORIA)

This Act slightly increases the content of "obscene" in the principal Act and follows the South Australian version of the common law test. It revises its exemption for certain works, on the one hand, by widening the class to include "artistic" and "political" works and, on the other hand, by making exemption depend upon the circumstances of publication. Lastly, it introduces compulsory registration of distributors and publishers with de-registration or suspension

[3] An important exception is the Indecent Advertisements Act 1917 (Tas.) s. 6, (repealed and re-enacted in the Police Offences Act 1935 (Tas.) s. 27) which is certainly the origin of s. 10 of the new Tasmanian legislation and may well be the source of some of the sections of the recent Acts in the other States.

[4] An important exception is to be found in the Victorian Act of 1938 (n. 1 *supra*) which introduced "unduly emphasising matters of sex or crimes of violence" under the heading of "obscene" and thus anticipates similar changes in the new Acts.

as an additional penalty for offences under the Act or at common law.

(d) OBJECTIONABLE PUBLICATIONS ACT 1954 (TASMANIA) No. 80.

This Act also uses the term "objectionable" and, in its establishment of a Publications Board of Review with powers of prohibition etc., is practically the same as the Queensland Act.

(e) OBSCENE AND INDECENT PUBLICATIONS (AMENDMENT) ACT, 1955 (NEW SOUTH WALES), No. 10.

This Act amends the original Act of 1901-46 and is therefore neither concerned with police offences, nor with the use of the word "objectionable", nor with the establishment of a Board of Review. Like the Victorian Act it widens the notion of "obscene", gives to certain works a qualified immunity, and introduces compulsory registration for the same purpose.

II.

(a) ASSESSMENT OF OBSCENE CHARACTER

This question really falls into two parts, (1) the factors to be taken into consideration by the court and (2) the wider meanings of "obscene".

(1) All the Acts have virtually a common form:[5]

> " . . . the Court shall have regard to (a) the nature of the matter; and (b) the persons, classes of persons and age groups to or amongst whom it was intended or was likely to be published, distributed, sold, exhibited, given or delivered; and (c) the tendency of the matter to deprave or corrupt any such persons, class of persons or age groups, to the intent that matter shall be held to be indecent, immoral, or obscene when it is likely in any manner to deprave or corrupt any such persons, or the persons in any such class or age group, notwithstanding that persons in other classes or age groups may not be similarly affected."

This represents a modernised version of the common law test and seeks to forestall objections by allowing the Court both to concentrate upon the circumstances in which the publication took place and to use any grouping of persons as a measuring rod of the harm likely to result from the publication. In this regard the Tasmanian version is even fuller in scope:[6]

> " . . . shall have regard to (a) the nature of the publication; (b) the persons, classes of persons, and age groups to or amongst whom or which the publication is intended, or is likely to be distributed; (c) the tendency of the publication to corrupt those persons, classes of persons, or age groups, or any of them, notwithstanding that other persons or classes of persons, or persons in other age groups, may not be similarly affected thereby; (d) the nature and circumstances in which the publication is distributed in this State; and (e) the literary, scientific, or artistic merit or importance of the publication, to the intent that a publication shall not be deemed to be objectionable unless, having regard to the foregoing matters and all other relevant considerations, the Board is of the opinion that the distribution of the publication in this State would have an immoral or a mischievous tendency or effect."

(2) All the Acts except that of South Australia seek to extend the field in which the courts can interfere. To this end they direct that, having regard to the factors just mentioned, the Court may find a work obscene if it exhibits various characteristics. The strongest example is contained in the Queensland Act[7] where literature may be held objectionable if it:

(i) Unduly emphasises matters of sex, horror, crime, cruelty or violence;

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[5] N.S.W. s. 2 (a) (ii) (3); Vic. s. 2 (2); Q'land s. 5 (1) s.v. "objectionable"; S.A. s. 33 (3).

[6] S. 10.

[7] Q'land s. 5 (1) *s.v.* "objectionable". N.S.W. s. 2 (a) (ii) (2); Vic. s. 2 (1).

> or (ii) Is blasphemous, indecent, obscene, or likely to be injurious to morality; or (iii) Is likely to encourage depravity, public disorder, or any indictable offence; or (iv) Is otherwise calculated to injure the citizens of this State.

In Tasmania it is only work which consists[8]

> . . . in substantial part of pictures (whether with or without the addition of words) and (a) is of an indecent nature or suggests indecency; or (b) portrays, describes, or suggests acts or situations of a violent, horrifying, or criminal, or of an immoral nature, . . .

which is comprised in the wider definition. However, the wide terms of Section 10 make this restriction of little practical value.

Opinion will probably continue to differ on the question whether such wide powers are desirable, although it is significant that the widest powers have been given by the two States which have seen fit to deal with the problem through the supervision of a specially appointed Board. At all events, it is submitted that the Legislatures have rightfully taken it as a basic assumption that there are persons in need of protection and that there is as much duty to protect in this field as, for example, in the censorship and control of films and plays, the prohibition of indecent exposure and the control of illegal drug traffic.

(b) EXEMPTIONS FROM THE PROVISIONS OF THE ACTS.

1. *Exemptions from Scope of Act.*

It is submitted that both the Queensland and the Tasmanian Acts are confined to literature and that a "picture" which both Acts define as: " 'picture' includes any print, photograph, lithograph, drawing, sketch, figure, or other representation, and any reprint, facsimile, copy, colourable imitation, or other reproduction of a picture;" is subject to prohibition only in so far as it is "a part" of "literature" whether of the outside or inside.[9] Despite the definition of "literature" and "publication" it does not seem, at least in Tasmania,[10] as though a single drawing, painting or photograph would be within the Acts unless it had formed part of a book, pamphlet, magazine, etc.

On the other hand, the New South Wales Act[11] includes under "publication" not only printed matter of any kind but also "any writing, print, picture, photograph, lithograph, drawing or representation". In Victoria and South Australia[12] wide definitions are given of the matter with which the Acts deal. In the former State, for example, " 'articles' includes books papers newspapers pamphlets magazines periodicals letterpress writing prints pictures photographs lithographs drawing statues figures carvings sculptures or other representations".

2. *Exemptions for Matter of a Public Character.*

This subdivision includes newspapers, professional journals etc. It is only in South Australia that there are no special rules to cover this heading. In Queensland and Tasmania,[13] on the other hand, newspapers are exempt from the Act, the "Police Offences" and Criminal Code machinery being still available in both States. Also exempted in Queensland are publications "of a medical, pharmaceutical, legal, or other professional character *bona fide* intended only for circulation among members of the professions concerned, or any publication intended only for *bona fide* political purposes . . . "[14] and, in Tasmania, publications of " . . . a purely official, religious, professional, or scholastic character;"[15]

In Victoria and New South Wales[16] newspapers, political matter and the items contained in the Tasmanian definition given above are within the pro-

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[8] S. 8.
[9] Q'land s. 5 (1); Tas. s. 2.
[10] Tas. s. 2. Compare Q'land s. 5 (1).
[11] S. 2 (a) (ii).
[12] No. 3749 (Vic.) s. 169. Compare S.A. s. 33 (1).
[13] Q'land s. 4 (2) and s. 5 (1); Tas. s. 2.
[14] Q'land s. 4 (2).
[15] S. 2 s.v. "publication".
[16] N.S.W. s. 2 (a) (ii) and s. 20 (1); Vic. s. 4 and see n. 12 *supra.*

visions of the Acts, but, by their publishers being exempt from registration, they are relieved from the additional penalties.

In Victoria[17] occurs the unique provision whereby *bona fide* political books are exempt only if the Court is satisfied as to the circumstances of their publication, thus equating them with literary, artistic, medical and scientific books.

3. *Exemptions Arising from Certain Qualities of the Material.*

(1) *Medicine and Science.* The Tasmanian provisions have already been given[18] and the Queensland[19] Act deals with this matter under the "professional" heading. The remaining Acts, however, deal with "*bona fide* medical or scientific" books etc. But, whereas the South Australian Act simply excludes such a work from the term "indecent matter",[20] in Victoria and New South Wales[21] such a work may lose its exemption if the Court is satisfied that notwithstanding its character as a medical or scientific work its publication: " . . . was not justified in the circumstances of the particular case having regard, in particular, to the persons, class of persons or age groups into whose hands it was intended or likely to come."

(2) *Literary and Artistic Merit.* With regard to Victoria and New South Wales this class of material is dealt with in exactly the same way as we have just mentioned under medicine and science. In South Australia,[22] too, " . . . books and other matter of artistic and literary merit" are excluded from the operation of the Act unless they: " . . . describe with undue detail, or emphasize, coition, unnatural vice, or other sexual, immoral, or lascivious behaviour, or the organs of generation or excretion." It may be further noted that the Victorian Act continues to refer to "work of *recognised* literary or artistic merit" and the Queensland Act[23] refers to publications which represent "in good faith and artistic merit any work of recognised merit or any scriptural, historical, traditional, mythical or legendary story only".

4. *Exemptions by Executive Action.*

Except in South Australia and Tasmania, the Acts provide for exemption by regulation or Order in Council, either of literature from the jurisdiction of the Board of Review (Queensland), or of printed matter from the class of matter, the distributors of which are required to register.[24]

(c) PENALTIES.

The Acts provide a familiar collection of sanctions such as fines, imprisonment, and confiscation which need not be mentioned in detail. Of particular interest are the powers of the Boards of Review to seize copies of publications prohibited by the Boards, and in Tasmania to compel the sale to them of a copy of any publication whether prohibited or not.[25] Except in South Australia the Acts contain provisions permitting freedom from actions of breach of contracts entered into with regard to obscene matter, and, except in Queensland, these provisions also refer to contracts involving offences under the common law or the Criminal Code.[26]

The most outstanding penalty, however, is that of de-registration or suspension of licence. In both Victoria and New South Wales all distributors and publishers of printed matter are required to register[27] but, as we have stated, printed matter does not include newspapers, matter of official, religious, social, professional, or scholastic matter, nor any matter exempted by regulation. One

[17] S. 3. [18] *Supra* n. 6. [19] S. 4 (2). [20] S. 33 (1).
[21] N.S.W. s. 2 (b); Vic. s. 3. [22] S. 33 (5).
[23] S. 4 (2).
[24] N.S.W. s. 20 (1); s. 4; Q'land s. 4 (2).
[25] Q'land s. 14; Tas. s. 11.
[26] N.S.W. s. 27; Vic. s. 10; Q'land s. 21; Tas. s. 16.
[27] N.S.W. s. 21; Vic. s. 5.

minor point of difference is that the penalty is available on indictments for obscene libel as well as under the Act, whereas in New South Wales both obscene and blasphemous libel are included.[28] Also, as a matter of evidence, the fact that a publication is marked with a distributor's name and address as required by the Act, throws upon him the onus of proof that he was not in fact the distributor.[29] This is expressly stated to be the case in proceedings under the Acts of both States and it is assumed that on indictment for obscene, or for obcene and blasphemous libels, the onus of proof will lie upon the prosecution.

J. A. ILIFFE *

EVIDENCE (AMENDMENT) ACT, 1954

In 1931 a Committee of Judges was formed to consider the law of evidence and a report published recommending changes in the law. In 1938, in England, Lord Maugham, a former member of the Committee and the Lord Chancellor, secured the passing of a bill[1] adopting the changes recommended by the Committee. In 1954, the Parliament of New South Wales passed an Act[2] closely following the pattern of the English Act and constituting several exceptions to the general rule regarding hearsay evidence. Some delay no doubt was desirable with a view to seeing the legislation in action, and observing the judicial interpretation thereof, but it is submitted that the delay of sixteen years in adopting the English legislation in New South Wales is mainly due to the slowness of operation of the law-reform machinery in this instance.

The Evidence (Amendment) Act of 1954[3] changes the law by making admissible evidence which was not previously so, but nothing in the Act "prejudices the admissibility of any evidence which would apart from those amendments be admissible".[4] Hence the Act is to be viewed as facilitating rather than hampering the reception of evidence, and is in line with the modern trend of making all reliable forms of proof admissible in an age where the congestion of court lists and the convenience of recording information by modern methods make many of the older rules of exclusion of evidence work unnecessary hardship in the proof of facts.

Part III of the Evidence Act[5] is amended by the insertion of several sections affecting the admissibility of documentary evidence. This part of the amending Act has the heading "Admissibility of Documentary Evidence as to Facts in Issue", but it is submitted that the Act is not restricted to proof of *facts in issue*, but extends to *facts relevant to the issue* and that the heading is not designed to distinguish between the two; and, indeed, no suggestion has been made in any of the authorities that the Act is so restricted.

The new section 14 (B)[6] is limited in its application to civil proceedings without a jury, and so another factor is added for consideration by counsel when deciding whether to proceed with or without a jury in those jurisdictions where there is a choice.[7] The section provides that "In any civil[8] proceedings . . . where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall . . . be

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[28] N.S.W. s. 24; Vic. s. 8.
[29] N.S.W. s. 26; Vic. s. 9.
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[1] 1 & 2 Geo. 5, c. 28.
[2] Act No. 35, 1954 (N.S.W.).
[3] *Ibid.*
[4] *Id.*, s. 2 (a) (ii).
[5] Evidence Act, 1898 (N.S.W.).
[6] Modelled on ss. 1 & 2 Geo. 5, c. 28.
[7] In the Matrimonial Causes jurisdiction where "any party to a suit of marriage may required the contested issues to be tried by a jury" (s. 61 (2) Matrimonial Causes Act, 1899 (N.S.W.).
[8] See *Lilley* v. *Pettit* (1946) K.B. 401; *Andrews* v. *Cordiner* (1947) K.B. 655, where similar evidence was rejected in the former (criminal) and admitted in the latter (civil) case.