

BOOK REVIEWS

E. M. CLIVE AND J. G. WILSON
The Law of Husband and Wife in Scotland

W. Green & Son Ltd., 1974, £17.50

This is a substantial work in both size and scholarship. It will be of great assistance, not only to Scottish lawyers but also to all who are interested in seeking comparative information in formulating solutions for the many problems presented by today's upheaval in traditional family relationships. This is of particular interest for Australian readers since it places in context many of the recent legislative reforms in England and Wales.

Scottish family law presents a blend of the old and the new which defies conventional social categorisation. Divorce has been available as a judicial remedy since the time of the Reformation (in contrast to England, where parliamentary intervention was necessary until 1857), yet the conceptual reorientation from matrimonial fault to irretrievable breakdown which took place in England six years ago has not yet been accepted in Scotland. The 'guilt' of the petitioner has not constituted a barrier to his (or her) obtaining a divorce decree in Scotland since shortly after the Reformation, and a divorce decree in Scotland has immediate effect (rather than the *nisi* solution still part of English law): yet Scottish courts are still unable to vary either lump sum decrees in divorce proceedings or separation agreements.

Sheriff Wilson and Mr. Clive's book is the first substantive Scottish treatise in the area of husband and wife law since 1951. It is a work of successive rather than joint authorship since Mr. Clive assumed responsibilities over a partially completed text after Sheriff Wilson's death in 1968. Mr. Clive's policy has been to try to change as little as possible of Sheriff Wilson's original text, although inevitably alterations and extensions have been necessitated by subsequent developments.

As the title of the book indicates, it is a treatise on the law of husband and wife rather than a work extending to all aspects of family law. Some consideration is given to children's law but almost exclusively in the context of divorce. All aspects of the law which *do* fall within the terms of reference of the book, are, however, considered in full detail, ranging from engagements to marry through the elements and incidents of the marriage contract to its termination by death or divorce.

The treatment by the authors of these matters combines the best elements of Scottish jurisprudence: close analytical argument from prin-

ciple, well-informed reference to the relevant case law, and a practical appreciation of the importance of procedural aspects in the winning and losing of theoretically watertight cases.

The style of the authors — an important factor in a book of such daunting length — is refreshingly clear and, on occasions, light-hearted: in the context of the complex questions relating to the title to engagement rings where the engagement is broken off, it is observed that, it would be unromantic, even for a Scotsman, to lay down in advance the circumstances in which the ring should be returned. 'Another example of typically dry Scottish humour occurs when, in regard to a damages claim for what English law would call criminal conversation, the authors cite the South African decision of *Potgieter v. Potgieter*, [1959] (1) S.A. 194 where damages were reduced on the ground that the husband had obtained a measure of satisfaction by shooting and wounding his wife's lover. Having quoted the judge's opinion (at p. 195) that, '... the cry of pain, the writhing form of his adversary must... have given the plaintiff intense satisfaction in some primitive manner', the authors comment that, 'it would be going too far, however, to say that a husband had any duty to mitigate his loss by such methods':

The value-judgments which the authors permit themselves to express are in general forcibly defended although they are driven to an unholy alliance with that controversial decision of *Gilmour v. Coats* [1949] A.C. 426 in their anxiety to refute the proposition in respect of guardianship cases that a parent who is a believer thereby has a better claim to custody than a parent who is an atheist.

Misprints are few, though Dean H. A. Hubbard of the University of Ottawa, whose precocity is lauded by the authors (at p. 449) in regard to an early article in the *Canadian Bar Review*, has his name slightly misspelt. Irish and New Zealand decisions are generally erroneously cited in round rather than square brackets. In a treatise so large, these errors are trivial indeed. The price, at £17.50, is not unreasonable.

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M. C. PRYLES, *Conflicts in Matrimonial Law: Cases and Text*,

Butterworth (Australia) Ltd., 1975, \$7.00.

This work is presented as a companion volume to the larger collection of cases and materials by Sykes and Pryles entitled 'International and Interstate Conflict of Laws'. The reason for this separation, as Dr. Pryles explains in his preface, is that, when the larger volume was being produced, the fate and the form of the Family Law Bill were still un-

certain. It was therefore decided to postpone the section on matrimonial law until these matters were resolved.

This is all very well, but it may be questioned whether it is altogether fair for a publisher to produce a book with so ostensibly compendious a title as Sykes and Pryles and to reveal only on Page 2 of the Preface that Family Law is excluded from its contents. Measure for measure, it is not unlike entitling a book 'Land Law' and failing to mention on the cover that it does not deal with mortgages, restrictive covenants and easements. Not every student has time to read the Preface of a book before deciding whether to buy it and the cover of Sykes and Pryles could prove regrettably misleading.

Conflicts in Matrimonial Law follows the same format as its counterpart, with typing and off-setting as substitutes for ordinary printing methods. It contains 148 pages (plus xii) and sells for \$7.00. Purchased in conjunction with a hardback copy of Sykes and Pryles (which is advisable, if for no other reason than that the limp version falls apart with disarming celerity) it therefore requires expenditure in excess of \$39.00. This is a remarkable price for a total of some 1050 pages produced by what are supposed to be cheaper methods. Nor does the format of Dr. Pryles's volume do much to reassure the parsimonious reader that here is no economy job. The table of cases is inadequate in that it lists only those decisions reproduced or summarised by the author and not those discussed in his introductory notes, or referred to in the decisions reproduced. The index is skeletal and consists of little more than a list of section-headings.

Dr. Pryles gets off to a bad start. Pages 1 and 2 contain four misprints (three of them the result of a peculiar propensity to oscillate between 'nuptial' and 'nuptual') and one rather misleading statement of law. *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67 is hardly 'concerned with the distinction between form and capacity' since Sir Cresswell Cresswell (apart from one brief, colourable reference near the beginning of his judgment) seemed oblivious of its existence. Certainly the case provokes the problems of classifying parental consent, but even so one wonders whether it is worth devoting nearly six pages to this rather antique decision when *Ogden v. Ogden* [1908] P. 46 is then relegated to little more than half a page and no mention is made of the fact that this decision has been upheld at least twice in recent years. Indeed, one would have welcomed some reference to the contemporary standing both of *Ogden* and of *Sottomayor v. de Barros No. 2* (1879) L.R. 5 P.D. 94. The latter decision is presented somewhat confusingly near the beginning of the discussion on capacity and the author gives no guidance as to how it can be reconciled with other authorities or accommodated within the orthodox choice of law rules. Mention of the analyses of writers like Falconbridge and Morris would have been of value here and one regrets the author's decision to curtail the inclusion of periodical and other literature germane to his field. Certainly, one feels that he might jus-

tifiably have devoted some of his valuable space to re-assessing the relative merits of the competing theories as to choice of law in matters of capacity; for instance, does s. 4 (3) of the Family Law Act strengthen the claims of the ante-nuptial domicile or not?

In fact, the revised rules concerning domicile are deferred till the beginning of the chapter on jurisdiction and no opinion is offered as to whether these rules apply to questions of capacity to marry. Little effort is made to explain the impact of s. 4 (3) and there is no attempt to evaluate the weight a court will now attach to a woman's marriage in assessing her post-nuptial domicile under s. 4 (3) (b): c.f. *I.R.C. v. Bullock* (1975) 119 Sol. Jo. 530.

With a book of this kind, inclusions, exclusions and proportions are very largely a matter of taste and it is unfair to criticise an author merely because his preferences do not coincide with one's own. Nevertheless, the impression one receives on reading Dr. Pryles' first two chapters is not so much of a difference of taste as of an appetite unfulfilled. Thus, one will search in vain for any reference to *Mohammed v. Knott* [1969] 1 Q.B. 1, *Breen v. Breen* [1964] p. 144, *Reed v. Reed* (1969) 6 D.L.R. (3d) 617, *Feiner v. Demkowicz* (1973) 14 R.F.L. 27, or *Schwebel v. Ungar* (1963) 42 D.L.R. (2d) 622; *Padolecchia v. Padolecchia* [1968] p. 314; *Ponticelli v. Ponticelli* [1958] p. 204 *In the Will of Swan* (1871) 2 V.R. (I.P. & M.) 47, *Pugh v. Pugh* [1951] p. 482 and *Cheni v. Cheni*, [1965] P. 85 appear only in the reproduced judgment of Cumming-Bruce, J. in *Radwan v. Radwan No. 2* [1972] 3 W.L.R. 939 (to which eleven pages are devoted), except that *Cheni* also rates a mention under the conversion of polygamous marriages. On the other hand, *R. v. Brentwood Superintendent Registrar of Marriages, ex p. Arias* [1968] 2 Q.B. 956 (set out without any reference to s. 104 (9) of the Family Law Act, which eventually crops up over a hundred pages later) receives a generous two-and-a-half pages while *Indyka v. Indyka* [1969] 1 A.C. 33 and its motley retinue get no fewer than thirteen, but with no reference made to *Law v. Gustin*, *The Times*, 1st April, 1975. For *Starkowski v. A.G.* [1954] A.C. 155 and *Van Grutten v. Digby*, (1862) 31 Beav. 561 one is referred to Sykes and Pryles. The decision in *R. v. Sagoo*, *The Times*, May 10th, 1975, was presumably decided too late for inclusion.

The book improves, however, as the reader proceeds and the assimilation of the Family Law Act is, on the whole, dexterously and ably done. The chapters on Jurisdiction and Recognition are lucid, systematic and helpful. There are some concise summaries of lesser cases — indeed one wishes the author could have expanded this technique and thereby made room for other authorities — and recent decisions like *Cruse v. Chittum* [1974] 1 All E.R. 940 and *Oppenheimer v. Cattermole* [1973] Ch. 264; [1975] 2 W.L.R. 347 are given suitable emphasis.

The result is a peculiar book of uncertain purpose and varying merit. The practitioner and student will welcome the later chapters not merely

because they are virtually all that are available at the time of writing but because they serve their introductory purpose well. The earlier parts which deal mainly with the Common Law, are very disappointing. They contain little to stimulate the student and little that is not readily available elsewhere. The price of the book means that in this respect it is not even worth buying to save the cost of photo-copying.

N. E. Palmer

D. C. PEARCE, *Statutory Interpretation in Australia*

Butterworths (Australia) Ltd., 1974. \$12.00.

Statutory Interpretation in Australia is by no means an easy book to review. Not the least of the difficulties is caused by the peculiar type-face which Butterworths (Australia) have adopted for most of their recent publications (Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies* is a pleasant exception). It is, without doubt, the ugliest and most illegible script which it has been my misfortune to see: the letters, words and lines are too close together, the print is altogether too large for the layout of the pages and the whole presents a boring and hideous prospect. As for the type in which substantial quotations are set, I can only comment that I have almost 20:20 vision and still found it difficult. I fear to think how less well sighted colleagues would cope. Butterworths must really do something about it!

Statutory Interpretation in Australia has twelve chapters dealing with the expected range of topics (Judicial Approaches, Intrinsic and Extrinsic Aids, Interpretation Acts etc.) and including a chapter entitled 'Re-interpretation' which deals with the role of the courts in the interpretation of legislation. Mr. Pearce's conclusion, contained in the book's last sentences, is that general comprehensibility of legislation can only be attained by the co-operation of all bodies concerned with legislation from its initial production to its interpretation. 'The rules to be used for the interpretation', he states (at p. 152), 'are an integral part of the exercise. Appropriate and identifiable rules must exist and must be followed'. This last is an admirable sentiment and sometimes, when in vacant or in pensive mood, I can almost persuade myself that it is capable of achievement in our present legal system. Yet brutal political reality will intrude. When the Conservative Government in England set up the *Industrial Relations Court* in 1971, who should they appoint as its president but Sir John Donaldson who had previously stood, unsuccessfully, as a Conservative candidate? That Donaldson, himself, finds it difficult to distinguish between his legal and political headgears is well seen from his lecture 'Respect for the Law' (1975) 4 *Anglo-Am. L. R.* 1 where he referred to the Clay Cross councillors and anti-Apartheid campaigners but not to the Enfield councillors nor to tax evaders on a

large scale who must, doubtless *ex genere*, be automatically above the law. Everyone, too, is aware of the *claque* of well-known nonentities who were appointed to the United States Supreme Court during the Nixon administration. Similarly, the self-righteous howls of the Right-Wing Press in Australia on the appointment of Senator Lionel Murphy to the High Court Bench sound the hollower when the (of course, different) political antecedents of some of his colleagues are remembered. I am afraid that this is the kind of thing that the interpretation of statutes is really about. The rules, if such they can ever really be called, merely serve (in their broader sense, at least) as a kind of camouflage designed to stop us getting at matters which are more essential to, and more deeply based in, the interstices of our society. The most that someone writing a book, such as Mr Pearce's, can really do is touch up the paint a little or, at most, arrange the camouflage in more appealing patterns.

Mr. Pearce has, however, both touched up the paint and rearranged the patterns in a lively and erudite manner. Any reader cannot but be struck by the prodigious industry which the writing of this book must have required and, so far as they go, one can find little to quarrel with in either his analysis or conclusions. Finally, *Statutory Interpretation in Australia* is interesting and scholarly, but I wish that Mr. Pearce had written a book more in tune with your reviewer's prejudices!

Frank Bates

BOOKS RECEIVED

Livermore, J.: *Legal Aspects of Marketing*, William Heinemann Ltd.
£4.90 (Casebound), £2.80 (Limp).

Pfennigsdorf, W.: *Legal Expense Insurance*, American Bar Foundation.
\$US3.00 (Limp).

Brett, P. and Hogg, P. W.: *Cases and Materials on Administrative Law*
(3rd Ed. by R. R. S. Tracy) Butterworth. \$24.00 (Casebound),
\$18.00 (Limp).

Afterman, A. B. and Baxt, R.: *Cases and Materials on Corporations
and Associations* (2nd Ed.) Butterworth. \$27.50 (Casebound),
\$22.50 (Limp).

Else Mitchell, R.: *Legacies of the Nineteenth Century Land Reformers
from Melville to George*, University of Queensland Press. \$1.00.

Miller, R. H. (Ed.): *Australian Yearbook of International Law*, Butterworth. \$12.50.

Heydon, J. D., Gummow, W. M. and Austin, R. P.: *Cases and Materials on Equity*, Butterworth. \$19.00 (Casebound), \$15.00 (Limp).

Nygh, P. E.: *Guide to the Family Law Act 1975*, Butterworth. \$8.00.

Inclusion in this section does not preclude review in a subsequent issue.