

CRIMINAL LAW AND PUNISHMENT, by P. J. Fitzgerald, *Professor of Law in the University of Leeds* (Clarendon Press, Oxford 1962), pp. i-xi, 1-275, Bibliography, Index, and Table of Cases 276-279. Australian price £2/1/6.

This volume is the latest of the *Clarendon Law Series*. It is not designed primarily for the practitioner or the academic teacher, or even for the advanced student, though each will find the presentation instructive and thought-provoking. The plan of the work was adopted because the author considered that it provided "a better introduction both for the layman and for the student who comes to the subject for the first time". Taking as his starting point the premise that the general aim of the criminal law is to discourage and prevent certain kinds of human activity, he examines the English criminal law in an endeavour to "evaluate the compromise" it has achieved between the sometimes conflicting interests of protecting the State and citizens from harm and the safeguarding of the liberty of the individual.

Professor Fitzgerald considers first the concept of crime, and he reaches (page 7) what is perhaps the only sensible conclusion, commonplace and circular though it may seem, that "the hallmark of criminality is that it is a breach of the criminal law". He reveals a commendable distaste for *Shaw v. D.P.P.* [1962] A.C. 220, which he considers to be contrary to the principle of legality and incompatible with democratic notions. His method of presentation requires him then to examine seven classes of anti-social activities that express themselves in criminal conduct: (1) violence, (2) dishonesty, (3) malicious damage, (4) negligence, (5) nuisance and trespass, (6) immorality, and (7) political and similar offences. From this examination he proceeds to general principles, which he sums up in two propositions: (1), no one is guilty of a crime without performing an act of some sort; and (2), an act by itself unaccompanied by any criminal intent does not suffice to render a person guilty of an offence (Page 94). Strict liability he finds anomalous but inescapably established, and he comments sensibly that while it may serve a useful social purpose it does so at the cost of sacrificing the important principle that a man should not be punished unless he is at fault. Theoretically, this is true, but most instances of absolute liability are, so to speak, in the nature of occupational hazards, and criminal regulatory prohibitions are a warning that if the person electing to follow a gainful enterprise, or to engage in a potentially mischievous pursuit, does not meet a particular standard, he must take the penal consequences. Although occasionally there are some cases of hardship that excite indignation, it is more than doubtful whether in their practical operation there is much genuine injustice inflicted by the application of strict liability provisions, and judicial dislike for the device tends to reduce harshnesses to a minimum.

The defences to criminal prosecutions, arising from the circumstances of the event charged as criminal, or from some characteristic personal to the accused at the time of the happening, are discussed in Chapter IV. The author correctly treats the M'Naghten Rules as tests, not of insanity, but of the kinds of mental derangement which are legally sufficient to exonerate an accused from punishment. He finds merit in the statutory concession recently made in England to over a

century of criticism of those Rules by the diminished responsibility provisions of the Homicide Act 1957. Queensland has adopted a similar formula, strangely enough, for in that State capital punishment has long been abolished, and incapacity to control actions ("irresistible impulse") is recognised as a defence, cf. *R. v. Rolph* [1962] *Qd. R.* 262. His answers to the criticisms of the defence of diminished responsibility (cf. Baroness Wootton, 76 *L.Q.R.* 224) are deserving of careful consideration. They provoke a permissible and pertinent reflection that the law, as an expression of the conscience of society, is finding the concept of criminal responsibility increasingly difficult to handle. Mankind is obstinately persuaded that a distinction can justly be made between madness and wickedness, between the blood-curdling acts of the mentally deranged and the atrocious cruelties of the evil in heart, and, lumberingly but gallantly, the law does its perplexed and tardy best to find an intellectually and socially acceptable formula recognising the distinction and enabling it to be applied in criminal trials.

The chapter on the criminal law at work is a succinct and valuable account of the things that we are fortunate to take for granted. It covers the course of criminal proceedings, and describes investigation, arrest, prosecution, and magistrates' courts, and the jury as an institution. It describes, too, the limitations on the impact of the criminal law imposed by the requirements of jurisdiction, of legality, and of double jeopardy, and also the protective restrictions that control the scope of questioning, search, entry and arrest, and the kind of evidence permitted to be adduced at the trial.

In the nature of things, there is little that is novel in the first five chapters except in the author's mode of presentation. That presentation is welcome, however, because it makes clear that the criminal law is only incidentally the province of lawyers, and that primarily it is an instrument to achieve social purposes. This is emphasized by the concluding chapter on punishment. It is in punishment that the true meaning of the criminal law is to be found. The extraordinarily difficult problem perennially confronting society, as Lord Atkin saw (*Donoghue v. Stevenson* [1932] *A.C.* page 580), is to devise and apply effective means that will induce or persuade, or, in the last resort, coerce its members into adjusting their self-regarding impulses within the limits of neighbourliness. Admonition throughout the individual's life, and training and instruction within the family, by religion and by schooling, by public opinion, and by the sexual, commercial, and social conventions and controls, are all devices for educating human beings so that they may live together as neighbours. When all other methods of education fail, and the individual disregards a criminal prohibition, society applies the ultimate and harshest means of instruction. It says to the offender, "If you will not learn by milder means, you will be taught by pain and fear authorised and applied by the State". But before the ultimate means may be used, moral sentiments require that a fair investigation be held to determine if the alleged offender has in truth done the forbidden act, and if he has, whether, because of the circumstances of the event or his personal characteristics, it is just that he should suffer censure and discomfort. Procedural rules and the substantive doctrines and prin-

ciples of the criminal law (cf. Jerome Hall, *General Principles of Criminal Law* 2nd ed., 1960), are designed to determine the question: is this accused justly a subject for punishment? If the answer is affirmative, society may then, but only then, proceed to punitive action. Many elements enter into the punitive process, but while expediency and the running of society as a going concern may seem to require that mankind's primitive and emotional (and often irrational) demands for retribution and vengeance shall be satisfied to some extent, the only moral justification for punishment is surely the prevention of crime. Punishment must never be an end in itself; it can be justified only as a means to the end of preventing or repressing crime and promoting neighbourliness. Where necessary, this end of prevention and repression may have to be achieved by the harsh education through pain to which the application of criminal sanctions subjects the offender, and by the sobering instruction which others receive from the example made of him. Lawyers are not prone to brood upon the philosophical perplexities of theories of punishment, but the final chapter of this work will furnish them with a useful and lucid introduction to a subject baffling in its complexity. It is this reviewer's opinion that most of the theoretical difficulties that beset the topic can be satisfactorily resolved if it be borne steadily in mind that criminal punishments are in truth part only of the elaborate and extensive devices used to educate and "condition" human beings, so that they will observe the minimal standards of neighbourly behaviour, and that they should not be used otherwise. If this be accepted (and it is submitted that any other approach is morally indefensible and socially debauching), questions of retribution, of retaliation, and of expiation become subsidiary, as they should be, and their propriety and social utility examinable. The exigencies of social control may perhaps on occasions require an offender to be treated with destructive harshness to assuage righteous indignation, but at least we should recognise what we are doing, and we may then glimpse the motives, often dubious, that influence us. Expiation may be desirable as part of the educational purpose of the punitive process, but let it be remembered that expiation, like reformation, is personal to the offender, and is not identical with the satisfaction of righteous anger or indignation. The notion of requital, or "pay-back", is deeply ingrained in mankind, and its application, in a variety of ingenious tortures, to persons regarded as impious or wicked has produced much misery for the victims, and not a little debasement in societies that have approved of such practices. Professor Fitzgerald wisely observes (page 205) that "the popular passion for justice may, like other popular feelings, be based on error and prejudice. Further, it can lead to disproportionate penalties and the punishment of the innocent. Here the rulers should lead, not be swayed by, popular opinion." Man has progressed to the extent he has by the use of his reason; he will only escape from the primitive urge to inflict pain and disgrace destructively when reason is genuinely brought to bear upon the problem of educating criminals and delinquents, by firm and sensible discipline, to develop the capacity for the observance of necessary standards of social conformity, or, when that is impracticable or hopeless, of holding them, for as long as may be needed, in protective but humane custody so that they may not inflict harm upon their neighbours.

Professor Fitzgerald is admirably balanced and dispassionate in his survey of the criminal law and its punishments, and his approach is refreshingly constructive and civilized. Practitioners and scholars will find in this volume many valuable insights and useful reminders of the real meaning of society's most awe-inspiring and fascinating mechanism of social control.

JOHN V. BARRY.*

* Judge of the Supreme Court of Victoria; Chairman, Department of Criminology, University of Melbourne; Chairman, Parole Board of Victoria.

THE BRITISH CABINET, by John P. Mackintosh (Stevens & Sons Ltd., London, 1962), pp. i-xi, 1-546. Australian price £4/1/3.

The author of this excellent book avows in the first paragraph of his preface that it has been written as a successor to Berriedale Keith's *British Cabinet System* in preference to the alternative course of preparing a third edition of Keith. All concerned would be entitled to congratulation for this reason alone, quite apart from the intrinsic merits of Mr. Mackintosh's book. As the present reviewer observes at greater length elsewhere in this issue, the practice of producing post-humous "editions" of well-established texts in preference to new books is to be deplored.

The result of enterprise in the present case is encouraging. Mr. Mackintosh writes in a spare, clear style and with a liberal sprinkling of the dry humour one tends to associate with the race to which he belongs. It had never struck me before, for example, that one reason why the British Government is usually quick to recognise new regimes is a lively appreciation in the Foreign Office that recognition may mean the creation of new openings for ambitious civil servants (page 465). Not less felicitous is the characterisation of Kitchener, surely one of the most repellent products of the English military caste, as a man who contrived to be "both awe-inspiring and inarticulate", and whose attitude to the mere elected representatives of the people, in the shape of the Cabinet, was governed by the consideration that it was "repugnant to him to have to reveal military secrets to twenty-three gentlemen with whom he was barely acquainted" (page 338). Very diverting too is the contrast between the methods of Mr. Churchill and those of Mr. Attlee in managing their colleagues when in power (pages 429-435).

The virtues of *The British Cabinet* are not confined to humour and lack of humbug, valuable as these qualities are. Mr. Mackintosh has produced a lucid and concise account of the emergence, evolution, and, so far as possible from this side of the shroud of official secrecy, the present working of the British Cabinet as an instrument of government. Although the historical part of the subject is in no way neglected, there is a welcome emphasis on political science, on the analysis of Cabinet as a means of transacting government business rather than as a product of its time in any given period. In this respect, heresy though it may be to say so, the book contrasts favourably with Sir Ivor Jennings's *Cabinet Government*, which tends to

become rather statuesque and overburdened with Victoriana at times.

In conformity with the emphasis on modernity, one of the most attractive features of the author's approach is the use he makes of interviews with living persons, even where it has been necessary for him to respect the professional anonymity of the civil service by refraining from acknowledging his source. By adopting the methods of so-called "contemporary history", Mr. Mackintosh succeeds in imparting a quite vivid sense of the actual working of government in recent times. It is just his bad luck that so soon after his not unreasonable conclusion, on the evidence as it stood a short time ago, that the Conservatives might be in power for ever, signs should be multiplying that the political pendulum has after all not ceased to swing; although in this context he might have given consideration to the impact of the European Common Market upon domestic British politics, for the matter has been in the background for the better part of a decade now. The treatment of the rather trivial part played by the Crown in modern British government is tactful and, as elsewhere, not without good humour: nothing could more effectively convey the apparently total insulation of the modern monarch from the realities of life than the information that in 1938 the late King George VI thought he might help things along by writing to Hitler "as one ex-serviceman to another" (page 521).

In short, a book to be welcomed and, apart from its technical use to students of the subject, to be read for its own sake.

COLIN HOWARD.*

* LL.M. (London), Ph.D. (Adelaide), Senior Lecturer in Law in the University of Adelaide.

KENNY'S OUTLINES OF CRIMINAL LAW, by J. W. C. Turner, M.C., M.A., LL.B. (Cambridge University Press, 1962), pp. i-lxviii, 1-658. Australian price £4/6/3.

Roscoe Pound says somewhere that each generation should rethink its law. In practical terms this ought to mean, among other things, that each generation should write its own textbooks, but in law we are as yet far from attaining this ideal. Somewhere in the legal world there is a body of opinion which regards the name on the outside of a textbook as more important than the small print on the inside, and which translates this belief into action by perpetrating the absurd custom of producing edited versions of books which derived their original value from the quality of a now deceased author. Why it should be supposed that a scholar who apparently regards himself, and is seemingly regarded also by publishers, as unworthy to write a book of his own, is nevertheless well qualified to revise the work of a distinguished predecessor, is beyond the comprehension of this reviewer. No less difficult to understand is the assumption that lawyers prefer to buy an out-of-date book by a famous author who happens to be dead rather than an up-to-date book by a less well-known scholar who retains the advantage of being alive; and yet this assumption must underlie the widespread practice of producing new books under old

names of which both *Kenny* and *Russell on Crime* are outstanding examples.

Each of these books has appeared in recent years under the editing hand of Mr. Turner. Felicitations are owing to the editor for the successful accomplishment of a great labour. Nevertheless, at least in the case of *Kenny*, it is unfortunate from every point of view that Mr. Turner was either not invited or not prevailed upon to write his own book. It can easily be understood that a modern equivalent of *Russell* would be superfluous because the need it met when it was young and fresh, getting on for a century and a half ago, is now being supplied in a modern idiom by Dr. Glanville Williams. There is, however, plenty of room for a text of English criminal law midway between the great tomes required by scholars and practitioners and the elementary students' books of which the best is perhaps *Cross and Jones*. One would have thought that Mr. Turner was equipped to write such a book without having to adapt himself to whatever remains of *Kenny's* original framework.

Whatever one thinks of the policy of controlling the living author by the dead hand of his predecessor, this new edition is entitled to be judged on its merits. The book was not written for use in Australia and Australian cases are referred to only in an occasional footnote, apparently more by chance than selection. It would therefore be unfair to judge the work by reference to its almost total irrelevance to the requirements of students and practitioners in this country. As a short account of the modern English law it is interesting and useful if this is what you happen to like. The present reviewer must confess, however, that, owing no doubt to some irrational personal bias, he does not much like it. The text seems to him to suffer from much avoidable obscurity which is added to by an unsatisfactory use of sub-headings. The general air of muddle is not reduced by a choice of type which insufficiently distinguishes the main text from quotations, headings and footnotes.

As to the typographical layout of the book, the intending purchaser is invited to look almost anywhere, but he will find a particularly wearisome intermingling of text, case summaries, extracts from statutes, and footnotes in the chapters on homicide and stealing. As to the text itself, space forbids the lengthy critique to which one is tempted, but surely the manner in which it is written must be as discouraging to the student as it is irritating to the teacher.

In the present reviewer's respectful opinion, the text is unduly discursive, fails adequately to distinguish the general from the particular, and is occasionally simply irrelevant (the reference on page 104 to the law of contract and tort, for example, which must be impenetrably obscure to the student uninstructed in those subjects and which fails to illuminate the criminal law even to the better informed). At times it seems to be designed, not merely not to anticipate the inquiries of the intelligent student, for there is little or no speculation outside the scope of decided cases, but positively to ignore his existence. To take just two examples of the minor obscurities which disfigure almost every page, what is the inquiring mind supposed to make of the almost self-contradictory account of the mental element in aiding and abetting on page 108, and the identification of a small group of thefts as "quasi-larcenies" on page 311 on

the trivial ground that they are not called larceny and are not made felonies, a distinction involving no point of principle at all?

On a larger scale, robust of intellect indeed will be the student who derives a clear picture of the law of homicide from the disjointed patchwork of chapter VII, or of the law of stealing and allied offences from an account which apparently proceeds on the basis that wherever possible no two crimes in the Larceny Act 1916, should be allowed to overlap (see particularly chapter XV on fraudulent conversion).

In the sense that the latest cases and statutes are cited, the book is up to date. The selection of periodical literature referred to, however, is sparse to the point of capriciousness, and very little awareness indeed is shown that the law of England may occasionally be better illuminated by a twentieth century decision or article from overseas than by some ancient case which arose in a totally different social setting.

COLIN HOWARD.*

* LL.M. (London), Ph.D. (Adelaide), Senior Lecturer in Law in the University of Adelaide.

AN INQUIRY INTO CRIMINAL GUILT, by Peter Brett, LL.B. (Lond.), LL.M. (W. Aust.), S.J.D. (Harv.). (The Law Book Co. of Australasia Pty. Ltd., Australia, 1963), pp. i-vii, 1-228.

In his introduction to *Precedent in English Law* Rupert Cross recalls Bentham's aphorism that jurisprudence is "the art of being methodically ignorant of what everybody knows". A similar sentiment seems to have animated Professor Brett when writing the book under review. The author's concluding paragraph is a faithful statement of the spirit which pervades every page. "My point is that a twentieth century criminal law cannot satisfactorily be based on a seventeenth century philosophy and an eighteenth century psychology. The foundations have crumbled. It must instead be based, so far as possible, on a twentieth century philosophy and psychology. The task is difficult, but I believe it can be accomplished; and in these pages I have tried to indicate some routes which may lead to the desired goal. I cannot suppose that I have convinced the reader that all the criticisms I have made of "the official theory" are well founded, nor that my own tentative efforts to formulate a new approach are entirely sound. But I hope that I have convinced him that there is a case for further enquiry. If I have succeeded thus far, the effort will not have been wasted."

The book has many merits and is altogether to be welcomed. The volume of first class writing about the law being produced by Australian scholars is still small, and much of the available effort has so far necessarily gone into the production of teaching materials. The publication of *An Inquiry Into Criminal Guilt* is a welcome sign that time is now being found for more purely speculative inquiry into specialized fields. Professor Brett's approach to his subject, the general principles of criminal responsibility, is

highly abstract and philosophical. He has evidently been deeply influenced by Wittgenstein and the philosophical technique of linguistic analysis with the invention of which Wittgenstein is generally credited, although he attempts to correct any imbalance thereby introduced into his processes of conceptual abstraction by bearing in mind A. N. Whitehead's valuable insistence that any degree of abstraction necessarily departs to some extent from the actual facts under discussion and is therefore to that extent misleading. (It is nevertheless unfortunate that at pp. 13-14 Professor Brett quotes at length a passage in which Whitehead concludes that "Logic . . . is a fake" but is able to arrive at this conclusion only by hopelessly confusing the status of the sentence "One and one makes two" as a proposition of logic with its status as a proposition of fact.)

The result of this method of inquiry is a high rate of detection of subtle errors in the generally received theories of criminal responsibility and a fairly low rate of answers with immediate practical appeal to the problems of reconstruction thereby presented. Three examples out of many may be mentioned. First, there is much to be said for the author's destructive analysis, scattered through the book, of the usual senses in which "intention", "recklessness" and "negligence" are understood, but the consideration is never squarely met that these concepts can be fairly readily and satisfactorily applied in their present form to the practical problems of law enforcement for which and from which they have been fashioned. There is no doubt that they suffer from philosophical inexactitude, but it is not necessarily correct to assume (as Professor Brett concedes by his references to Whitehead) that greater exactness would produce a corresponding improvement in the law. In the reviewer's opinion the standard of precision in generalities aimed at by the Model Penal Code is about the limit of useful exactness in the law, and he is not at all sure that Professor Brett in principle disagrees with this view; for in contradiction to the spirit of many of his criticisms he finished up with strong doubts about precision in the law.

Secondly there is the discussion of strict responsibility (which omits all mention of the reviewer's own work in this field, to his utter mortification). Here the author, predictably, comes down on the side of the angels but again, in the reviewer's respectful opinion, fails sufficiently to explore the practical implications of the mere existence of the phenomenon of strict responsibility. In turn this leads him to make a relatively superficial analysis of the major contribution made by the High Court of Australia to this part of the law and therefore largely to overlook the growing general importance of the concept of negligence in the criminal law.

Thirdly there is the preference expressed for case-law development of the criminal law as opposed to periodical codification. As with religion, the theoretical arguments about the relative merits of code and case-law are unlikely to convert anyone. The results of almost untrammelled case-law in this field are surely beyond dispute. To quote Rupert Cross again, this time from an address given in Professor Brett's own university: "I yield to none in my admiration of the achievements of the common law in many spheres,

but the substantive criminal law is not one of them. After all, it is the common law which has saddled us with such things as the definition of larceny and the concept of malice aforethought. The basic trouble is, I believe, the complete unsuitability of the substantive criminal law as a subject for development, either by way of addition, alteration or abrogation, through the medium of case-law." The present reviewer could not agree more, and thinks that here again Professor Brett has been hoist with his own petard of philosophical subtlety; for the author's disapproval of most of the case-law he discusses is manifest.

At this point it is high time to emphasize that one is certainly not a specimen of the class of intellectually lazy sceptics who doubt the value of philosophy because it is difficult. On the contrary, the employment of Professor Brett's method of inquiry is capable of yielding valuable and useful results and has done so in this case. It is in the application of these results that disagreement arises. It is clear that Professor Brett has throughout his book aimed at a high degree of practicality and never failed to bear Whitehead's warning in mind. This reviewer is saying no more than that in his opinion the author has only partly succeeded in this aim. Nevertheless he has certainly succeeded in his other aim of convincing the reader that there is a case for further inquiry into the questions which he raises. If and when anyone undertakes such a further inquiry he will be well-advised to start by reading this book to set his mind working.

There are a number of misprints, but unfortunately the reviewer omitted to keep a note of them.

COLIN HOWARD.*

* LL.M. (London), Ph.D. (Adelaide), Senior Lecturer in Law in the University of Adelaide.

CASES AND MATERIALS IN CONSTITUTIONAL AND ADMINISTRATIVE LAW, by Peter Brett, LL.B. (Lond.), LL.M. (W. Aust.), S.J.D. (Harv.), (Butterworths, Australia, 1962), pp. i-ix, 1-517. Australian price £5/15/-.

For the second time in one year Dr. Brett appears as the author of a valuable and interesting collection of teaching materials in his special field of public law. He thereby not only demonstrates his impressive learning and industry but also puts other teachers in the same field in his debt. The book under review is stimulating and attractively presented. Starting with a chapter entitled "Two Basic Ideas", the ideas being the rule of law and the separation of powers, the ground covered includes the supremacy of Parliament, the executive power of the Crown, the judiciary, the exercise of statutory authority, and remedies against administrative action. The staple diet of selected judgments is liberally seasoned with comments and questions by the author and the whole rounded out with a few extracts from other writers. We welcome the book and wish it every success.

Nevertheless it would be surprising if the present reviewers, for all their well-known *esprit de corps*, found this book faultless, and they do not. In the first place, as with the earlier case book on criminal

law, the value of this selection of materials is in our opinion unnecessarily limited through being designed to fit a particular course in a particular law school. It is not really an answer to this to say, as Dr. Brett does in his preface, that he "thought it best" to present the problems which arise within the context of a single Australian State; for this approach not unnaturally leads him to regard that State as Victoria, with a consequential lack of inquiry into the problems of other States which in some instances might have led to interesting results. An example which leaps to our collective eye is the dismissal of general warrants as being of merely historical interest. In South Australia the menace of the general warrant is a very clear and present danger to the ordinary citizen: see *Police Offences Act (S.A.)*, s. 67. These warrants are in constant use.

Secondly, and again in common with the criminal law book, there appears to us in general to be reliance on English cases to a degree which distorts the Australian law. Examples of omissions which we think are probably attributable to this bias are the following. At p. 443 there appears the statement that in *habeas corpus* proceedings no appeal lies from a decision ordering the release of a person from custody, and the authority cited is *Home Secretary v. O'Brien* [1923] A.C. 603 (H.L.). No mention is made of the High Court decision in *Lloyd v. Wallach* (1915) 20 C.L.R. 299, which appears to establish the precise contrary. In connection with the legal position of the Crown servant there is no mention of either *Reedman v. Hoare* [1960] A.L.R. 54, or *Ryder v. Foley* (1906) 4 C.L.R. 422. And so far as we have been able to trace there is no reference to parliamentary, as opposed to judicial, review of the constitutionality of subordinate legislation by way of standing committee. There are both Federal, and at least in South Australia, State committees of this kind.

Speaking more generally, we hope Dr. Brett will forgive us for suspecting that it is a certain partiality on his part for the English, as opposed to the Australian, legal scene which accounts for his decision virtually to ignore what he calls in the preface "complications arising from the Commonwealth Constitution and the peculiar nature of Federal-State relations". In his view, to have included detailed reference to such problems, would have "wrenched the structure of the book out of shape". This argument appears to us, with all respect, to have more aesthetic than practical appeal. Surely it is precisely the constitutional peculiarities of Australia which are likely to give rise to the most original and baffling, and therefore instructive, problems in this field in this country. Maybe they do not arise all that often in practice, but this is not a good criterion of their importance.

We conclude, then, that this is a good book and a valuable addition to the still limited range of home-grown teaching materials. Our opinion that it suffers from certain limitations should not be allowed to overshadow the stimulation which provoked us to criticism.

ALEX C. CASTLES.†
COLIN HOWARD.*

† LL.B. (Hons.) (Melbourne), J.D. (Chicago), Senior Lecturer in Law in the University of Adelaide.

* LL.M. (London), Ph.D. (Adelaide), Senior Lecturer in Law in the University of Adelaide.

AN INTRODUCTION TO THE CIVIL LAW, by K. W. Ryan, B.A., LL.B. (Old.), Ph.D. (Cantab.), (The Law Book Co. of Australasia Pty. Ltd., 1962), pp. i-xiv, 1-294. Australian price £2/18/-.

The object of this book, pursued competently and with a firm grasp of basic principle, is to set out the main institutions of the German and French systems of private law and to compare them with English law. After a brief historical introduction, Dr. Ryan conducts his reader through the major fields of private law, highlighting on the way the leading principles of the three systems and evaluating their respective merits.

The chapters on contract and property (chapters 2, 3 and 5) take up almost half the book (excluding the introduction). In his chapter on the general law of contract the author deals with such basic propositions as freedom of contract, offer and acceptance, consideration and cause (the French counterpart of consideration), contractual liability and remedies for breach of contract. Under "particular contracts" he examines sale, gift and lease, three examples of the numerous types of particular contracts known to, and extensively regulated by, continental systems. The law of unjust enrichment, so controversial amongst English lawyers and so comfortably settled down to a system of codified technicalities in Germany, is examined fairly briefly.

The most important aspects of the German and French laws of property, namely the notion of patrimony, the distinction between movables and immovables (already well known to students of private international law), the *numerus clausus* of real rights, and restraints upon alienation are all dealt with very lucidly. The notion of possession is analysed in great detail, probably more because of the widespread, somewhat exaggerated academic interest in this subject, than because of its practical importance.

The brevity of Dr. Ryan's chapter on the law of torts is in striking contrast to the ever-increasing complexity of the common law on this subject. Dr. Ryan's treatment of torts reflects the conviction of continental lawyers, embodied even more genuinely in the French than in the German code, that the law relating to wilful and careless wrongdoing consists of a simple set of principles. Strict liability is a different matter and Dr. Ryan must be commended for giving fairly broad treatment to the continental developments in this field. Of particular interest is the comparison of the English, French and German rules on vicarious liability, since in these a problem which must have almost identical social implications in the three countries, has received very varied legal treatment.

The laws of succession in foreign countries frequently interest the practising solicitor. Dr. Ryan's chapter on succession (pages 193-218) will be studied more widely than any other part of the book, with the exception perhaps of the section on formation and annulment of marriage (pages 244-252). The validity of marriages concluded in Germany is very frequently canvassed in Australian courts at the present time; counsel who has to adduce expert evidence on this subject will find his task easier if he possesses the elementary information which Dr. Ryan presents. The emphasis given to the distinction between diriment impediments to marriage (impediments affecting the validity of the marriage) and prohibitive impediments (impediments

not affecting the validity of the marriage) is of particular merit. It is just as easy as it is fatal to the correct solution of private international law cases, to overlook this important distinction.

The continental matrimonial property systems are again quite foreign to the common law and yet private international law forces the common lawyer to acquaint himself with these complex institutions. Dr. Ryan describes briefly and clearly the main features of the present day French and German systems.

In a book about the private law systems of France and Germany, one might not expect to find more about trusts than the remark that there is no such institution in either system. Instead, Dr. Ryan presents us with a comparative analysis, exposing a number of civil law substitutes for the trust. For the comparative lawyer the chapter on trusts is the most stimulating part of the book.

By setting out the main institutions of modern French and German private law, the author hopes to correct the erroneous belief that the "civil law" constitutes a unitary system in which local variations in different countries relate only to minor matters. This error, which is as embarrassing to a continental lawyer as it is persistent, might have been combated more effectively if the book had been called "An Introduction to the private law systems of France and Germany". "Western Germany" would have been even more accurate. It is one of the weaknesses of this book that it ignores completely the most significant event in recent legal, as well as general German history; namely the division of Germany into East and West. It is to be hoped that Dr. Ryan's readers will allow for the fact that the legal systems of the two parts of Germany are developing separately and are already strikingly dissimilar in many ways. Dr. Ryan's account of the present German matrimonial property systems for instance, in no way applies to Eastern Germany, where separation of property has been the universal matrimonial property regime since 7th October, 1949, the day on which the East German constitution came into force.

It is an inevitable result of the conciseness of Dr. Ryan's treatise that the leading principles of the three systems are presented in their traditional, or better, in their most widely-accepted forms. Thus error, because widely endorsed, has sometimes qualified for inclusion in the book. Too many English writers have been ready to accept, like Dr. Ryan, that the subjective understanding of contract, prevalent in England in the 19th century, was due to flirtations with the continental conception of agreement. Was not Serjeant Pollard, addressing the court of King's Bench in 1550, the author of the most subjective definition of contract ever devised, and was not the phrase, "union, collection, copulation, and conjunction of minds" or "meeting of minds" religiously reiterated by common lawyers for 250 years before the influence of Pothier made itself felt in England? On the other hand, the modern German law of contract is not quite as subjective as Dr. Ryan would have us think. The German courts have gone further than the English courts in taking an entirely objective view of at least certain types of contracts. In the case of services rendered to the public on standardized terms, such as public transport, liability is said to arise purely from the acceptance of the service, so that such things as mistake, and even capacity, have become completely immaterial.

Those who view the law as a complex mosaic of unconnected and often mutually inconsistent rules will find this book of little merit, since it is written on a level of generality incompatible with the creed of any casuist. It will fare much better in the eyes of those who, like the reviewer, still retain the optimistic conviction that the manifold rules emerging from cases, statute and custom may yet be summed up in the form of coherent general principles. The book is recommended not only to students, but also to practitioners. The practising lawyer who wants to inform himself on points of German or French law by reading the French or German texts will find his struggle against the technical complexities and the unfamiliar jargons of both systems much facilitated by the background information on fundamental principles which Dr. Ryan has skilfully supplied.

HORST K. LÜCKE.*

* LL.B. (Adelaide), M.C.J. (New York), Dr.Jur. (Cologne), Senior Lecturer in Law in the University of Adelaide.

STRATA TITLES, by *A. F. Rath, Q.C., P. J. Grimes, LL.B., and J. E. Moore, LL.B.* (Australia: Law Book Co., 1962), pp. i-xvi, 1-132. £2/16/-.

This "handbook" comprises annotations and practice notes on the recent Conveyancing (Strata Titles) Act 1961 (N.S.W.). The claim on the dust jacket, that "Readers will find the material presented in a form which is accessible and interesting and essentially practical", is substantially correct. Perhaps the best method of assessing the value of the handbook is by a consideration of the problems which called forth such legislation, and the particular means adopted for their solution.

Since legislation embodying the Torrens System was first introduced about a century ago, it has been subjected to a series of formidable challenges. Early in its career those challenges were directed against its very foundations, but in latter years challenges have been indirect, in that there has from time to time arisen the necessity of modifying the system to meet the needs of legislation in associated fields which directly or indirectly affect the land law. We are familiar with the adaptations required to absorb changes derived from the fields of Town Planning, Local Government, Compulsory Acquisition, the recovery of rates and taxes and the administration of bankrupt estates to name but a few. Moving nearer home, as it were, the system has had to attempt to accommodate the device of the building scheme or scheme for planned development, which was, one feels sure, barely present (if at all) to the minds of the original draftsmen of the Act.

Since the war there has been a growing tendency to establish schemes, either through the formation of companies or by using the long lease or the trustee, for the creation of so-called "home units."

Apart from two notable problems, the formulation of such schemes has not troubled the careful and thoughtful conveyancers in the

profession. Two features, however, which bristle with difficulties have been the provision for the enjoyment by all unit holders of necessary easements, and the machinery by which such schemes are to secure registration under the present Torrens System legislation. Speaking generally, those difficulties would appear to arise principally from the fact that home units, in the nature of things, must frequently be defined, spatially, in three dimensions: in other words, like some of the chambers in Lincoln's Inn in England, home units have not only northern, eastern, southern and western boundaries, but upper and lower boundaries as well. Such a situation leads ultimately to the demand for "strata titles", and it is the adequate fulfilment of such a demand that involves problems of defining easements, avoiding conflict with town planning legislation, securing by insurance the safety or permanence of shared property, conforming to land tax and rating requirements and council by-laws, overcoming problems associated with tenancies in common, and achieving an assignability of the units that is both free and adequately protected.

Students of the Real Property Act will find most interesting the ingenious yet highly rational and economical methods by which all the above problems were solved by the draftsmen of the above Act.

The first step provided for by the Act is the lodging of a "strata plan" which shows in comprehensive detail the dimensions of the building, its component lots and the appurtenances thereto and a Schedule of "unit entitlement" (the proportion of value which each unit bears to the total value of the building). The unit entitlement establishes the basis upon which the unit holder is assessed for rates and taxes and for maintenance, repair and insurance of the building; it confers and limits his voting rights at meetings of the corporate body (which comes into existence on registration of the strata plan); and it determines his share (as a tenant in common) in the common property (which is constituted by the land and buildings other than the separate units held by the unit holders).

Once the strata plan with all its details is registered as such under the Act, the Lands Titles Office issues separate certificates of title for each lot, and thereafter all dealings with the lot conform to the pattern of the parent Act (basically similar to our Lands Titles Office forms and practice). Such titles take the form "A.B. is the registered proprietor of . . . an estate in fee simple in a lot number [61] in strata plan number 1234 and [8 undivided 1/64th shares] in the common property therein". The proprietary rights thus manifested are freely assignable and chargeable like any other property registered under the parent Act, and the Act provides in effect that membership in the corporate body automatically charges with charges in the proprietorship of the strata lots.

The Act has model rules for the control of the conduct of the members on or in the property. Unit-holders can make their own rules or be content to adopt the set of model rules.

The important problem of Easements is provided for in general terms. This is done by simple and straight-forward drafting, of great merit.

So far as Town Planning is concerned, the local councils have power to approve or to disapprove strata titles. The grounds worth

noting on which a council may withhold approval are that the whole plan would interfere with same town planning scheme or with the amenities of the neighbourhood.

The whole Act is worth a close study not only because it is a neat piece of drafting, but because it may provide a model for other but similar legislative ventures. For example, I can see no reason why a similar scheme could not be introduced to cope with the far from satisfactory situation at present existing with respect to restrictive covenants and building schemes. For those who are interested in the legislative solution of these and like problems, the handbook may be recommended for its clear and systematic treatment of the provisions, and particularly for its detailed notes on every major aspect of the new Act.

W. A. N. WELLS.*

* Q.C., M.A., B.C.L. (Oxon.); LL.B. (Adel.), Senior Solicitor, Crown Law Department, Adelaide.

APPELLATE COURTS IN THE UNITED STATES AND ENGLAND, by *Delmar Karlen*, with *Forewords by Lord Evershed and Mr. Justice William J. Brennan, Jr.* (New York University Press, 1963), 180 pp., \$6.00.

In 1961 and 1962 an unusual legal experiment was carried out. A team of American jurists, comprising four judges, two Federal Government law officers and the author visited England to study at first hand the workings of appellate courts. They were received by a team of English jurists, similarly composed and known as the "Evershed Committee", after its Chairman, Lord Evershed, then Master of the Rolls. A return visit was paid by the English team early in 1962, when the practice of various United States appellate courts, both State and Federal, was studied.

The two committees were not in any sense representing their governments, nor were they required to produce a report or to agree on recommendations. The purpose of the exchange was simply to enable each of the participants to form a better view of the strengths and weaknesses of their own system in the light of their discussion and observation of the other. On the last day of the English visit to the United States it was agreed that each participant should reduce to writing his individual criticisms of the other system. These papers were circulated and discussed on an "intra-mural" basis; it was not intended that they should reach a wider audience, but rather that they should form a basis for the exchange of ideas and stimulate critical analysis of both systems.

Professor Karlen's book is his individual contribution to the exchange of ideas which the Committees wish to promote. The first part of the book describes appeals in the United States, separate chapters being devoted to the procedures of a State Intermediate Appellate Court, a State Court of Last Resort, a Federal Intermediate Appellate Court, and the Supreme Court of the United States. The second part describes English procedure in the Court of Appeal, the Court of Criminal Appeal, the House of Lords,

the Privy Council, and the Divisional Courts. In the final part Professor Karlen compares and contrasts features of the two systems, emphasizing the points of difference which had seemed to the participants in the colloquy to have been of particular significance. His comparison of time-saving features in the practice of both systems is especially thought-provoking. It is interesting to note that one immediate result of the exchange has been the experimental introduction in the English Court of Appeal of the practice of dispensing with the reading by counsel of the pleadings, the order appealed from and the judgment of the court below. Their Lordships agreed in March, 1962, to read all these papers, including cases cited in the judgment appealed against, before coming into court.

Professor Karlen refrains from making specific proposals, which he prefers to leave for further consideration. He is content to put before the reader, in an attractive and useful form, the material which was before the two committees. It is a timely and suggestive book and one which has special claims on the attention of judges, barristers, solicitors and others who are concerned with the administration of justice in appellate courts.

I. A. SHEARER.*

* LL.B. (Adelaide). Lecturer in Law in the University of Adelaide.