trade in possibly diseased potatoes, and to some others. But surely it should be amended.

I use section 92 for the purpose of emphasizing what these two books make very clear—that there should be a revision of the Constitution. As to section 92, confusion and uncertainty will continue indefinitely unless it is amended. An endeavour should be made to state clearly what it is desired that a provision of this kind should accomplish. Section 117 could be improved. The industrial power of the Commonwealth, limited to conciliation and arbitration in interstate disputes is in an absurd form. The legislative control of aviation and navigation is irrationally divided between the Commonwealth and the States. Divided control of what should be one railway system makes little sense, though I suppose that the States will insist upon keeping control of their railways with their deficits. The provision (section 80) about trial by jury is useless, and provisions with respect to New States (sections 121-124) are unworkable.

Many of the differences of judicial and other opinion which are made so apparent by these two books are the consequences of constitutional provisions which common sense, in some cases without political controversy, could put in an intelligible and practical form.

J. G. LATHAM*

The Law of Torts, by J. G. FLEMING. (The Law Book Co. of A/asia. Pty. Ltd., Sydney, 1957), pp. i-xxxix, 1-779. Price £4 4s.

'What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms, or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.'

So spoke the great Mr Justice Holmes in 1897. But though Professor Fleming calls his new book 'The Law of Torts' he does not use the word 'law' in the unpretentious sense which appealed to Holmes. Indeed both the bad man and his lawyer will run grave risks if they look to it to tell them what the Supreme Court of any of the Australian States is likely to do in a given situation.

The puzzling thing about this book is the difficulty of discovering what it sets out to do. In his preface the author says—'I have seen my task in undertaking an altogether fresh approach, both in point of substance and arrangement, with a view to presenting as realistic a description of the modern mid-twentieth century operation of tort law as seems to me both possible and desirable in the interest of both student and practitioner alike.' Perhaps the key word in this sentence is 'realistic'. It quite clearly does not mean for Professor Fleming what it meant for Mr Justice Holmes. If one may judge from internal evidence, 'realistic' refers rather to the social philosophy which Professor Fleming thinks he can discover behind a decided case than to anything to be found in the law reports.

Accordingly the book follows the arrangement of the American Restate-

* Chief Justice of the High Court of Australia, 1935-1952.

ment rather than that of established English textbooks. In the U.S.A. the doctrine of precedent sits less heavily on judicial shoulders than it does in this country or in England, and there is no appellate court which can secure uniformity of decision among the forty-eight States of the Union. This means that in the U.S.A. speculative thinking about the law can play a more effective part than it can with us. This has undoubtedly led to much stimulating writing in the American law schools, but it is apt to mislead students in Australian Universities when articles in the American University Law Journals are referred to as though they were authoritative statements of the law in Australia.

The task of the sociological jurist is more difficult in Australia or in England than it appears to be in the U.S.A. For with us he must first master and state accurately the effect of the decided cases – unless he frankly confesses, as Professor Fleming does not, that he is describing the principles of what he thinks should be the law, whether or not they 'coincide with the decisions'.

In this task of accurately stating the effect of the decided cases Professor Fleming's performance is disappointing, as a few examples will show.

Take first his treatment of *Grant v. Australian Knitting Mills.*[1] It is mentioned in a chapter on proof, which, though oddly enough confined to proof in cases of negligence, is very well done. But, speaking of the maxim *res ipsa loquitur,* the author says that 'after some earlier doubts, it has been invoked in cases where a manufacturer is sued for injury caused to an ultimate user or consumer by a defect in the article.' *Grant's* case is cited for this proposition, though the report nowhere mentions *res ipsa loquitur* and indeed makes it plain that the plaintiff by calling a body of expert evidence did not seek to rely on the maxim. How could he? Is an outbreak of dermatitis on the legs something which ordinarily does not happen without negligence on the part of the manufacturer of the patient's underclothing?

In chapter 21 Professor Fleming treats of a subject which he calls – 'Suppliers of Chattels: Products Liability'. And, (p. 510) he says – 'Although formerly a branch of negligence, manufacturers' liability in effect quickly discarded the element of fault and assumed the characteristics of strict liability through the operation of the procedural device of *res ipsa loquitur.* Less than four years after *Donoghue v. Stevenson,*[2] the Privy Council rejected the contention that the maxim was inapplicable merely because the manufacturer allegedly loses control on releasing the article upon the market and intermediaries handle it before it reaches the consumer. The view prevailed that control during the process of manufacture was sufficient once the plaintiff has eliminated himself and other extraneous forces as likely causes of the injury.' This involves not only a misreading of *Grant's* case but a misunderstanding of *res ipsa loquitur.* What counsel ever relied on the maxim after he had called evidence which tended to exonerate the plaintiff and everyone but the defendant from liability?

Equally unsatisfactory is the treatment of *Balmain New Ferry Co. v. Robertson*[3] (pp. 37-38) and of *Tolley v. Fry*[4] (pp. 615-616). At page 68 it is said that a milkman is liable in trover if he makes use of another's bottles for the purpose of delivering milk to his customers, because sub-

[1] [1936] A.C. 85.
[2] [1932] A.C. 562.
[3] (1906) 4 C.L.R. 379.
[4] [1931] A.C. 333.

jecting them to the risk of breakage and loss amounts to an assertion of dominion inconsistent with the rights of the owner, *regardless of whether he knows or not that the bottles do not belong to him.* For this proposition two Victorian cases are cited: *Model Daily v. White*[5] and *Milk Bottles Recovery Ltd. v. Camillo;*[6] but in both these cases what the plaintiff complained of, and what was held to be conversion, was the unauthorized use by the defendant of bottles which were embossed with a statement that they were the property of the plaintiff.

It is not necessary to cite further instances to show that it is unsafe to rely on this book as accurately stating the law applied in English or Australian courts. This is a decided disadvantage to both the students and the practitioners to whom the book is addressed.

Those who have already learned their law may find Professor's Fleming's sociological criticisms of it stimulating. But they must accustom themselves to a style of writing in which neither clarity nor precision find a place. The following example (p. 71) may have meaning, but it certainly does not charm the ear—'This emphasis on possession as distinct from ownership, is a historical hangover from an earlier tangibility of wealth.' Nor is the English language enriched by Professor Fleming's addition to it of the word 'multiguity'.

E. G. COPPEL*

The editors sent a copy of the above review to the author, and offered him the opportunity to comment; his reply is as follows:

I am grateful to the editors for offering me the opportunity of a brief reply to Dr Coppel's preceding review of my book. In responding to their invitation, I will refrain from commenting on his critique of my general approach, confident that I may safely leave the vindication of my position to the unbiased reader.

I feel constrained, however, to protest against the imputation of inaccuracy. Dr Coppel cites four examples to support his intemperate conclusion that 'it is unsafe to rely on this book as accurately stating the law applied in English or Australian courts':

1. He challenges my citation of *Grant v. Australian Knitting Mills*[7] as authority for the proposition that *res ipsa loquitur* may be invoked in cases where a manufacturer is sued for injury caused to the ultimate user or consumer by a defect in the article. Although Lord Wright does not refer to that procedural device by its Latin name, a careful reading of the passage on page 101 undoubtedly lends support to my conclusion, and this opinion is shared by the editors of Salmond[8] and Winfield,[9] Street,[10] Charlesworth,[11] T. E. Lewis,[12] R. W. Baker[13] and Underhay.[14]
2. My treatment of *Balmain New Ferry v. Robertson*[15] and *Tolley v. Fry*[16] is castigated as 'equally unsatisfactory' but, as the reviewer

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[5] (1935) 41 Argus L.R. 432. [6] [1948] V.L.R. 344. [7] [1936] A.C. 85.

[8] *Salmond on Torts* (11th ed., 1953), 519. [9] *Winfield on Tort* (6th ed., 1954), 505.

[10] *The Law of Torts* (1955), 141-142, 184-185.

[11] *The Law of Negligence* (2nd ed., 1947), 31, 32.

[12] 'A Ramble with Res Ipsa Loquitur' (1951) 11 *Cambridge Law Journal*, 74, 79.

[13] 'Res Ipsa Loquitur. "A Pandora's Box of Misunderstandings"?' (1950) 24 *Australian Law Journal*, 194, 195. [14] (1936) 14 *Canadian Bar Review*, 287-294.

[15] (1906) 4 C.L.R. 379; [1910] A.C. 295. [16] [1931] A.C. 333.

does not deign to adduce reasons, I am compelled to the conclusion that this accusation is as unfounded as that preceding it.

3. Dr Coppel finally joins issue with me over my citation of *Model Dairy Pty. Ltd. v. White*[17] for the proposition that a milkman is liable in conversion for using another's bottles for the purpose of delivering milk to his customers, *regardless of whether he knows or not that the bottles do not belong to him.* True it is that, on the facts of that case, it was found that the defendant knew the bottles to belong to the plaintiff, but Gavan Duffy J. explicitly stated that 'a man who bails or lets out to another a bottle is, in my opinion, asserting a right inconsistent with the rights of the owner of the bottle, even though he does so, not for direct payment, but to expedite the sale of the contents, *and this whether he knows that the bottle is another's or not.*'[18] Without need to enter on the debatable question of what constitutes a *ratio decidendi,* it is a little puzzling to encounter a challenge to the propriety of citing a considered judicial pronouncement in support of the proposition therein enunciated. (In *Milk Bottles Recovery Ltd. v. Camillo*[19] Mr Justice Gavan Duffy's opinion was approved.)

Constitutional Problems in Pakistan, by SIR IVOR JENNINGS, K.B.E., Q.C., Litt.D., F.B.A., formerly Constitutional Adviser to the government of Pakistan. (Cambridge University Press, 1957), pp. i-xvi, 1-378. English price £2 2s.

Pakistan came into existence as an independent member of the British Commonwealth under the terms of the Indian Independence Act 1947, which provided for the government of the State to be carried on under the Government of India Act 1935, with some modifications, until such time as a new Constitution was framed. Under the Indian Independence Act, a Governor-General was to represent the Crown, and the functions of the legislature of the Dominion, including the framing of a constitution, were to be discharged by a Constituent Assembly which also had to function as the Federal Legislature.

The Constituent Assembly met over a period of seven years until it was dissolved in October 1954 by the Governor-General, Ghulam Mohammed, during the absence of the Prime Minister, Mohammed Ali, in the United States. The Assembly failed to produce the Constitution which was its prime responsibility, and for the greater part of its life it was deadlocked on major questions touching the future of Pakistan. The great dispute was over the question whether the new State should be an Islamic theocratic organization or, in broad terms, a western liberal democratic state. During 1954 the pace of events quickened; the Muslim League was defeated in the East Bengal Provincial Assembly elections by forces which openly supported Bengali separatism. Rioting followed and the central government used this as the pretext for dismissing the East Bengal Government. In September, the Constituent Assembly voted to strip the Governor-General of his powers under the Government of India Act 1935, as amended, and to transfer these to the Prime Minister. The Governor-General countermoved, and in October dismissed the Constituent Assembly on the ground that it had lost the confidence of the people, and he directed the Prime Minister to make important changes in his cabinet.

[17] (1935) 41 Argus L.R. 432. [18] *Ibid.,* 434. [19] [1948] V.L.R. 344.