finds no mention whatsoever of leading Australian cases wherein the criminal law in this country has been moulded somewhat differently than it has been in England, and in many cases somewhat better, it might be argued.[2a] The authors are admittedly mainly devoted to giving English university students what they call a 'bird's eye view' of English criminal law within a reasonable compass and without too expansive a canvass of controversial material.

But Dr Cross himself has shown in his work on Evidence[3] that it is possible not only to refer but to consider (at least as authorities which would persuade an English Court) Commonwealth and even American authorities and discussions thereon, in a book aimed mainly at the university or professional law-school student. Australian courts of high authority have solved some questions of criminal law in ways which are at least worth consideration if not emulation. Some reference to cases like *Thomas v. R.*,[4] *Proudman v. Dayman*[5] and *Bergin v. Stack*,[6] on the question of strict liability and mistake, and to *R. v. Porter*[7] and *Stapleton v. R.*[8] on insanity and the shaping of the M'Naghten Rules would benefit the English reader and make the book more useful to the Australian. There are the important decisions of *R. v. McKay*[9] and *R. v. Howe*[10] on homicide in self-defence, which consider closely a question which has not received any serious attention in an English court this century. It would be helpful to point out that the decision in *R. v. Ward*[11] now in receipt of a complete *imprimatur* from the House of Lords in *D.P.P. v. Smith*,[12] was shortly but completely rejected by the High Court of Australia in *Smyth v. R.*[13] English judges are more ready now, it seems, to refer to and to be persuaded by cases decided in the other common law jurisdictions; English students should be aware of the more important of such decisions. Of course the above sort of criticism is the Australian reviewer's perpetual *cri de coeur*, moved about equally by a desire to see an English work made more useful to Australian readers and Australian authorities brought to the notice of English readers. It may be that today it is a cry which will evoke a more ready response from English authors.

PETER L. WALLER*

Causation in the Law, by H. L. A. HART, Professor of Jurisprudence in the University of Oxford, and A. M. HONORÉ, Rhodes Reader in Roman-Dutch Law in the University of Oxford (Oxford University Press, 1959), pp. i-xxxii, 1-454. Australian price £4. 9s. 3d.

This new work is, so far as I am aware, the first treatise to appear which devotes itself entirely to an examination of the concept of causation in the different branches of the common law. It represents an expansion and development of certain ideas which were first advanced by the authors in a series of articles which appeared in the *Law Quarterly Review*

[2a] However an oblique reference to *Stapleton v. R.* (1952) 86 C.L.R. 358 appears on p. 62, without title or citation.

[3] Cross, *Evidence* (1958).

[4] (1937) 59 C.L.R. 279. [5] (1943) 67 C.L.R. 536. [6] (1953) 88 C.L.R. 248.

[7] (1936) 55 C.L.R. 182. [8] (1952) 86 C.L.R. 358; n. 2a *supra*.

[9] [1957] V.R. 560. [10] (1959) 100 C.L.R. 448. [11] [1956] 1 Q.B. 351.

[12] [1960] 3 W.L.R. 546. [13] (1957) 98 C.L.R. 163.

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in 1956,[1] coupled with a critical examination of the case-law on the topic in the light of those ideas.

Let it at once be said that this is a first-class work of major importance, which should do much to clear away the confusion which surrounds the notion of cause in the case-law. Its appearance is particularly welcome at the present time, when the tendency of English legal writers seems to be that of devoting themselves to the preparation of new editions of outdated works, rather than to the task of breaking new ground.

The book is arranged in three parts. In the first, the authors embark on an analysis of causal concepts, in which they examine existing theories and advance their own. The second part is concerned with the discussion of the case-law on the topic of causation in the fields of tort, contract, criminal law, and evidence. The third part, which is comparatively short, contains a discussion of Continental theories of causation as a legal notion.

In the fields of philosophy and science, the notion of 'cause-and-effect' has almost, if not entirely, vanished. It has been replaced by concepts of correlation, or of permanent and invariable association, between apparently independent sets of occurrences. In contrast to this, the courts are constantly concerned with asking whether X 'caused' the damage or harm which was suffered by Y. They have not been blind to the fact that science and philosophy seem to regard this question as outmoded. Rather have they defiantly insisted that they are concerned, not with the concepts of philosophy and science, but with the notions of the 'plain man'.

In an early chapter, the authors investigate this difference of approach. They discuss at some length the theories of Hume and Mill on the notion of cause, and offer an explanation why the courts have seen fit to disregard those well-known and apparently convincing theories. This explanation repays careful attention, but it is too long to summarize here. Perhaps the most important point which emerges is that philosophic theories of causation are concerned with the general and the usual, whereas the courts are concerned with the particular and the abnormal.

On this matter I would be inclined to advance what is perhaps a different reason from that of the authors. Science, and the type of philosophical analysis essayed by Hume and Mill, assumes, either tacitly or expressly, a deterministic universe. The law, in contrast, assumes the existence of responsible, free-willing human beings who set processes and events in motion. And in this I believe that the law is right. For however apparently cogent may be the arguments against free will, the belief in its existence seems ineradicable, and no one in practice behaves constantly and consistently as though he believes that everything that he does is predetermined. The arguments of determinism are often paraded to avoid blame, but never to avoid praise.

Be this as it may, it is with the 'plain man's' notion of cause that the courts are concerned, and the authors' main task is that of analysing this notion and exposing the several strands of which it is composed. In this they are, if I may say so without impertinence, signally successful. Perhaps their success may be attributed to two assumptions which they make and which run throughout the book—that the 'plain man' does in fact have certain fairly clear notions about what he means by 'cause', and that the notion of 'cause' is not a single and unvarying one, but

[1] Hart and Honoré, 'Causation in the Law' (1956) 72 *Law Quarterly Review* 58, 260, 398.

rather a series of notions which differ in varying contexts. For example, the authors point out that the most common type of situation in which the 'plain man' speaks of 'cause' is that in which a human being, by physically manipulating an object, brings about a change in that object and, secondarily, in other objects. But this is not the only use that the 'plain man' makes of the word. He may, for example, also use it to describe a case where one man provides an opportunity for something unusual or dangerous to occur, or provides another man with a reason for action.

As well as clarifying the 'plain man's' various notions about causation, the authors discuss and deal what it is to be hoped will prove a death blow to a line of thought which has achieved undue support in some legal writing—namely, the idea that since there is no single all-embracing notion of cause, there is no meaning worth bothering about, and that therefore the whole concept can be replaced by decisions based on 'policy'. This idea is allied with another trend in legal thought which has proved popular in recent times, to the effect that causation is (although meaningful) an outdated concept which ought to be banished from the law and replaced by decisions based on the policy of the branch of the law under consideration.

Of course, in the practical working out of these more modern notions, difficulties have been encountered. It is easy to talk about policy, but far less easy to achieve agreement as to what the correct policy is or should be. The authors, however, are concerned to make an outright attack on the line of reasoning which holds causation to be a superfluous legal notion, and they succeed in their task of demonstrating that it is fundamentally unsound.

Throughout this first part of their book, which sets out the theoretical analysis, the authors have plainly been influenced, if this is not too insipid a word, by the school of philosophy which derives its inspiration from the work of Wittgenstein. Professor Hart has, of course, a high reputation as a philosopher as well as a jurist, and the present work shows a happy blending of legal theory with the results of modern linguistic philosophy. Unfortunately much modern legal writing tends to accept as proven fact ideas derived from philosophy and psychology which have long been rejected by specialists in those fields, and it may be hoped that this book will encourage other legal writers to review some of their more cherished theories in the light of modern progress in other fields of knowledge.

In the second part of the book the authors turn to a detailed discussion and analysis of the case-law. Their investigations range over American and Commonwealth cases as well as those from England. It is not to be expected that everyone will agree with their analysis of every case, and little point would be served in discussing here those matters on which I would tend to take a different view. I would, however, make one point of general criticism of this part of the book.

Although the authors discuss a vast number of cases in the light of their theory, they apparently refuse to state that any of the cases is wrong. The strongest word of criticism that I recall, after a careful reading of the book, is that a case decided some years ago in Victoria is to be regarded as 'doubtful'. And even this slight degree of eyebrow-raising is rare. For example, it seems to me that the whole thrust of the authors' argument concerning the concept of 'foreseeability' demonstrates that the

reasoning in *Bourhill v. Young*[2] is quite unsound. Yet although the authors refer to this case on several occasions, they nowhere suggest that it was wrongly decided.

I appreciate, of course, that if one is writing a textbook of English law there is little point in saying that a decision, especially a decision of the House of Lords, is wrong, no matter how absurd or unjust its results may be. The refusal of English appellate courts to reconsider their past decisions would make such criticism pointless, and even misleading to a student who seeks to find out 'what the law is'. But the authors are not writing a textbook of English law, and they could well have afforded to put aside the polite fiction—in which no one believes—that all the cases are correctly decided and can be reconciled. They might even have remembered that their book will be read in many jurisdictions outside England, jurisdictions where the judges have not refused to accept the responsibilities that accompany the judicial office.

Despite this blemish, however, the book remains a splendid piece of work. It should be read by everyone who aspires to be learned in the law, and I have little doubt that it will be greatly in demand in future years. I would hope, however, that this will lead to reprints rather than to new editions. For, after all, there is little point in revising a book such as this to keep up with the new cases, and the authors ought now to devote their considerable talents to analysing and clarifying other dark areas of the common law.

PETER BRETT*

Industrial Conciliation and Arbitration in Australia, by ORWELL DER. FOENANDER, LL.M., LITT.D. (The Law Book Co. of Australia Pty Ltd, Sydney, 1959), pp. i-xx, 1-220, and Appendix 1-119. Price £2. 15s.

This is the seventh book by the author dealing with labour relations in Australia. It deals with the constitutional sources of jurisdiction and the form of the existing Commonwealth system of conciliation and arbitration. The publication arises from the new provisions inserted, in 1956, in the Commonwealth Conciliation and Arbitration Act. For convenience the whole Act is printed as an appendix to the book.

The 1956 Act represented a completely new departure from the previous combination of arbitral and judicial power in the one tribunal, the Conciliation and Arbitration Court. This combination of powers being precluded by the *Boilermaker's Case,*[1] a new start with a division of arbitral powers to the Commonwealth Conciliation and Arbitration Commission, and the necessary accessory or consequential judicial powers to the new Commonwealth Industrial Court had to be made. In addition, a further experiment (in this instance not imposed by constitutional limitations) was undertaken by appointing conciliators without any power to settle industrial disputes other than by the process of conciliation (Chapter III).

This division of functions is so strikingly different from the position prior to 1956, that a book based on the new Act from Dr Foenander will be of great assistance to students and to those actively concerned with cases arising in the jurisdiction. Unfortunately the book, as appears from the footnote references to Industrial Court and Arbitration Commission

[2] [1943] A.C. 92.

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[1] (1956) 94 C.L.R. 254.