BOOK REVIEWS

JESTING PILATE
and OTHER PAPERS AND ADDRESSES

By the Right Honourable Sir Owen Dixon, O.M., G.C.M.G., D.C.L. (Hon.) Oxon., LL.D. (Hon.) Harv., LL.D. (Hon.) Melb., LL.D. (Hon.) A.N.U. Collected by His Honour Judge Woinarski, M.A., LL.D. Melb. (Law Book Co. Ltd.) 1965. pp. 275. Price: $6.60.

After 12 years as Chief Justice of the High Court and after 35 years as a member of that Court Sir Owen Dixon retired in 1964. The High Court had been created during his lifetime and was as yet in its infancy when he was called to the Victorian Bar in 1910 and, with respect, the Court may be said to have grown up with him. Indeed, without detracting from the substantial contributions of his predecessors and other members of the Court, it is not an overstatement to say that it was under his aegis that the decisions of the High Court of Australia came to be accepted as making contributions to the jurisprudence of the common law which (*pace* R. M. Jackson and C. P. Harvey, 28 *M.L.R.* 261, 262) no common lawyer can afford to ignore.

Of his judicial work Sir Owen has said 'it was hard and unrewarding' and in that short sentence has epitomised for all time an important aspect of the judicial office. The general nature of judicial work inevitably tends to confine appreciation of its merits to the legal craftsman. If the uninitiated are familiar with the judiciary at all, it is with those members of it who have been connected with some cause celebre, having sensational facts and little legal content, or who have attracted public attention by their overt eccentricities or, perhaps worst of all, who have attempted to relieve the tedium of a trial with witticisms which might be expected to appeal to those whose reading matter is confined to the popular press.

Sir Owen had none of these attributes. He was a legal craftsman, a professional judge with a highly developed sense of the dignity of judicial office. He did not allow sensational facts to deflect him from the pursuit of legal principles. If he had eccentricities, they do not appear to have been revealed either to the general public or to legal practitioners. His humour, as revealed in the law reports, is scholarly and to those of a generation whose schooling has not included some instruction in the ancient classical languages, may even appear to be 'donnish'. Those of us who either practice, teach or study the law, and who regard ourselves as members of a learned profession, know that no one in Australia has done more than Sir Owen to maintain

and enhance the reputation of our profession for learning. Of his 'unrewarding' labour, we can but say, '*οὐ λόγῳ τιμώμεν ἀλλὰ τῇ συνουσίᾳ πλέον*' ('Honoured not in story, but in the hearts of those who know it best'. Soph. *Oedipus at Colonnus*, 62, 3).

Fortunately Sir Owen's wisdom and learning were not confined to the courts, and at times were available, if not to the general public, to a wide selection of learned associations, both academic and professional. We are indebted to His Honour Judge Woinarski and to the Law Book Company for having made available to the general public and to posterity material which otherwise may have been available, even to the academic lawyer, only after considerable research.

The publishers describe this collection as a book for persons of cultured tastes but, in the opinion of this reviewer, it is something more. It is a work that cannot but cultivate a taste for literary style and elegant phraseology in any person of discernment who reads and re-reads it. Sir Owen is, of course, a master of English prose and the very simplicity of his style displays his mastery. Effect is achieved without unnecessary adornment so that when he speaks of the law to professional bodies not skilled in the law, the basic problems involved are immediately apparent. He has that rare quality of which Marc Bloch has written: 'Car je n'imagine pas, pour un ecrivain, de plus belle louange que de savoir parler, due meme ton, aux doctes et aux ecoliers. Mais une simplicite si haute est le privilege de quelques rare elus'. *(Metier D'Historien*, at p. IX).

The field covered by the essays is wide and varied and reflects not only the experience of a high judicial officer but that of a diplomat and that of one who has practised at the bar. Members of those professions who, amongst other occupational hazards, are in demand as expert witnesses, may well feel less vulnerable and considerably reassured after they have read and studied the addresses on 'Science and Judicial Proceeding' and 'The Law and the Scientific Expert.' These, together with the title oration 'Jesting Pilate', are calculated not only to dispel misconceptions as to the pedantic nature of the judicial process, so often harboured by the layman, but provide a valuable lesson for the student of law. Mastery of the law and its technicalities does not of itself make a great judicial jurist. It must be coupled with a deep understanding of and a constant striving to understand the problems confronting those who come to the court whether as litigants, witnesses or practitioners.

It is perhaps this aspect of the common law judicial office that tends to distinguish it from those systems under which judges are trained primarily as professional judges and permanent civil servants. The very nature of the judicial office entails a high degree of aloofness but where practice at the bar or as a solicitor is a prerequisite to appointment to the bench it affords ample opportunity for gaining

experience of all those human activities which provide the factual context for the operation of the law and the exercise of the judicial function.

In this collection there is consolation and even praise for the much maligned profession of Accountancy. To Sir Owen the accountants are not 'the witch doctors of the modern world, . . . apt to deal in unrealities' but persons who, in the same way as the lawyer, practice an art, which 'must depend on a special branch of organised knowledge and be indispensable to the progress or maintenance of society' and whose 'skill and knowledge of the profession must be available to the service of the State or the community.' Here again is that depth of understanding and appreciation of the art of others which is the hall-mark of the craftsman. If this reviewer may be permitted to add a rider, it is to the effect that when lawyers and accountants are compelled to deal with unrealities, those very unrealities have, as often as not, been created by the persons who are elected to govern us and whose qualifications do not necessarily include a knowledge of either law or accountancy.

For the student who is just starting his legal studies there is much in this volume to stimulate and inspire. In the classic phrase of Holmes, J., 'The life of the law has not been logic, it has been experience'. (*The Common Law,* 1938 ed., at p. 1) and it is this very experience that the younger student lacks. To him this book is an epitome of the experience not only of a great judge but also a man of affairs whose talents had not been confined to the service of his country in its municipal courts of law but had also found employment in the wider field of international relations. Indeed, it is a book which this reviewer would place in his list of prescribed reading for any course of introduction to legal method.

For the more mature student and the jurisprudentialist there are stimulation and interesting fields for speculation as to the mental processes of the judiciary, involving the eternal conflict between legal principles and human needs, the apparent thesis and antithesis of 'legalism' and 'realism'. To Sir Owen, a classical scholar who, perhaps nostalgically, recalls a time 'when a false quantity was worse than an immoral act', legal principles and rules were paramount but they were not an end in themselves. They were flexible tools which in the hands of a skilled craftsman could be and were adapted to cater for the needs of the time. The Reports contain many examples of Sir Owen's expertise in effecting this synthesis between 'legalism' and 'realism'. As early as 1926, when he was an acting Judge in Victoria, he demonstrated how the doctrine of 'feeding or clothing' the estoppel could be invoked to mitigate the rule that a breach of condition gives rise to a right to repudiate a contract for the sale of goods (*Lucas* v. *Smith,* [1926] V.L.R. 400). The English Court of Appeal in *Butterworth* v. *Kingsway Motors,* [1954] 2 All E.R. 694, at p. 701, did precisely what

Sir Owen had adumbrated and in *Patten* v. *Thomas Motors Pty. Ltd.* [1965] N.S.W.R. 1457; 83 W.N. (N.S.W.) Pt. 2, 378, the Supreme Court of New South Wales followed suit. Again the majority decision of the House of Lords in *White and Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413, in which the rule that one party may persist in carrying out his part of the contract after the other party has given notice of intention not to proceed was applied with rigidity, has caused some concern amongst thinking members of the profession. Yet in *Automatic Fire Sprinklers Pty. Ltd.* v. *Watson* (1946), 72 C.L.R. 435, at pp. 463-4, Sir Owen has clearly demonstrated that the rule is not so inflexible that it must inevitably be applied where the justice of the case demands otherwise.

It is perhaps this ability to synthetise 'legalism' and 'realism' that is the hall-mark of Sir Owen's juristic skill; his ability to interpret the past in the light of the present and the present in the light of the past which may well be the true function of the common lawyer as well as that of the historian. This function was rejected by the English common lawyer when the House of Lords and, subsequently, the Court of Appeal, decided that they were rigidly bound by their own decisions, thereby exemplifying the words of Marc Bloch: 'L'homme passe son temps a monter des mecanismes, dont ils demeure ensuite le prisonnier plus on moins volontaire'. (*Metier D'Historien*, at p. 11) and enabling Lord Devlin to say in 1962, 'I doubt if judges will now of their own motion contribute much more to the development of the law.' Thanks to the edict of the High Court, under the leadership of Sir Owen, in *Parker* v. *The Queen*, the Australian judiciary remains free to develop and to adapt the legal principles of the common law to the needs of the age. That edict may well have inspired the English and Scottish law lords to release themselves from the shackles imposed by their nineteenth century predecessors.

To those who feel that it is a reviewer's function to criticize, this reviewer has only one criticism to offer and that, as befits a solicitor, goes to a matter of title. We are told that 'Jesting Pilate' did not wait for an answer to his hypothetical question, 'What is truth?' but this collection reveals Sir Owen as a man whose whole life has been devoted to a meticulous search for truth. Those of us who are familiar with the Law Reports have little doubt as to the measure of his success and this collection can only confirm our views. To those who have neither need nor inclination to read the Reports but who are concerned with the search for truth this collection provides a valuable lesson in methodology.

His Honour, the editor, is to be congratulated upon his work in making this collection available to the general public, and the publishers for the excellent lay-out and printing which are excelled only by the quality of the subject-matter.

P. F. P. Higgins

THE LAW OF CONTRACT

By G. C. Cheshire and C. H. S. Fifoot, Australian edition by J. G. Starke and P. F. P. Higgins (Sydney, Melbourne, Brisbane: Butterworths, 1966). pp. 1-866. Price: $9.75.

In recent years observers of the Australian legal scene have been witnessing a growing trend in Australian Courts, particularly in the High Court, towards greater self-reliance, and away from strict adherence to English precedents: even the authority of the House of Lords may now have to yield where the High Court inclines to a different view of the law. Because of the numerous law reform measures now being taken in England, there will soon be much more 'unravished' common law administered by Australian than by English Courts. This will make it even more imperative for the Australian Courts to adapt and develop, without much guidance from overseas, common law principles which have been discarded in their domicile of origin. Bench and Bar will be able to carry out this task more successfully, if they receive competent assistance from academic writings, particularly from textbooks.

The Australian edition of Cheshire and Fifoot's *Law of Contract* is not intended merely as a series of annotations to an English text; the editors emphasize that their aim has been to produce an Australian textbook as such. Within the limits unavoidably set by the fact that the basis of the book is still Cheshire and Fifoot's original exposition, the editors have been successful. The book contains a great deal of valuable information about the law of contract as it applies in Australia. The leading Australian decisions and statutory enactments in the field of contract have been collected, providing a much more useful reference tool for practitioners than such collections as the *Australian Pilot* to *Halsbury* can hope to be. In the past many Australian law teachers have used the English version of *Cheshire and Fifoot* as their basic textbook, and they will undoubtedly be glad to use the Australian edition to help them meet the 'Australian content' requirement which recent judicial trends have imposed.

Cheshire and Fifoot has always enjoyed a high reputation for its elegance of style and the Australian editors have left the original text unchanged whenever possible. They have wisely refrained from attempting to emulate the rococo-like phrases of the English text. Their style is clear and businesslike and it is only on rare occasions that phrases appear which the English authors may well have read with a sensation of shock. One example appears on p. 132, where the editors describe the rule in *Adams* v. *Lindsell* as the 'effective on despatch rule'. One reason for the popularity of *Cheshire and Fifoot* with students has been the clear account it gives of the material facts of leading cases. The editors have provided similar accounts of numerous Australian decisions. Inevitably, the book has become a little bulky, and it is doubtful whether a complete knowledge of its contents should be expected of Australian contract students.

Despite its sterling qualities and its great success as a student text, *Cheshire and Fifoot* has not remained without critics. It has been said, and with some justification, that the authors might, at times, have shown greater perseverance in analysing and solving difficult logical and conceptual problems. It would seem that the editors, too, have sensed this rather facile quality of the original text, for they have occasionally felt impelled to add notes of explanation even in the absence of Australian material which made this necessary. For example, to Cheshire and Fifoot's somewhat radical conclusion from *Bell* v. *Lever Bros.* that there is no doctrine of common mistake as such, the editors have added the no doubt necessary qualification that the common law rule is subject to the exception stated in sec. 6 of the English Sale of Goods Act and its Australian equivalents.

As regards the topic of common mistake, readers will be surprised to find that the editors have 'defected to the enemy' in the well-known dispute about the correctness of *McRae* v. *The Commonwealth*. They point out that the result in that case is difficult to reconcile with sec. 6 of the Sale of Goods Act. However, the High Court in *McRae's Case* showed convincingly that the words of the section did not apply, and once this is conceded, a problem of reconciliation simply does not arise. The editor's argument seems to overlook an even more fundamental point which is implicit in *McRae's Case*: although there may not be a *rule of law* rendering contracts void for common mistake, the existence of such a mistake may nevertheless raise serious and difficult problems of construction; indeed, the construction appropriate to such situations may well be such as to deprive the contract of all or of nearly all operation and obligatory effect.

The Australian edition of *Cheshire and Fifoot* has been given a very marked 'Australian flavour'. Australian cases have been substituted for English decisions with identical or similar *rationes decidendi* (see, for example, the substitution, on p. 204, of *Causer* v. *Browne* for *Chappelton* v. *Barry U.D.C.*), dicta by English judges have given way to similar pronouncements by their Australian brothers. When dealing with the 'business-efficacy' test for the implication of contractual terms for example, the original text quotes a dictum in which Lord Justice Mackinnon 'deprecated its indiscriminate application' (p. 149 of the 6th edition). The Australian edition cites instead a dictum by Chief Justice Jordan, in which the learned Chief Justice 'emphasized the caution with which the courts must proceed when implying a term' (p. 250). More frequently, however, the editors have used their Australian case material to qualify, extend, further elaborate, or even contradict English decisions. This is no doubt the most valuable contribution which the book has made. Two examples may be cited to explain the authors' procedure in this respect. In *Olley* v. *Marlborough Court* the Court of Appeal held that a notice displayed in a hotel room and intended to exempt the hotelkeeper from liability for loss of patrons' property, had not become part of the contract, since the patron

saw the notice for the first time after the contract had already been made. The editors point out that the decision might have been different if the guests had been *habitues* of the hotel. This they support convincingly with a brief analysis of *Balmain New Ferry* v. *Robertson*, a decision of the High Court (p. 205). The decision by Harman J. in *City and Westminster Properties* v. *Mudd* is open to the interpretation that parties can validly conclude a collateral contract which is inconsistent with the terms of the main contract. Whilst Cheshire and Fifoot relate that decision without apparent contradiction, the editors point out that it is incompatible with leading Australian decisions (p. 143, n. 166).

A possible criticism of the book is that it does not do complete justice to the Australian cases. The Australian Courts have elaborated in great detail areas of the law of contract which *Cheshire and Fifoot* deals with either not at all or with extreme brevity. Examples are the distinction between verbal and written contracts (more fundamental than the sketchy treatment given to it by most textbooks, indicates: *e.g.*, pp. 196-198 of *Cheshire and Fifoot*, Australian edition), 'subject to contract' and related problems (not analysed in detail by Cheshire and Fifoot because 'the comparison of decided cases is apt to confuse rather than to illuminate'—p. 34 of the English edition), and the legal nature of option contracts. Admittedly, the Australian editors have expanded the very brief account of these problems given by the original text and they have provided references to many Australian decisions in these fields. However, a textbook which placed reliance primarily on Australian cases would almost certainly deal with these aspects of the law of contract in much greater detail than the editors have done.

There are few suggestions made by the editors which this reviewer would be bold enough to call mistaken. Only two specific points of criticism might be noted: (1) The editors state the law concerning rectification somewhat differently and, with respect, more convincingly than the original text (pp. 323 *et seq.*). But they support the proposition that there 'can be no reformation of a document containing literally the terms in which the parties intended to express themselves' with a reference to a dictum from the judgment of Higgins J. in *Bacchus Marsh* v. *Joseph Nathan*. It would have been useful if the learned editors had warned the reader that Higgins J. was in dissent in that case and that Isaacs J., one of the majority judges, seemed willing to apply a more liberal test for purposes of rectification. (2) In order to ascertain whether a contractual term amounts to a condition as distinct from a warranty, Jordan C. J. enunciated a test which the High Court endorsed in *Associated Newspapers* v. *Banks*. The editors have restated that test as follows: 'Is the term such that, in its absence, the party wishing to rescind would not have entered into the contract?' With respect, what Jordan C. J. did require was not only that the party wishing to rescind fully expected the inclusion

of the term, but also its complete or at least substantial performance: 'The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor . . .' The test appears much stricter than the learned editors make it seem.

None of these criticisms is intended to detract in any way from the real achievement of the editors. They have provided the first account of the Australian law of contract in textbook form. Students and practitioners alike will find this edition of *Cheshire and Fifoot* indispensable.

H. K. Lucke

INTERNATIONAL LAW IN AUSTRALIA

Edited by D. P. O'Connell, Australian Institute of International Affairs (The Law Book Co. Ltd.). 1965. pp. 603. Price: $11.

Sir Garfield Barwick, in his foreword to this collection of essays makes two points which emphasise the importance of this book. The one is that it is only in very recent years that Australians have had to take stock of international relations, with a clear consciousness that as a nation they stand in a peculiar relationship to the world around them. The second point is 'the need for a wide base of well-informed and thoughtful citizens in the electorate as essential to the stability of national policies, and . . . to their wise formulation'. This book, he states, is therefore 'singularly timely', for it is needful *now* for Australians to have readily available 'accurate and objective' information about external affairs.

The contributors are all highly qualified, some of them not only by reason of their academic distinctions in the field of law, but in practical experience in the conduct of Australia's international affairs: thus, *e.g.*, Sir Kenneth Bailey, C.B.E., M.A., B.C.L. (Oxon.), LL.M. (Melb.), Australian High Commissioner in Ottawa, formerly Commonwealth Solicitor-General, and currently a candidate for the International Court of Justice, and J. G. Starke, Q.C., B.A., LL.B. (W.A.), B.C.L. (Oxon.).

The subjects specifically covered offer materials not only for students of international law as such but for students of Australian constitutional history, especially chapters I and II on 'The Evolution of Australia's International Personality' from 1874 to the present day, and on 'Australian Constitutional Law in Relation to International Relations and International Law'. Both these chapters, by Professors D. P. O'Connell and G. Sawer, set the tone for much of the book by inviting informed controversy and public as well as scholarly interest, as well as providing information and illumination.

Other chapters deal with treaty-making practice and procedure, commitments under the U.N. Charter, international trade, air and sea law, and coastal jurisdiction. Treatment of these topics is not of even depth, which in a compilation of this sort is hardly to be expected, and some are more discursive and challenging than others. Thus on the subject of Australia and G.A.T.T. Professor Alexandrowicz dwells at some length in his 23 pages of text on Australia's disputes with Chile and with France, in the first case on subsidies, and in the second on trade in wheat with Asia (10 pages). But the cases are judiciously chosen to illustrate the legal issues at stake, and trends in Australian and G.A.T.T. policy: and he ends with the pointed remark that 'though Australia's commercial links with her Asian neighbours tend to be intensified, her political affinities do not run on lines parallel to economic considerations'.

Less discursive is Mr. T. A. Pyman's more than 40 pages on air law, and the numerous agreements (primarily since the Chicago Conference of 1944) and Conventions which assist in the regulation of international air traffic.

Australia's relations with the I.L.O. are given a critical historical as well as legal appraisal by Prof. J. G. Starke, who argues that Australian Commonwealth and State governments have not raised labour standards in conformity with I.L.O. pressures as much as from internal pressures; they have not ratified or accepted all I.L.O. conventions and recommendations, and perhaps the States in particular have lagged in bringing State labour legislation into conformity with these norms. 'It is a curious fact, too', he asserts, 'that Commonwealth and State industrial tribunals do not make as much direct use of International Labour Conventions and Recommendations as might be expected; nor is their attention always drawn to the terms of such of these instruments as lay down standards relevant for the purpose of their awards and determinations'.

Australia's relations with the South Pacific Commission, the Colombo Plan, International Financial Institutions, and her position in International Law with regard to her overseas territories and Antarctica receive fairly extensive treatment. Dr. A. C. Castle's is the most extensive contribution here, and deals with the question of Australia and her overseas territories and her relations with the United Nations. These chapters, as indeed many others, are meticulously footnoted and documented, which enables students not only to appreciate their contents better but to refer to sources which should in part indicate other lines of exploration, and in part provide access to critical sources.

The range of topics is too formidable for one reviewer to be able to do justice in balanced appraisal and criticism. In these terms questions of jurisdiction over visiting armed forces, diplomatic and consular immunities and privileges, immigration and aliens, extradition and asylum are fields for the specialist — as indeed are many of the other subjects canvassed.

Nevertheless, some lacunae may be noticed, as for example direct reference to Australia's trade relations with Communist China, and the question of recognition of China (Taiwan China only is mentioned, and only in passing). More strangely, perhaps, there is no chapter on Australia's relationships with states of the Commonwealth of Nations, although Prof. O'Connell provides a short section on this in his first chapter, and brief allusion is made to it in a few other chapters, as, for example, in the matter of Fugitive Criminals. But there are institutions of the Commonwealth of Nations, such as the Economic Consultative Council, the Commonwealth Shipping Committee, Air Transport Council, Telecommunications Board, and many others, and Australia's participation in these is important quite apart from her participation in the related U.N. Specialised Agencies. This, however, may be taken as a small point since in the body of the work there is frequent reference to the Commonwealth of Nations, fairly suggesting 'the weakening of the Commonwealth' mentioned by Sir Garfield Barwick, but not how, or why there is a 'need to shore it up', which Sir Garfield also mentioned. Perhaps on this score, the real weakness is in the index which very nearly ignores the Commonwealth of Nations. This is perhaps unfortunate, for as Professor O'Connell suggests in his conclusion to Chapter I, and as may clearly be inferred elsewhere, there is in this book a source 'to which the newer Commonwealth States', especially those 'who have adopted federal constitutions', might look for guidance.

With this, a worthwhile book is urged upon the Australian public.

Dr. A. K. Fryer

AUSTRALIAN CRIMINAL LAW

By Colin Howard, Ph.D. (Law Book Co. Ltd., 1965). pp. 372. Price: $9.50.

This book is not the Australian equivalent of *Archbold* and does not purport to be. Professor Howard has selected a number of crimes and concepts which may be regarded as illuminating the criminal law and has discussed them in the context of the Australian Criminal Codes and the Australian common law criminal jurisdictions. Chapter 1 briefly deals with preliminary matters such as the derivation of Australian criminal law, but includes a useful section on the burden of proof. Chapter 2 deals with homicide, chapter 3 with assault (sexual and non-sexual), chapter 4 with theft (including robbery and receiving) and chapter 5 with ancillary responsibility (complicity, conspiracy and attempt). In chapter 6 capacity, voluntariness and understanding are considered under the headings of automatism, provocation, intoxication, insanity and youth. Under the general heading of 'awareness' the author discusses concepts such as intention, recklessness, negligence, mistake and the provisions of the Tasmanian, West Australian

and Queensland codes relating to intentional acts and omissions and chance and accidental events. The chapter also includes a discussion of the concept of compulsion.

The author has much the same attitude to the purpose and the function of the criminal law as Dr. Glanville Williams in his book on criminal law, indeed he acknowledges his debt to Dr. Williams in the preface to his book. In particular the author shares with Dr. Williams an enthusiasm for actual recklessness as a test of guilt in substitution for tests of guilt based on the objective standard of the hypothetical reasonable man.

The extent to which the criminal law should be concerned with the mind of the offender is an arguable matter, much depending it is suggested on the nature of the particular crime under discussion. There are too many different kinds of mental ingredients in combination with too many different kinds of circumstances to maintain that recklessness ought as a general rule to be inferred in the definition of a crime. Moreover, in some circumstances it seems absurd to demand an intending or reckless state of mind before determining guilt. Suppose for example a man hits his wife over the head with an axe in a fit of temper and is charged with unlawful wounding. Should we really be deterred from concluding his guilt even though we may think that his story that he was blinded by rage may be true? No doubt it is true as a psychological fact that many crimes of violence are committed by persons who in their rage just didn't think or advert to the consequences of their acts — crimes of violence are in fact commonly committed by enraged persons. Should a jury be told to acquit a person inflicting violence short of death if they think it might reasonably be true that he just didn't think of the particular relevant criminal consequences of his act? Or suppose he claims that he inflicted violence by reason of some non-insane irresistible impulse. In layman's language the excuse is, 'I couldn't help myself'. In either case he might be acting involuntarily as Professor Howard appears to recognise at page 283 of his book. Nevertheless there is a good case for convicting people who lose their tempers and inflict violence, regardless of whether or not they act recklessly in the legal sense.

It is unfortunate that Professor Howard has in general declined to discuss in relation to any particular crime whether recklessness as to any of its ingredients should or should not be the law, particularly as he would seem to have confused what the law is with what it should be. It is fundamental to his view that the concept of recklessness is to dominate the criminal law. He regards the Codes as something of an obstacle, but (at p. 5) he declares that for Tasmania the law has been settled by *Vallance* (1961) 108 C.L.R. 56 and 'there can be little doubt that the High Court will in due time declare recklessness to be as much a part of the criminal law of Queensland and Western Australia as it is of the law elsewhere'.

It is submitted that Professor Howard's enthusiasm for recklessness as a dominant theme in the criminal law has led to some questionable conclusions. Contrary to his view (at p. 356), the High Court did not decide in *Vallance* that the requirement in section 13 of the Tasmanian Criminal Code that an act be voluntary and intentional means that the whole *actus reus* of the crime be proved to be intentional. A majority of the judges (Kitto, Menzies and Taylor JJ.) held that the word 'act' in section 13 of the Code ought not to be interpreted so as to require an intentional wounding but rather an intentional causative act giving rise to the wound. It is true that Kitto J. found his ingredient of recklessness in the crime of wounding by holding that the verb 'to wound' implies intent. Menzies J. arrived at his conclusion of recklessness by holding that the exculpation from guilt in section 13 for a chance event included within its meaning an event of wounding not foreseen by the actor. Taylor J. found his ingredient of recklessness in section 8 of the Criminal Code Act which preserves common law defences. However, the High Court refrained from dealing with sections 150 and 152 of the Code, which furnish an excellent argument that the crime of wounding can be constituted in Tasmania by negligence (culpable no doubt). Thus Professor Howard's initial premiss is incorrect. *Vallance* did not decide that section 13 imports an ingredient of recklessness into the Code. The case does not even decide that recklessness is vital in order to prove unlawful wounding—a view which has been taken on a number of occasions since *Vallance* by Tasmanian judges in criminal trials, on charges of unlawful wounding.

Professor Howard relies upon the dissenting minority judgments of Dixon C.J. and Windeyer J. However, he seems unaware of the fact that in three cases, *Murray* [1962] Tas. S.R. 170, *Snow* [1962] Tas. S.R. 271 and *Martin* [1963] Tas. S.R. 103, the Tasmanian Court of Criminal Appeal has followed the majority reasoning of the High Court in *Vallance* and held that the word 'act' in section 13 does not comprehend the external elements of whatever crime may be in question.

Moreover there is good reason to suppose that at common law there is no presumption that intention or recklessness should extend to every element of the offence in question. In *Reynhoudt* (1962) 107 C.L.R. 381 a majority of the judges held that on a charge of assaulting a police officer in the due execution of his duty the only mental ingredient involved in the offence is the intention to assault. The court was divided three to two and it is interesting to notice that, as in *Vallance*, Dixon C.J. took the minority view. The majority view was followed by the Tasmanian Court of Criminal Appeal in *Martin* (*supra*). These cases receive no mention by the author in this context.

Professor Howard's initial error on this fundamental matter would appear to have led him into a variety of further errors. For example, at p. 138 he discusses his conclusion that on a common law rape charge it is necessary for the Crown to prove an intent to have sexual intercourse against the consent of the female involved. He states that the

position under the Code appears to be the same as at common law. However, he does not mention that there is a decision to the contrary effect in *Snow*, referred to above. In that case the Tasmanian Court of Criminal Appeal held that since section 185 of the Tasmanian Criminal Code simply provides that rape is constituted when a person has carnal knowledge of a female not his wife without her consent, intention to have sexual intercourse against the consent of the female involved is not an ingredient of the crime in Tasmania. Section 13 does not operate to import intent or recklessness into section 185.

Again it may be that the author's erroneous view as to *Vallance* has led him into error in considering the provisions in the Code States relating to parties to crimes. Section 4 of the Tasmanian Code provides that 'where two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such purpose a crime is committed of such a nature that its commission was a probable consequence of such purpose, each of them is deemed to have committed the crime'. The author's conclusion (at p. 232) is that probable consequences are such consequences as are foreseen as probable by the accused and not such consequences as might be thought probable on a purely objective test. In support of his view he cites *Nichols* [1958] St.R.Qd. 200 and *Brennan* (1936) 55 C.L.R. 253 and asserts that the reasoning of the High Court in *Brennan* was accepted in Tasmania in *Murray* [1962] Tas. S.R. 170. It is suggested that this is misleading. In *Murray* both Burbury C.J. (at p. 180) and Crawford J. (at p. 209) plainly took the view that section 4 establishes an objective test. Moreover a reading of *Brennan* and *Nichols* will disclose that they cannot fairly be claimed as authorities for the proposition contended for by Professor Howard.

The Tasmanian Code by section 156 defines culpable homicide as including a killing by an unlawful act. Manslaughter is defined as culpable homicide not amounting to murder. Professor Howard (at p. 105) quotes Crisp J. in *Davis* [1955] S.R. 52 to the effect that 'criminal negligence is always necessary to found a charge of manslaughter' in support of his conclusion that in Tasmania manslaughter is synonymous with criminal negligence. However, the author would appear to be unaware of the judgment of the Tasmanian Court of Criminal Appeal in *Leighton* 1960 (unreported) where Crawford J. expressed the view that an assault would be an unlawful act sufficient to prove manslaughter. This reviewer knows of no Tasmanian authority to the contrary and on a number of occasions in Tasmania manslaughter has been left to the jury on the alternative bases of death following an unlawful assault with a lethal weapon, and culpable negligence in the handling of the weapon.

Again, the author's conclusion (at p. 103) that manslaughter is synonymous with criminal negligence in Queensland and Western Australia is doubtful and unsupported by authority. The cases of *Mamote-Kulang of Tamagot* (1964) 37 A.L.J.R. 516 and *Martyr* [1962]

Qd.R. 398 (which are referred to) are persuasive authorities to the contrary. Professer Howard also predicts that at common law manslaughter will become synonymous with criminal negligence. The case of *Church* [1965] 2 All E.R. 72 was presumably unavailable to the author, at any rate it may be regarded as a sizeable straw pointing in the other direction.

Two further matters of particular interest in Tasmania warrant mention. The section dealing with attempt is an excellent and comprehensive survey of the authorities. However, it seems a pity that the brilliant judgments contained in *Haas* [1964] Tas. S.R. 1 have been virtually unnoticed. The author's statement at p. 258 that it is for the judge to determine the question of sufficient proximity and for the jury to determine whether the *act* in question is in fact proved requires qualification. If the judge decides the act is not too remote 'it is still for the jury to say whether the inference of a series leading to the completed crime should, as distinct from can, be drawn'. See the judgment of Crisp J. in *Haas* at p. 24.

At p. 355 the author expresses the opinion that the principles of criminal responsibility expressed in the Code govern the criminal law generally in Tasmania. This is probably not correct—see section 2 of the Criminal Code Act 1963.

Professor Howard has written the first narrative text book of Australian criminal law. This is indeed a notable achievement, and in spite of the author's strong preference for a subjective test of responsibility, members of the profession who practise in criminal jurisdictions will find the book most useful and stimulating.

E. Sikk

FREEDOM IN AUSTRALIA

By Enid Campbell and Harry Whitmore (Sydney: University Press, 1966). pp. xiii and 298. Price: $7.

Few words have been more abused in this century than the word 'free'. *Arbeit macht frei* replaced the franker *Abandonnate ogni speranza* above the gates of a modern Inferno; and while this may have been the ultimate cynicism, it is still disturbing to read about the 'laws guaranteeing freedom for every citizen' in the preamble to the Constitution of the People's Republic of Mongolia, or the 'free territory under the jurisdiction of the State of Vietnam' in the Protocol to the S. E. Asia Collective Defense Treaty. There is far too much 'true freedom' about in the world for most people's comfort. It is far too easy, as President Johnson and Mr Holt have discovered to our cost, to invent a few extra freedoms when pressed for a bit of concrete thinking.

Nevertheless when the average citizen, booked for a parking offence or told to stop singing in the pub, protests 'It's a free country, isn't it?' he does mean something, however vague. It *is* a free country after

all, isn't it? Professor Campbell's and Professor Whitmore's book is a very successful attempt to give a precise content to the popular slogan.

The blurb tells us that the authors 'survey for the layman, (*sic*) in considerable detail, the law as it relates to civil liberties and individual liberty'. This does a good deal less than justice to the authors. In the first place the book is not simply written for the layman. It is carefully annotated from the legal point of view, and contains invaluable summaries of the law throughout Australia on particular topics—for example obscenity, treatment of the sick and (until the publication of Dr. Campbell's recent book on the subject) parliamentary privilege —where no such summaries were to be found before. In the second place the book is certainly not confined to questions of law; it also deals with the way in which discretions entrusted to public authorities are in fact exercised.

The book begins with a short introduction for the general reader to the sources of law and the Commonwealth and State Constitutions. There is a brief discussion—rather too brief, perhaps—of the merits and demerits of a written constitution with entrenched civil rights provisions. It is then divided into four parts. Part I is concerned with personal freedom; it is this part which includes a chapter on the treatment of the sick. Part II relates to freedom of expression, and includes a chapter on freedom of religion. Part III deals with economic freedom, that is, the freedom to work and freedom of property. Part IV is entitled 'The Individual and his Government'. This is perhaps the least satisfactory part of the book. It contains a chapter on Aborigines which like the average Australian comment on this topic is brief, smug and unconvincing; a chapter on the Discretion to Prosecute which does not seem to me to merit a separate chapter; and a chapter on Protection from Power which tries to compress the greater part of administrative law into 17 pages.

The method which the authors follow throughout is to outline the relevant law on a given topic and then to indicate those aspects of its content and its administration which may be thought to offend against the 'rule of law', for lack of a better phrase. (I do not accuse the authors of relying on this woolly catch-phrase; on the contrary they manifest a healthy scepticism as to its content and utility).

To take an example of this method, the chapter on Obscenity starts with a brief historical background. It goes on to consider current English and American law, with an account of the implications of the decisions in *R.* v. *Secker & Warburg* (the 'Philanderer' case), the *Lady Chatterley* case and *Shaw* v. *D.P.P.* in England, and the *Roth* case in America (the judgment in the *Ulysses* case might have been mentioned here). There is then an account of the law and practice of Commonwealth censorship, which points out its defects. Though there is a Literature Censorship Board and a Literature Censorship Appeal

Board (whose members all in fact possess some academic qualifications) which exist to report to the Minister, these Boards give no hearing, their proceedings are secret, and so are their recommendations. Further, the Minister refers to the Board only those works which in his opinion have literary merit; and whatever the Board's recommendation the Minister may override it. Examples of how this has worked are given. *The Trial of Lady Chatterley,* Inge and Sten Hegeler's *The ABZ of Love* and Ian Fleming's *The Spy Who Loved Me* were banned without reference to the Board. The Board was twice over-ruled when it recommended the release of *Lady Chatterley.* The authors add that 'We have without doubt a political censorship, which varies in its impact according to the influence brought to bear by various pressure groups in the community, and the imminence of elections'. It is a pity they do not similarly give instances of this allegation. They then go on to deal with State censorship and informal censorship (by local libraries) along similar lines, and end with suggestions for a future policy in this field.

The result is a most interesting, readable work which cannot but make the citizen aware of the structure of the society in which he lives, and thoughtful about the implications of many of its rules and conventions. The comment throughout is careful and well-balanced—sometimes irritatingly so; a touch of Russellian *saeva indignatio* would be refreshing.

Michael Scott

CASES AND MATERIALS ON CONSTITUTIONAL AND ADMINISTRATIVE LAW

By Geoffrey Wilson (Cambridge University Press, 1966). pp. xxv and 609. Price: $10.95.

It is still fashionable, I understand, to extol the 'case-method' of teaching law, at the expense of some other not very clearly defined method of teaching practised at some other unspecified time or in some other unspecified place by some other person or persons of an obstinate and reactionary turn of mind.

In fact, of course, there is nothing at all new about the system. In the form of the tutorial system it has been practised in Oxford and Cambridge since first the common law came to be taught at those universities. In the form of class instruction it was practised at Harvard under Langdell at the close of the nineteenth century.

A more modern variety of the method, however, consists in deprecating altogether the use of expository textbooks and instead flinging at the student a number of cases and expecting him to derive from them an ordered set of principles which other and better minds than his have striven for years to achieve and to embody in expository textbooks.

This abdication of the teaching function is not of course confined to the field of law. It took centuries of human endeavour to produce the twelve times table. Today the child is presented with a box of jolly-coloured bricks and encouraged to find out for himself. When ultimately he takes a job behind a shop counter he may be pardoned (as he counts desperately on his fingers) for being justifiably irritated when he learns that someone else did all the work before and embodied the results in an easily learnt paradigm called a twelve times table.

One advantage of the ultra-modern form of case teaching is that it enables the busy academic to compile a list of cases of greater or less relevance to his chosen topic, strike out the headnotes for copyright reasons and also lest the student should derive any assistance from them, have his typist copy the marked passages, send them to a publisher and claim a thumping great volume to his credit on the publications list.

The percipient reader will gather that this reviewer is not well disposed towards the average case book. His words, therefore, may carry a little more weight when he gives it as his opinion that the present volume is an instance of exactly how a casebook should be compiled.

In the first place, like that other excellent casebook, *Nathan's Equity through the Cases,* the teaching, co-ordinating function is not abdicated. The text of the cases and materials is carefully and logically ordered, and interspersed with explanatory material of a legal, historical and sociological character. This explanatory matter is carried into the footnotes, which often make most fascinating reading in themselves.

In the second place, the footnotes lead the student on to further sources. Here perhaps a little more might have been done—again I have in mind the exhaustive references to authorities in *Nathan*—but that is a counsel of perfection.

Thirdly—and here this casebook is so far as I know unique—the whole volume can be read as a consecutive whole, and indeed I cannot imagine a more interesting and readable introduction to the subject for the first year student.

Nor is it less interesting or readable for the trained constitutional lawyer. And that is because, fourthly, the volume contains not merely cases but a wealth of material from other sources—newspapers, parliamentary reports, reports of committees, statutory instruments, cinematograph rules for the City of Cambridge, and so forth. Needless to say a great deal of this material is not readily available, a great deal not available at all to the general student, and this alone would amply justify the book's publication.

So much for the advantages which would in any case suffice to commend the book to the public attention. Its originality lies in its approach to the subject. In the words of the preface, 'the sharp distinction made by Dicey between legal and conventional rules has

been abandoned. This distinction, which groups together all those rules which are not directly enforceable in the courts, whether or not they have anything else in common, has had an amazingly long life, but it is time it was discarded, at least as a guide to what it is important for a student of constitutional law to know and as a means of organizing the materials of the subject'. The editor goes on to describe the distinction as 'a dogmatic distinction which is the product of an old-fashioned jurisprudence and a narrow and outdated view of a lawyer's role in society'.

On the importance to the lawyer of this distinction, I join issue sharply. Surely in such cases as *Ndlwana* v. *Hofmeyr, Harris* v. *Donges* and the later decisions in South Africa, and *Trethowan's Case* and *Clayton v. Heffron* in Australia, it is of the utmost importance to distinguish between those rules which can and those which cannot be enforced by the courts. Those territories which like South Africa, the Commonwealth of Australia, and the Australian States, have constitutions which derive in part from imperial legislation, embodying many rules which are in the United Kingdom matters of convention, and in part from a reception or adoption of United Kingdom conventions, cannot afford to ignore a distinction which lies at the root of so many of their constitutional conflicts.

Nor, for that matter, am I in the least intimidated by the threat of being considered narrow and outdated in believing that the lawyer's role in society is confined to law. Examples from Cato through Bacon and Robespierre to our own Sir Robert Menzies incline me to remain hopelessly fuddy duddy where it comes to the lawyer's intervention in the political field.

Nevertheless the advantage to the constitutional lawyer of Mr. Wilson's approach is that it sets decisions which are too easily regarded as purely legal into their political context.

Take, for example, *Thomas* v. *Sawkins*. In this case, a leading textbook assures us, 'it was held that the police may attend a public meeting held in private premises if they reasonably suspect that a breach of the peace will occur or that seditious speeches will be made'. The decision was much criticized by lawyers at the time. The average student today is apt to note it as an authority for the proposition that the police may enter private premises if they reasonably suspect that a breach of the peace will occur; a startling proposition, but one not at all incompatible with the judgments of the Divisional Court. What, can the police burst in when my wife is threatening me with a rolling-pin? What, even if she stands five feet high in stiletto heels and I'm a coal-heaver?

Mr. Wilson prefaces the report with an extract from parliamentary debates concerning a meeting at Olympia (private premises!) of the British Union of Fascists. Alun Thomas, the plaintiff in *Thomas* v. *Sawkins*, was a Communist. He held his meeting two months later at the Caerau Library Hall in Glamorganshire.

There follows the case of *Duncan* v. *Jones*. Mrs Duncan, it will be recalled, set up her soap-box opposite the entrance to a training centre for the unemployed. What did she do this for? Did she intend to taunt them, rouse them to revolution, exhort them to prayer? Believe it or not, the Law Reports do not tell us. Mr. Wilson does. He even gives the names of the speakers (who included Mr. Bing) and points out that the meeting was held 'at about the time that the unemployed would be returning from lunch'. He might have added that despite the findings of the magistrate and the decision of the Divisional Court there was really practically no evidence of any likelihood of a disturbance. He does, however, set the stage.

Relevant sections of the Public Order Act, 1936, follow this, together with a number of decisions by stipendiary magistrates on 'What is a Uniform'. Then, with a leap across the years, we come to the doings of the infamous Mr. Jordan and the apparently immortal Bertrand Russell and the Committee of 100.

Before all this *Humphries* v. *Connor* and *O'Kelly* v. *Harvey* have been set against the background of Orange fanaticism (still a potent and violent element at the present day), Mr. Wise of *Wise* v. *Dunning* has been portrayed hung about with grotesque beads and brandishing a crucifix, and we have seen the pacific Mr. Lansbury exhorting the women of England to break the law on every occasion, and specifically to smash windows and damage golf-courses.

The whole account is not only vivid and enthralling; it encourages in the student a healthily critical approach towards decisions, ostensibly legal in character, backed often by an array of precedents, but reached, after all, in circumstances of religious and political turmoil which could not but affect the minds of those who made them.

It would be parochial to expect Mr Wilson, in a work on British Constitutional Law, to advert in any detail to Australian precedents. Nevertheless I commend to him the field of Australian State Constitutional Law as a fruitful source of precedents on such topics as the appointment of a premier, the dissolution of parliament, the dismissal of ministers, collective responsibility of ministers, relations between upper and lower houses and the sovereignty of parliament.

Michael Scott

AUSTRALIAN COMPANY LAW AND PRACTICE

By The Honourable Mr. Justice Wallace and J. McI. Young, Q.C. (The Law Book Co. Ltd., 1965). pp. lxxviii and 1345. Price: $25.50.

This book takes the form of extended annotations on what are loosely termed the Uniform Companies Acts. It also includes comparative tables of the previous State Acts and the UK and NZ Companies Acts, specimen financial statements, a table of offences and penalties, a list of documents which must be filed with the Registrar, an analysis of winding up procedure and a model set of Memorandum and Articles of Association.

One can say 'loosely termed' because the meticulous footnoting of this work shows the extraordinary number of irritating divergencies between the texts of the different Acts. Some of these presumably are based on the private grammatical hobby horses of the various State Parliamentary Draftmen's Departments. For example in New South Wales, Victoria, Queensland and South Australia the Act provides that a person who does certain things '*shall be* guilty' of an offence against the Act. In Tasmania, Western Australia and the Australian Capital Territory he '*is* guilty' of an offence. The Queensland Act says '*As* far as necessary'; all other Acts are satisfied with '*so* far as necessary', except for the A.C.T. Ordinance which compromises on 'so far as *is* necessary'.

Other differences however, might well raise points of substance. Thus in section 37(1), which prohibits the distribution of application forms for shares or debentures unless accompanied by a prospectus, all the Acts except the Queensland Act speak of a prospectus 'a copy of which has been registered by the Registrar'. In the Queensland Act, the prospectus must be one 'which complies with the requirements of the Act'. The effect of this seems to be that in Queensland it is not enough to rely on registration of the prospectus and therefore a stockbroker or banker who in good faith circulated a prospectus which, although registered, did not in fact comply with the Act would be liable to the heavy penalty imposed. One may speculate whether this result was due to a conscious policy decision or is simply an unfortunate by-product of semantic States' rights.

Turning to the book itself, it must be said at once that this is an outstanding work which should remain the Australian practitioner's standard textbook on Company Law for many years to come. The unfortunate tendency to string together abbreviated headnotes, apparent in many text-books which take the form of annotated statutes, has been avoided and in most instances there is a lucid discussion of matters of principle combined with copious references to decided cases and also (again a welcome feature) to other text books and periodic literature. The learned authors also provide helpful guidance on some of the provisions of the Acts which have not yet been the subject of litigation, *e.g.* section 20 which partially abolishes the doctrine of *ultra vires.*

The appendices, and in particular the model Memorandum and Articles of Association, should be of great practical use. A few very minor points of criticism. The documents required to be filed on incorporation include a list of persons who have consented to be directors (p. 1187, section 115 (4)). With a prospectus, verified copies of consents and material contracts must be filed (p. 1188, section 42 (2)(c)).

The printing and binding have been attractively done and appear to be up to the Law Book Co's. usual high standard.

P. C. Heerey

THE CHARGE IS MURDER

By V. G. Kelly (Rigby Limited, Adelaide, 1965). pp. 240. Price: $3.95.

It is becoming almost a cliche to say that society in general is obsessively interested in murder; obsessive when one considers the comparatively small number of murders against the statistics for other major criminal offences. Certainly, murder involves the consideration of a human death, a finality by which those who live are bound to be attracted. But whatever the reason for this interest, there is no denying that it is amply catered for; not a month passes without some new book on the topic appearing in our bookshops. We have sociological and psychological expositions on the causes of murder, criminological studies of the patterns and incidence of murder, penological advice on the treatment of murderers.

By far the largest class of books on murder is that which reports on actual cases, be they solved or unsolved: narrative treatment of recent trials (for example, the large number of proposed books dealing with the 'Murder on the Moors' case) and historical reportage of old ones. And within this class, there is considerable variety. Some deal with only one case, others with many; some endeavour to prove an incorrect decision, an injustice, or to justify an unpopular action, others are content to simply report without comment; some offer penetrating analysis of the circumstances, the evidence, the causes and results; others merely reiterate the court records and newspaper headlines; and some deal with cases that have legal interest, others with those that have 'human drama'.

Unfortunately, Mr. Kelly tries to give us a little of everything, and in so trying, fails to give us anything. *The Charge is Murder* contains accounts of seventeen homicides (not all resulted in convictions for murder) each of which gained great public attention at various times over the last fifty years. All the cases are Australian, probably the most famous Australian cases in terms of notoriety and newspaper interest. But they are certainly not the most famous in terms of legal interest; there are no points of law discussed, no indication where a case has added something to the law, decided a difficult point, or cleared up a complex issue. Mr. Kelly has concentrated almost entirely on the facts. In discussing the *Ross* case, he does put forward the theory that Ross was innocent, but it is not pressed with any great degree of analysis, or any other than facile comment.

The whole tone of this book is that of the newspaper headline. There are efforts to introduce comment on general aspects of these cases, but it never rises above triteness. The cover tells us that this is 'not a book for the queasy-minded', but this is, in fact, exactly what it is. Why say 'night of terror' when you mean rape? Why inform us that 'part of his body was missing' when a corpse has been castrated?

One does not wish to glorify in gory detail, but at the same time, a fact is a fact, and should be stated. If you are going to write about murder, you have to be prepared to accept that it is not a pretty business, and must be dealt with accordingly.

This book does contain facts, however unsatisfactorily presented. If you want to save yourself a day spent in the midst of newspaper archives, then it will serve some function. If you want anything more, then *The Charge is Murder* is not for you.

N. Reaburn