BOOK REVIEWS

R. C. VAN CAENEGEM, *The Birth of the English Common Law*,

Cambridge University Press, 1973. £2.90.

This short book is a revised version of four lectures delivered in the University of Cambridge in 1968: English courts from the Conqueror to Glanville; Royal writs and writ procedure; The jury in the royal courts; English law and the Continent. Professor Van Caenegem likens himself to the Flemish knights who joined William of Normandy in the conquest of England. 'Though this sort of military adventure is now out of fashion, the intellectual adventure of conquering some difficult problem of another country's history is equally thrilling.'

He is at his best exposing the unargued assumption, whether it is the romantic chauvinism of the Stentons and Mr. Richardson and Professor Sayles or such nonsense as Hegel's *Volksgeist*, the 'wonder-working spirit which stands at the beck and call of every historian', as Maitland called it. He shrewdly asks, 'if national character is the fountain of the Common Law, why did the latter enter its historical path in the least English phase of English history and why should a similar system have originated at the same time in Normandy?' He then quotes Hegel to destroy the contention that perhaps the climate of England accounts for our peculiar law, 'Where once the Greeks were, now live the Turks!'. Economic forces will not provide an answer either. England's economy was not so different from the rest of Europe's. Rather he resolves to, 'do the proper work of a historian by studying the precise and particular circumstances in which the Common Law arose'. He rightly places the Common Law as, 'the oldest national law in Europe'. By the thirteenth century, 'the Common Law and the Common Law courts were already firmly and unshakably established. They had taken root and received their essential techniques and outlook in the days of Henry II, before Roman law was influencing legal practice in lay courts anywhere in Europe.... This precocity, the premature character of the Common Law, is all-important. Let us not forget that the fundamental assize of novel disseisin is of 1166 at the latest'. Because England's administrative system was a bit more mature, a bit more self-sufficient, it did not need to adopt the Byzantine Roman law and procedure. 'Kings and Lords of French extraction built in England a better feudal system than at home: ... The Common Law ... was originally not English at all. It was a species of continental feudal law developed into an English

system by kings and justices of continental extraction. Within a few generations, this exotic innovation took on the protective colouring of a thoroughly native species.... This Common Law was the "law of a class" and not "of the whole kingdom and the men who dwell therein". The Common Law took no interest in the unfree peasants who were harshly excluded and even amerced if they tried to use its benefits. The men who created it were members of a small dominant aristocracy and it was accessible to them and the free minority of the natives (an upper layer amongst the English), and they created it in order to preserve harmony among the free, landowning top class. It is not surprising that the technical language of this "English" Common Law was French and remained so (though it became less and less understandable to French people) until the seventeenth and eighteenth centuries. After all, when the foundations were being laid, the Common Law was undistinguishable from the system of *brefs, requenoissants* and tenures that grew up in Normandy at the same time to serve the same ruler and the same class, and this legal system certainly could not be called English. It was founded in a period when "academically, as well as in the mores of aristocratic life, England was a colony of the intellectual Empire of France". This Anglo-Norman law only became English after the loss of Normandy, nurtured (while it withered away in Normandy) by a state that had turned from the Anglo-Norman into an English state, with English instead of French kings, justices of English descent on the benches and with an aristocracy that had in the end become so "English" that "the Conquest was viewed with distaste by men who were French in speech and habits, and who owed their whole family fortune to William I and his successors".'

These quotations do not illustrate enough the style and wit, the pleasing paradoxes and delicious footnotes, which make this book necessary reading for anyone interested in the history of the Common Law and a delight for all who enjoy elegant scholarship.

Derek Roebuck

K. C. T. SUTTON, *Consideration Reconsidered: Studies on the Doctrine of Consideration of the Law of Contract,* University of Queensland Press, 1974. $13.50.

The doctrine of consideration enjoys, in some circles, much the same reputation as an elderly aunt, whose well-intentioned but officious intrusions into the continuum of everyday life are sadly outmoded and seriously counter-productive. This aunt is not alone in her meddlings, moreover, for she finds a close and often sinister accomplice in the doctrine of privity. Not infrequently, an attempt to elude one of these harpies will momentarily succeed, only to fall victim to the other.

In this most scholarly and compendious work, Professor Sutton examines the character and ancestry of the doctrine of consideration and rehearses the arguments for and against euthanasia. His book is a monument of learning and research. It takes the reader through the history of the concept, the varying definitions and notions of 'legal benefit', and 'legal detriment', the darkest origins of promissory estoppel and its development before and after the decision in the *High Trees* case [1947] K.B. 130, the assimilation of this doctrine into American and Commonwealth jurisdictions and the proposals for reform. The analyses are penetrating and the observations are profound and well-reasoned; each facet of the subject is adduced and scrutinised with a compactness and agility rarely encountered in a work of such comparative breadth. But this is more than a masterpiece of conflation or a mere global miniature of the field. *Consideration Reconsidered* is a highly original treatise, not only in its arrangement and interpretation of an enormously wide field of authority, but in its conclusions and resultant premises.

Perhaps the author's talents are shown to best advantage in his meticulous and subtle genealogy of the concepts of promissory estoppel. His conclusion is, to adopt the author's own words, that, 'the principle of equity applied in the *High Trees House Case* did not originate with *Hughes* v. *Metropolitan Ry. Co.* (1877) 2 App. Cas. 439 but was in fact propounded and applied in much earlier cases... the principle that justice required that a representor should be kept to his undertaking in circumstances where it would be "manifestly inequitable" to allow him to go back on his word, was recognized and applied long before 1877.' This contention is supported by reference to other currents of authority more conventionally regarded as parallel to, rather than convergent upon, the decisions in *Hughes*, and the *High Trees* case. According to Professor Sutton, there was more support for the *High Trees* decision than perhaps even Lord Denning realised; the whole accretion of case-law around such cases as *Dillwyn* v. *Llewellyn* (1862) 4 De G. F. & J. 517, *Hammersley* v. *de Biel* (1845) 12 Cl. & F. 45, *Panoutsos* v. *Raymond Hadley Corpn.* [1917] 2 K.B. 473 and many other seemingly disparate authorities may be seen as contributories to a common principle of which *High Trees* was just a further manifestation. The idea is an interesting one which, while it may not go unchallenged, is boldly and convincingly generated.

One could have wished, perhaps, for a closer analysis of the problems raised by promises to perform (or actual performance of) a pre-existing legal obligation. This question has recently been before the Privy Council in the form of the validity of a stevedoring company's performance of their contract with a carrier for the unloading of a ship, as consideration for a promise on a consignor's part to be bound by a ceiling of damages.

The majority judgment, although based primarily on the notion of a unilateral contract made binding by the act of unloading, specifically states that an agreement to do such an act would amount to good consideration. The decision thus goes some considerable way towards curing the frailties of *Shadwell* v. *Shadwell* (1860) 2 C.B. (N.S.) 159, *Chichester* v. *Cobb* (1866) 14 L.T. 433 and *Scotson* v. *Pegg* (1861) 6 H. & N. 295. It may also provide an antidote to the technicalities envisaged recently by Reynolds as attendant upon the untempered application of a unilateral-contract theory in the consignor-stevedore situation; viz., that immunity may depend upon such minutiae as whether the damage to the goods occurred before or after the stevedores began to unload them. This decision was, of course, delivered after the book went to press, but the earlier judgments of Beatty J. and the New Zealand Court of Appeal were reported and could, perhaps, have been more prominently treated; particularly since the earlier authorities lacked a certain stamina and one case at least — *Scotson* v. *Pegg* — could be rationalised on other grounds. In addition, the author might have mentioned other case-law (for example the police reward cases) in his analysis of the policy arguments for and against this form of consideration. However, it must be acknowledged that this would have been to expand the preliminary part of the book perhaps more than the author deemed practicable.

Professor Sutton appears to accept that the old cases on gratuitous bailments are *sui generis* and have little effectively to say on the modern doctrine of consideration. This may be so, but it would have been interesting to hear his comments on the sort of elements which the courts in pre *Donoghue* v. *Stevenson* situations were prepared to regard as transforming a lender's obligation from that owed by a purely gratuitous transferor into some more onerous semi-contractual measure of responsibility for the defective nature of his goods. In his chapter on the nature of consideration, Professor Sutton might advantageously have contrasted those phenomena which are acknowledged as constituting good consideration with the factors which have occasionally been advanced as converting a gratuitous bailment into one importing a different standard of liability. For instances, in *Griffiths* v. *Arch Engineering, Ltd.* [1968] 3 All E.R. 217 Chapman J. said that in a situation involving the regular interchange of tools among workmates 'the mutual prosecution of the common work' would suffice to render any such transfer (even assuming it to amount to a bailment in the first place) non-gratuitous (c.f. *Palmer* v. *Toronto Medical Arts Building Ltd.* (1960) 21 D.L.R. (2d) 181). This may not be consideration but it is something not entirely dissimilar, and its relationship, if any, with the exchange of benefits under a binding contract might fruitfully be examined.

Closer to home, perhaps, one is slightly surprised to find no mention of the decision in *Bolton* v. *Madden* (1873) L.R.2 Q.B. 55 in relation to the examination of 'abandonment of a legal right' as good consideration; and *de la Bere* v. *Pearson Ltd.* [1908] 1 K.B. 280 confined to a footnote in the discussion of promissory estoppel in the United States. The latter is an important and difficult case which would reward analysis.

However, these are very minor matters(and probably misconceived) when seen in relation to the excellence of this book as a whole. Professor Sutton is a most accomplished impressario; he marshals his authorities with precision and delivers them with confidence and persuasion. The result is an enjoyable and stimulating book which can be read with pleasure and will form a most valuable addition to the literature on this subject.

N. E. Palmer

D. J. HARRIS, *Cases and Materials on International Law*, Sweet & Maxwell. $21.10 Casebound; $14.35 Limp.

The teaching of international law in England has been influenced by both the positivist philosophy and the national interests of Britain. Commonwealth universities, staffed by men trained in England, have seldom strayed away from the English pattern. Yet, in recent times, an absolute sacerdotal reverence to the English pattern has become untenable due to many factors. The new Commonwealth countries are refusing to subscribe to the doctrines of traditional international law. The older ones find that their interests have become different from Britain's and have begun to subscribe to newer claims. In the field of theory, in the English speaking world, the impact of American scholars like McDougal and Falk are becoming more fashionable. Besides, the scope of international law itself is becoming unmanageable so that it becomes difficult to determine what areas must be covered in an undergraduate course. The recent spate of undergraduate text-books differ so widely as regards areas covered.

Looking at Harris' casebook in this context, there is no doubt that it is an excellent book for use at an English university. There are materials which seek to take into account the more recent trends. There are passages from Morgenthau, Henkin and Friedmann, and Tunkin too finds a place. There is an excellent selection of American and English cases and notes explaining problems in the areas covered. Important Security Council and General Assembly resolutions and the texts of conventions are included. In very copious footnotes, references to the literature on the topics are given. It is certainly not an ordinary casebook.

But it is a pity that the book does not include material relevant to other Commonwealth countries. This, of course, was not the aim of the author from the point of view of one who has to teach the subject at an Australian law school, it is indeed a defect, particularly in view of the fact that an Australian case book (*Holder and Brennan*) already exists. *Harris* then can only be recommended as an excellent book of reference for Anglo-American material on the subject and of course on those areas like the law of treaties etc. in which national attitudes (at least in the Commonwealth) have not begun to diverge significantly.

M. Sornarajah

H. J. GLASBEEK, *Cases and Materials on Evidence,* Butterworths (Australia) Ltd. $21.50 Casebound, $17.50 Limp.

Australia is not well served by its books on the law of evidence. The Australian edition of *Cross* suffers from all the defects which beset Australian editions of English texts, is not easy to read and is not always accurate. Edwards's casebook, although containing a vast number of cases, presents a disorganised impression, could do with much more comment and is not particularly attractively produced. Accordingly, the appearance of Professor Glasbeek's new work, which I have been eagerly awaiting, is a notable event.

The first point to be made is that the author has adopted a much broader approach to the law of evidence than any of the other Anglo-Australian works, which is entirely to be welcomed. Professor Glasbeek sees evidence as a socially relevant topic which casts light on the operation of the trial process itself rather than as a series of sterile principles, relevant only in that they must be learned in order to prevent the lawyer making a fool of himself in court. In this context, there are some further points which might well have been made. When the distinction is made between direct and circumstantial evidence, no mention is made of the possibility of error made by eyewitnesses. Some mention of Arne Trankell's book *The Reliability of Evidence* might have been illuminating as well as a reference to *Wooldridge* v. *Sumner* [1963] 2 Q.B. 43. In that case, it was impossible to extract precisely what had happened when a photographer was injured at a show jumping event even with fifteen eyewitnesses experienced in matters involving horses and show jumping. Cases such as *Wooldridge* v. *Sumner* tend to show that the touching faith demonstrated, for example, by Lord Widgery C.J., in the *Bloody Sunday* inquiry, in the fact finding process may be slightly misplaced. I suspect that Professor Glasbeek agrees with me, but it would have been nice to have heard him on the matter.

As a collection of leading cases on the law of evidence *Glasbeek* is highly satisfactory. All the leading cases are there, backed up by some perceptive comments and questions. However, as in *Edwards*, estoppel (misspelt, incidentally, in the preface) and documentary evidence are largely omitted. Although one supposes that these are the topics which fall to be omitted if anything is to be excluded, estoppel, in particular, can cause some unpleasant practical (and academic) problems.

Despite the fact that Agatha Christie's lady detective, Miss Marple, has suddenly become both married and plural (see p. 18), I really enjoyed reading this book. It is lively, stimulating and comprehensive and should prove popular with the better student. Professor Glasbeek's departure to Canada marks a great gain for that country and a sad loss to Australia.

Frank Bates

A. S. FOGG, *Australian Town Planning Law*, University of Queensland Press, 1974. $10.00.

This admirably written, intelligent work is not, as the author willingly concedes, a text book in the ordinary meaning of the word, nor is it a legal treatise in the strict sense. What Mr. Fogg sets out to do, and what he does extremely well, is to analyse and describe the differing land use planning laws throughout Australia as a basis for suggesting improvements that such investigations reveal as necessary and desirable and with an underlying theme of uniformity for the whole of Australia.

I repeat that it is not a textbook which lawyers operating in the town planning field would use in the courts. There are only 150 cases mentioned in the index and they are used in the main to illustrate some point of the author in the area of the planner rather than the lawyer. But having said that, I should make it quite clear that for any lawyer or planner seeking the existing principles of town planning and the meaning and exposition of the statutes upon which they are based I know of no better book than this. For the politician searching for improvements in his State's planning legislation Mr. Fogg's 'research report' is ideal, and in that connection I do not think it too parochial to say it will be of great assistance to the writer and others in the Tasmanian Parliament in considering its new legislation shortly to be introduced to establish a State Planning Commission, a statutory corporation consisting of a State Planning Commissioner and two Associate State Planning Commissioners whose main function, in a three-tier planning system for the State, is to prepare a State Strategic Policy Plan.

As the book jacket properly claims, all major portions of planning law are traversed in the book. These include a comprehensive description of planning schemes of the various States and the discussion of subdivision in relation to town planning, of re-zoning, of existing uses, of planning appeal systems and of compulsory acquisitions of land in relation to planning.

This is an eminently well written book that should be on the shelves of specialist lawyers, planners, Parliamentarians and members of local government.

R. W. Baker

R. BROOKING, *Building Contracts*, Butterworths (Australia) Ltd., 1974. $20.25.

As Mr. Brooking points out in his preface, building cases are 'of infinite variety' ranging from the claim by a tradesman for work and labour brought in the magistrates' court to the contract for the construction of a multi-storey office building. Size, however, may not be reflected in the contract documents and an expensive project may be constructed without either party having signed a document. Alternatively, where a contract has been signed, a pile of documents may exist, out of which a number may be designated a 'contract document' with no clear precedence assigned to any of them. Little wonder that the author refers to 'the maligned "building cases", notorious for their unpalatable and indigestible detail, their duration and their cost'.

The work itself includes chapters on building agreements, tenders, contract documents, uncertainty, waiver and rectification, implied terms, as well as rise and fall clauses, sub-contracts, arbitration and nuisance in relation to building operations. In these earlier sections there are concepts that the commercial and contract lawyer as distinct from the practitioner will find familiar illustrated with profuse case law.

The chapter dealing with tenders at p. 12 (or 2.2 if you prefer the cross-head form of reference which Butterworths seem to be using as a standard layout in their recent works) makes reference to letters of intent with *William Lacey (Hounslow) Ltd.* v. *Davis* [1957] 1 WLR 932 as a case in point. Although the legal value of a letter of intent may arouse doubt in the minds of contractors, *William Lacey* does not illustrate this problem but turned on an implied promise to pay reasonable remuneration on the part of the defendant in the absence of a binding contract. A more opposite illustration, it is suggested, would have been *Trollope and Colls, Ltd., and Holland and Hannen and Cubitts Ltd.*, trading as *Nuclear Civil Constructors* v. *Atomic Power Constructions Ltd.* [1962] 3 All ER 1035. Here a letter of intent dated June 1959 on the part of the plaintiffs stated their intention to enter into a contract

agreement for civil engineering work with the defendants as soon as an outstanding matter was settled between the two parties and requesting the defendants to proceed with the necessary work. Contract conditions were finally agreed in April 1960, the plaintiffs acting as sub-contractors to the defendants for civil engineering work. The court decided that the contract came into existence in April 1960 and had retrospective effect to govern the relationship between the parties from the commencement of the work.

Apart from reference to Australian, New Zealand and English cases the book is largely concerned with the law and practice in Victoria and the appendices contain the *Arbitration Act* 1958 (Victoria) and *Building Cases Rules* (Rules of the Supreme Court of Victoria, Chapter 1, Order 76). As a point of local interest, there is an inclusion of the adjustment formula used in rise and fall clauses issued under the sanction of the Master Builders' Association of Tasmania (Document C4 'Rise and Fall Cost Adjustment of Contract', July 1971).

In conclusion, the work is certain to find a place on the shelves of practitioners who involve themselves with this area of the law as an easy reference, with a good index, an item not always apparent in some better known works.

John Livermore

BOOKS RECEIVED

Weerasooria, W. S., Allan, D. E., Hiscock, M. E. and Roebuck, D.: *Credit and Security in Ceylon (Sri Lanka)*, University of Queensland Press. $10.00.

DeGuzman Jr. S. T. J., Allan, D. E., Hiscock, M. E., and Roebuck, D.: *Credit and Security in The Philippines*, University of Queensland Press. $6.00.

Chitti Tsingsabadh, Allan, D. E., Hiscock, M. E. and Roebuck, D.: *Credit and Security in Thailand*, University of Queensland Press. $6.00.

Hutley, F. C.: *Australian Wills Precedents* (2nd Ed.), Butterworths & Co. $9.50.