BOOK REVIEWS.

The English Legal System. By G. R. Y. Radcliffe and G. Cross. (Butterworth & Co. Ltd.: London. 3rd Edition, 1954. viii and 440 pp. £1. 7. 6 stg.).

The new edition of this work is not substantially different from the previous editions, but incorporates some additional material which takes account of recent research and some important developments in the law. While not purporting to embody original work, it offers a remarkably comprehensive account of the history of English courts and legal institutions, and is a classic of its kind. Not its least virtue is its clarity of expression which makes it a pleasure to read. It is a book which can with confidence be prescribed for students as an introduction to legal history, or at least to some important aspects of it.

The emphasis is on the organisation of the courts of law, beginning with a short account of the Anglo-Saxon period. Each chapter, describing the activities of each court up to modern times, has very much the air of a carefully worded, almost self-contained essay on the subject in hand. The land law is dealt with, for the most part, only in relation to court proceedings, *i.e.*, the real actions, the action of ejectment and so on. Though a detailed treatment of the law of real property was outside the scope of the book, it is perhaps a matter for regret that the authors have not used their gift of lucidity to guide the student through the tortuous maze of the contingent remainder and related topics. An excursion into this field of legal history would be more than welcome, despite the capable exposition already available of Dr. Cheshire in his Modern Real Property.

There is a useful discussion on pp. 325 *et seq.* of the high costs of litigation and the possibility that this, by dissuading a poor person from taking legal action in his own interests, could amount to a denial of justice. It is well recognised, of course, that there are problems associated with the introduction of legal aid which need careful attention. As the authors point out (p. 331), the question is still to be considered "whether it is expedient that people should be enabled by a State subsidy to litigate doubtful claims without the fear of being financially inconvenienced if they fail. That a rich man should be able to indulge in speculative litigation while a poor man cannot do so may seem unjust. But to enable everyone to do so might be to apply a cure which was worse than the disease." Some interesting figures are provided of the number of litigants who received legal aid in 1952 in

the High Court of Justice, the great majority being parties to divorce actions.

There are as many different kinds of introductory law books as there are authors. *The English Legal System,* because of its more limited scope and fuller treatment of its special subjects of legal institutions, is at the same time rather more than a mere introduction. Though it brings its account up to the present, its purpose is chiefly historical, and this serves to make it, apart from any other consideration, suitably complementary to books like Professor Hood Phillips' *A First Book of English Law* and Jenks' *The Book of English Law* which, in their different ways, attempt to give a general view of modern English law with some historical background.

It is to be hoped that the misprint *per indicium parium* on p. 23 will be corrected to *per iudicium parium* in the next edition. Further, on p. 69, as well as in the index on p. 405, the famous case of *Ashford v. Thornton* is incorrectly referred to as *Ashton v. Thornton,* which repeats an error from the earlier editions.

These, however, are small points. The book remains an admirable and engaging piece of work.

L.J.D.

A First Book on Anglo-American Law. By CHARLES HERMAN KINNANE. (The Bobbs-Merrill Co., Inc.: Indianapolis. 2nd edition, 1952. xvi and 810 pp. Our copy from the publishers.).

Here we have an introductory law book of considerably greater scope than *The English Legal System.* In the first place it is fairly evenly divided between a survey of the long history of the law and an account of the modern institutions and legal system of the United States. In the second place it is a very much longer book, so much so indeed that reading it is a major assignment, and the student will find in it no quick introduction to his subject. There is no reason in any case why he should, for the law is a complex and solemn matter, and Professor Kinnane would have done the law an injustice and the student a disservice by any superficial observation. His purpose is to remind students that the law has an important history on the foundation of which the modern system is built, that it is concerned with problems of philosophy and social policy, that as students they should be prepared to go beyond a mere acquisition of knowledge for the professional practice of law and train themselves to understand it, to interpret it and to criticise it from an informed standpoint.

In the preface to the first edition the author indicated that though he hoped the work would prove valuable for the student beginning his studies, he was writing equally as much for the general reader. It would appear on the whole that the book is better suited for those undertaking legal studies, and in the preface to the second edition Professor Kinnane stresses in particular the value of a broad approach to the law by its students, hoping that his own work has been a contribution to this.

It would be impossible to deal at length in a review with all of the author's writing; it may be enough for a start to point out that its range is remarkably extensive, and apart from a general survey of English legal history, there are discussions of the definition and sources of law, the meaning of justice, the organisation of federal and State courts in the United States, the initiation and conduct of lawsuits, judgment, procedure, the operation of equity, and general problems of jurisprudence. Most of the second half of the book deals with the organisation and administration of United States law, and will not therefore be of immediate value to an Australian or English student being introduced to the law, but it can be helpful to those more advanced who may have the praiseworthy wish to learn something about other legal orders than their own.

There are parts, however, of Professor Kinnane's historical treatment which need to be read with some qualification. He is particularly critical, for example, of law under the Anglo-Saxons, and much of what he says cannot be allowed to pass unchallenged. He begins by describing the Angles and Saxons, on first settlement, as being little more than savages. A great deal, of course, must depend on what one means by this word. Life was undoubtedly hard and rough in northern Europe in the fifth century, but this should not blind one to the fact that the Germanic tribes, including those which invaded England, had already a developed culture of their own. The real trouble is that the lapse of centuries and the perishable nature of human records have left us with an inadequate knowledge of Anglo-Saxon times, and particularly of the early period. We should be careful therefore of drawing conclusions based on the absence of material. This is most important in the field of law, because it appears certain that the surviving documents represent merely a part of Anglo-Saxon law. Miss Dorothy Whitelock in *The Beginnings of English Society* (Pelican Books, 1952) points out that the invaders carried with them to England an already developed legal system and it was subsequently committed to writing, largely through ecclesiastical influence, in only perfunctory fashion. She writes, "What brought this about in the first place was the neces-

sity to add to existing law injunctions relating to the Church . . . After this other kings promulgated laws, when there was occasion either to add new statutes or modify existing ones, or to re-state old law that was being disregarded . . . A great mass of customary law was handed on orally, and no attempt seems to have been made to codify it until the days of the Norman legists, when much was forgotten or misunderstood" (pp. 134-5). This is the first answer then that one might make to Professor Kinnane's complaint (p. 214) that the earliest written laws we have, the laws of King Aethelbert of Kent, "are said to have been composed of only ninety short sentences. Imagine a modern state trying to get along with so little!" The fact is that the Anglo-Saxon needed, and had, a lot more. And in passing it might also be mentioned that the extent of Aethelbert's laws is not a matter of hearsay or conjecture—the "ninety short sentences" may most conveniently be read in F. L. Attenborough's excellent work, *The Laws of the Earliest English Kings*. The curious thing is that Professor Kinnane himself appears to recognise, though somewhat ambiguously, that there must have been a great deal outside the written law. Thus he says (p. 235), "The very scantiness of the Anglo-Saxon law is indicative of the background and wretched state of the legal institutions. We are told that as a result of 450 years of Anglo-Saxon legislation from the time of Aethelbert, there were only enough laws to fill a hundred pages. Although much of the law was doubtless customary and not reduced to writing, the two facts that much was unwritten, and that the written part was so small, tell us more than many paragraphs could."

Despite even this grudging admission, however, there are observations which call for comment. In the first place, we know that some written laws have failed to survive, for example the laws of the Mercian king Offa, in the second half of the 8th century, though on p. 217 Professor Kinnane gives the impression that they are available to us now. In the second place it is by no means certain what Professor Kinnane is hinting at in his last sentence. What is it that his "two facts" tell us?

In the end there is outright inconsistency. On p. 237 we find, "The pitiful collection of Anglo-Saxon dooms was the sum total of the Anglo-Saxon law, and that sorry collection of rules did not include the rules that ought to have been included." On p. 258 he says, speaking of the state of affairs in the early 12th century before the Normans and Plantagenets began to work on the native English law, "We have noticed that the written law was very limited. We have noticed also that it probably comprised only a small fraction of

the total body of law . . . " Finally, he describes (p. 247) the effect of the arrival of the Normans as "adding to the English zero, the Norman nothing"; if this comment is intended to refer to legislation only—and it is very far from certain that this is the case—it should be made unequivocally clear, and even then there would be ground for criticising his assessment of the English dooms as being of no consequence. Does he really believe that the civilisation of the Anglo-Saxons functioned without law?

Professor Kinnane then goes on (p. 226) to suggest that the backward state of the contemporary law is evidenced by the uncertainty which exists about the law of real property. The short and simple answer to this is that the doubt arises not from the non-existence of any established rules of law but the absence of records. No acceptable theory of the character of the law can be built up on Professor Kinnane's premise that lack of certain information means of necessity lack of refinement or lack of any system at all.

Again, his account of the Anglo-Saxon *bot* and *wergild* is more than inadequate. So far from being a mere crudity, the law in these matters was in fact a step forward, and was aimed at preventing the private feud by providing for a money settlement, *bot* in the case of an injury, *wergild* (to be paid to the relatives) in the case of a death. This indeed Professor Kinnane recognises. It is therefore curious to find him writing on p. 244, "In Anglo-Saxon days the community had no direct concern with who killed whom or with how many murders occurred. In those times the killer or his kindred paid the murder price to the kindred of the deceased. It was predominantly a purely private affair except for the possibility that the murder price might not be paid, in which happy event those not of kindred to either the killer or the killed could expect to enjoy without having to pay even an admission charge, the entertainment afforded by the feuding of the kindred involved. In a very real sense, a murder could be a joyous occasion for the community—although a really serious case of mayhem might be almost as good." This sort of thing is at once an over-simplification and an over-statement. It is in particular unfair and misleading as a general observation on the Anglo-Saxon period. Some of the crudeness attributed to it would appear to be of Professor Kinnane's own making. Money compensation may at first have been voluntary, but in the later law it is compulsory. And later too if compensation were not paid the offender would suffer the penalty of outlawry, which meant that he might be killed at sight. One cannot pretend that this is a civilised practice by modern standards, but at least

it shows that there was a public interest of a kind in law enforcement and that it is a distortion of the facts to treat such affairs as a piece of private fun which the Normans later unkindly stopped. There is furthermore sufficient evidence of this growing public interest in the development of the notion that some crimes might be a breach of the peace or an injury to the dignity and authority of the king or of some responsible person.

Anglo-Saxon law is obscure, elementary and undeveloped; it compares unfavourably with modern law. But it is unreasonable to dismiss it lightly, it is unreasonable in particular to say (p. 227) that "married women seem to have been little more than mere personal chattels in the early period, and in fact a sort of superior slave", without mentioning also that the law did have some concern for their welfare, that in later Anglo-Saxon law they had considerable legal capacity and rights and that in any case women had an influential and highly respected position in Germanic society in general from the earliest times. This latter point is clear enough in the literature. There was more to the Anglo-Saxons than Professor Kinnane would have us believe, and it is regrettable especially that he has had nothing to say on their culture, which deserves some respectful treatment. It is evidenced by the remarkable ornaments and jewellery which have survived (notably in the Sutton Hoo ship burial of *circa* 670), which illustrate their extraordinary craftsmanship. It is evidenced by the high literary achievement of a poem such as Beowulf, dating probably from the early 8th century, which did not appear *ex nihilo* but was the expression of generations of experiment. The 9th century, too, the age of King Alfred, would repay some study; it is a time of considerable learning and cultural activity, encouraged very largely by the great king himself. And lest this should be thought to be an unexpected and isolated event, the reader should be reminded that contacts with the Continent in the 8th century were extensive and highly important. Willibrod, Boniface and Alcuin, an intimate of Charlemagne, carried learning and Christianity from England into Europe. Civilising influences were not a one way traffiic *into* England, as Professor Kinnane appears to suggest on p. 213. The Anglo-Saxons had much to give themselves.

Finally, the system of payment of a sum in compensation for a specified injury is a feature of the law which should on examination cause little surprise. Modern workmen's compensation acts, such as the Commonwealth Employees' Compensation Act 1930-1954 in Australia, containg lists of injuries for which compensation is

provided (loss of one eye, loss of both hands and so on) make interesting reading for the legal historian and should be carefully studied by those modernists whose range of vision is limited strictly to the present. It is true that as against workmen's compensation legislation the early English laws were closely concerned with what we should now regard as criminal law and measures for enforcement of the peace, because of a lack of distinction between crime, tort and breach of contract. Nevertheless the detailed provisions of the Third Schedule of the Act referred to above may perhaps serve to remind critics that the Anglo-Saxons were not quite as barbarous as has been hastily supposed.

There is not much more comfort to be derived from the author's account of the Norman Conquest. He finds himself in difficulty about the law which could be said to be in force under William, a difficulty however which he largely creates for himself by proceeding on the basis of two premises, firstly that the Anglo-Saxon law was barbaric and insignificant, and secondly that no one knew for sure what it was anyway, largely, he says, because on the death of a king his law was often considered to die with him. This seems a rather dubious argument to bring forward particularly as William specifically provided that the law of Edward the Confessor was to be observed. Professor Kinnane however concludes that William's direction meant very little, which in his view was probably just as well. This view at least appears to be deducible from pp. 242-3 of the text. Once again Professor Kinnane might be asked whether he really believes that there was no law functioning at the end of the 11th century. But surely it is clear that though there may have been some difficulties about the content of the Anglo-Saxon law at the time there was at least a body of law which did operate, and the compilation known as *Leges Henrici Primi,* obscure and curious work though it might be, is a reasonably successful attempt to restate that law. The question of the continuity of English law, language, and customs is not an easy one, but it may well be that though at this distance our view is clouded more that is English survived than is generally believed.

One or two other points call for a mention. The first is the account of the origin of trial by jury, on pp. 273-5. This is exceedingly confused. No clear distinction is shown between the grand jury and the petty jury, indeed these expressions are not used. The function of the grand jury as a jury of presentment is referred to but not made clear, and no explanation is given as to how the petty jury developed at all.

The Grand Assize, an alternative mode of trial to trial by battle, and introduced by Henry II probably in 1179, is also dealt with unsatisfactorily. It was a method of obtaining a verdict available at the defendant's option in an action concerning title to land begun by writ of right. On pp. 276, 277, and 618 the Grand Assize is described as an action in itself, of unknown and ancient origin, but existing long before Henry II's time.

The separate and peculiar development of the Chancery law is justly enough referred to as a curiously tortuous way of developing legal rules and remedies though one may perhaps wince a little to find it characterised (p. 300) as a fine example of British "muddling through." But Professor Kinnane's explanation as to why legislation was not for preference resorted to in order to effect changes in the law fails to adduce one very important reason. The parliamentarians were very largely, like the judges in the common law courts, themselves common lawyers; they were not therefore likely to be easily stirred into rectifying the judge-made law, even assuming that there was any full understanding of such a function abiding in Parliament.

The explanation of a judgment *in rem* (pp. 582-5) and its distinction from a judgment *in personam* (p. 587) is also inadequate, if not misleading. A judgment *in rem* is defined there simply as one which operates "with respect to, or concerning things." No attempt is made to explain that a judgment *in personam* is one which determines the rights of parties *inter se* with respect to the subject matter, whereas a judgment *in rem* is a decision effective *adversus omnes,* that is, against the whole world.

Again, the account of the writ of *habeas corpus* ignores its historical origin as a merely procedural writ used to oblige defendants or jurymen to appear before a court, or later by the common law courts to assert their jurisdiction against rival courts like the Chancery. Its use as an important protection of civil liberty is rightly stressed by Professor Kinnane, though when he describes it as an ancient writ, he does not make it clear that this is a later development.

A few other errors should be mentioned. The Latin word for citizen (singular number) is *civis,* not *cives* (p. 521). Burma is an independent country outside the British Commonwealth. Professor Kinnane states (p. 462, n. 20) that this "appears" to be so; a simple reference to the Burma Independence Act, 1947 (U.K.) or any of several appropriate text books would have set his doubts at rest. And in the case of *Ashford v. Thornton* in 1818 (referred to on p. 240 but not by name), the challenge to trial by battle was made by the ac-

cused (the appellee), and not by the person bringing the appeal of murder, as the author states.

Finally, it is difficult to go as far as he does in calling the common law (p. 689) a horrible system; its weaknesses, particularly in its past history, must be recognised, but to sum it up thus does it some disservice in interpretation and misjudges its real worth.

On the whole this book must be treated with a certain amount of reserve. For the British lawyer it may be more valuable for its account of the United States law, even though there is now and again in its praise some faint flavour of Blackstone *redivivus*.

L.J.D.

Legal Controls of International Conflict. By JULIUS STONE. (Maitland Publications Pty. Ltd.: Sydney. 1954. lv and 851 pp. £A5. 5. 0. Our copy from the publishers.).

A new work on international law at a time when relations between states are as hag-ridden as they now are is bound to be received with interest; it will in the event be welcomed when it is revealed as a very comprehensive treatise which goes to the heart of important modern problems in international law. It is clear from the introduction that the book aims to concern itself specifically with the fundamental philosophies of the subject and the difficulties of applying legal rules in the international sphere, in addition to discussing critically the achievements of a system of law built up painfully and over a long period in a context of tension and conflicting interest. Thus, in speaking of the purpose of a modern investigation of international law, Professor Stone says (p. 48), "Such work should still seek to afford an accurate exposition of traditional rules, while testing constantly the assumption that all of them enjoy an equal degree of legal and social force, or of utility in the present world. It is in this spirit that the present volume is designed, both as an exposition and as a critique of the modern law of disputes, war and neutrality."

An interesting feature is Professor Stone's method of exposition. Being aware of what he calls "the chasm between doctrine and practice", he has expounded the *system* of international law in the main body of the work, and dealt with some of the problems and controversial—not to say changing—aspects of the subject in a number of Discourses placed at the end of the appropriate chapter. There is a lot to recommend this method, and it has been successfully adopted. Public international law is a difficult subject, and for the reason that

there is much in its nature which is unstable in the strictly legal sense. The dynamic elements, as they are called, can be handled separately in these supplementary essays, free from embarrassing entanglement with the traditional learning. The Discourses may also serve the valuable purpose of drawing the attention of the international lawyer in a marked and direct fashion to the fact that there *are* such significant conflicts, discords and disruptive tendencies. This is illustrated particularly well by the large number of Discourses attached to the section of the book on the "General Legal Nature of War and Neutrality" (pp. 297 *et seq.*). On the other hand it is possible that the Discourses could also have been incorporated in the main body of the text quite appropriately, and this course indeed is recommended by Professor G. Sawer in his review in 27 Australian Law Journal, pp. 735 *et seq.*

It would be a difficult task to comment on the whole of Professor Stone's work. He is concerned especially with problems of war and international disputes; but the monumental size of his book means that full justice could not be done to it in any review of reasonable size. Perhaps one may for a beginning make observations on one or two matters which spring to one's notice. In the first place, it is helpful to find the Permanent Court of International Justice and the International Court of Justice dealt with, in effect, simultaneously—as being, that is, two manifestations of the same institution. In this way it is possible to understand and appreciate more properly the close relationship historically and judicially between the two courts.

Again, very full consideration is given to the operation of the Great Power veto in the United Nations Security Council, and in particular to the effect of the abstention or absence of a Permanent Member with special reference to the Korean war. The problem is examined from all points of view and conclusions are fairly presented. A few lingering doubts might, however, still be entertained on the matter of the paralysis of the Security Council's activities through the deliberate absence of a Permanent Member. It may be true that such a paralysis was intended and its possibility a necessary condition for the acceptance of the Charter. Professor Stone then says, "The mere fact that the non-concurrence is manifest in an obstructionist absenteeism from the Council rather than an obstructionist negative vote seems immaterial" (p. 212), and adds in a footnote that even if absence did not imply a veto, "any Great Power whose interests might be seriously affected by an impending Security Council decision would, for the future, simply attend and cast a veto." It is, however, arguable that this might in the long run be more desirable than the unedifying

spectacle of a great nation refusing to "play speaks" and turning an undignified if schoolboyish back on all proceedings. If a member wishing to prevent a particular course of action is obliged at least to appear and vote—and even hear at first hand the opposing arguments—it is just possible that some benefit may accrue to international organisation, without any vital point of principle being compromised.

On the question of superior orders and the Nuremberg Trials, Professor Stone again treats the subject exhaustively. One might only add that Dr. Schwarzenberger takes the view that the principle that superior orders cannot be brought forward as a defence was established in the Breisach case in the 15th century, and therefore has a long history behind it. This would strengthen the view, in the matter of substantial policy and justice, that there was ample notice to the whole world of the possible application of this principle.

In his discussion of air warfare, Professor Stone examines at length the problem of legitimate targets and the bombing of civilian populations, and discusses the possibility of affording protection from attack to "true" civilians as distinct from civilians engaged in actual war production, who might be regarded as "quasi-combatants." One cannot press too strongly the belief that any measures which may successfully limit the extent of human suffering in war are to be welcomed; yet the practical difficulties inherent in establishing an immunity for true civilians are obvious. But what is worse is the dreadful implication in the modern concept of total war which might be considered as well. If the justification for regarding the work force of the enemy, the civilians who produce the supplies for war, as a lawful military objective is the fact of their direct contribution to the prosecution of the war and to the capacity of the soldier to carry on hostilities, may it not also be argued, whether we like it or not, that the true civilian makes his own not inconsiderable contribution too? It is he who is a centre of hostile will in the community, who provides the soldier with comforts and encouragement, and through taxation provides the finance for the war to continue. These are themselves highly significant matters in time of war, and once they are accepted as such, the whole population stands condemned. However detestable such a prospect might be, the treatment of the whole population as a legitimate military target may well be the ultimate logical consequence of modern warfare, and the fact that under a certain amount of bombardment, as in London in 1940, the civilian inhabitants may actuallly have their will to resist increased, may merely serve to encourage the enemy to make a better job of his attacks, which in fact he may now do with the aid of the hydrogen bomb. One can only

express the hope that in the face of such an appalling expectation of the engulfing of civilians it may at last be possible for nations to make genuine efforts towards peaceful existence.

Professor Stone has made a point of stressing the significance of economic considerations in the conduct of war, and it is an important departure in a treatise on international law for this to be done. It is undoubtedly more than justified in view of the increasing appreciation of and deference to the role of modern economic warfare. The subject is dealt with in Part III.

In view of the size of this work, it may perhaps be uncharitable to ask for more, but there are one or two matters which one would like to see treated further. The Nuremberg Trials for example are covered adequately, but the Tokyo Trials—though there is, of course, much similarity—are dealt with only in passing in a footnote. More of Professor Stone's observation on this subject would have been welcomed.

One small point on p. 640, footnote 26, needs correction. Reference is there made to "the well-known doctrine of 'non-recognition' announced by Secretary of State Kellogg in relation to Japanese aggression in Manchuria in 1931." The Secretary of State was at the time Mr. Stimson, and the reference is to the "Stimson doctrine." The intention was thereby indicated not to recognise any situation brought about by means contrary to the covenants of the Kellogg Pact, 1928.

The author's claim that his book may be used by law students at all stages, by government advisers, and by diplomatic missions is justified. There is a full treatment of the traditional working of international law, together with a wealth of documentation and reference which must be as nearly complete as it is possible to be. Throughout one is impressed by the unremitting penetration of Professor Stone in getting to the very heart of the difficulties of the subject. It is one which is enveloped in vexed problems and troublesome controversies; they have been seized on and dissected with patience and care. In particular he has helped to show that the problems are far more involved and go far deeper than the bystander is aware. This point he brings out particularly in his examination of war. Thus (p. xxv), "the actual complexities of the nature of war are far greater than the merely legal ones . . . The supposed single problem of war must conceal a veritable legion of problems, varying from generation to generation, and even from year to year." Professor Stone's method of analysis is a root and branch one; problems are examined from every conceivable point of view; arguments for and against are listed exhaustively. There can be few text-books in which the investigation of

the subject is so extensive and so thorough, and one cannot but be grateful that the aspects of international law with which the work is concerned have been so faithfully handled.

On the technical side, the production of the book is attractive, and its print is pleasing to read. These, for many reasons, are no small matters.

L.J.D.

Effective Legal Writing. By F. E. Cooper. (The Bobbs-Merrill Co. Inc.: Indianapolis. 1953. x and 313 pp. Our copy from the publishers).

The importance of a clear and attractive use of language is now being increasingly recognised by persons trained in many fields, from engineers to parliamentarians, largely, one imagines, because of a serious decline seen to have developed in the study and practice of this art by the general run of humanity. Correct and adequate expression is above all necessary for the lawyer who can only convince by his arguments if he has managed to communicate his ideas; and they will be the more readily intelligible if they are written in English which is interesting to read.

Of recent years there have been a number of books and articles on the subject of law and language, and *Effective Legal Writing* is one of the newest. It is a useful and promising addition to the literature in this field and deserves careful attention. In its nature it is a book for use by classes of students, and indeed as the author says in the Prefatory Note was developed out of a law school course aimed at improving "skill in the rhetorical techniques of effective presentation." He proceeds by way of a very impressive collection of examples and illustrations, which, apart from giving the subject a considerable vitality, are also of obvious value in the teaching of the art of using words.

Such a course of instruction in a Faculty of Law would seem to be more than justified, particularly if it be used in conjunction with or as an introduction to the study of legal drafting. The difficulty, of course, is finding room for this subject in a curriculum which is already overcrowded. Indeed Professor C. A. Peairs (in 34 Boston University Law Review, 404) would deny the admission of any course on legal writing on the grounds that it inevitably means the extrusion of some other more necessary subject. One can sympathise with his view that the writing of good English is something that should be taught before

students take up the study of law. The awful truth, however, is that it is by no means certain that this is in fact satisfactorily attended to, and in Australia the lowered standards of matriculation have made an already uncertain situation difficult. In the University of Western Australia all first-year law students are required to take the course in English prescribed for first-year Arts students, and while this does not entirely answer the problem, attention is at least directed to the importance which the use of language has.

While Professor Cooper's texts are generally sprinkled with pertinent and stimulating questions intended to encourage the student to think about matters for himself, the book itself does not enter deeply into an examination of the theory of writing. Only the first eighteen pages touch on this, by way of general discussion, and they are not on the whole impressive. The use of words is at best a tricky business, and one cannot always agree with Professor Cooper's strictures. One cannot in the first place accept his objection to numerous expressions which he calls "weakeners." Words like "nearly", "practically", and "substantially" which he condemns are in fact very necessary; he says (p. 15) that they "label the statement as being at least a little bit false." They in fact do nothing of the sort. If there is a fault it lies not in the words themselves but in the writer's straightout misstatement. If one says, "all Australians are tea-drinkers", the statement is (most probably) false; if on the other hand one says, "nearly all Australians are tea-drinkers", the statement is perfectly correct. Professor Cooper should be attacking not the words but rather the inaccuracies of thinking processes which the words reveal. Similarly, phrases like "I am sure that" and "it is clear" are not necessarily signs of uncertainty or guilt. They may in point of fact be very useful stylistic devices to provide a variety of feeling or a rhythm of movement. Again, it is undoubtedly true that much legal writing is heavily repetitive and formal. The word "said" in particular may be much overused, as is suggested in the quotation cited with approval on p. 16. But here too it might have been fairer to point out that it can after all serve a purpose if properly handled. "Literary men", the quotation says, "other than lawyers, do not use it in their writings." Of course they don't, for the simple reason that the lawyer's purpose is a different and special one. His writings are meant to bear a legal import; he wants to convey his meaning without possibility of mistake or subsequent misinterpretation. The word "said" judiciously used, and many similar ones, will help him to achieve that purpose.

The truth is that some of Professor Cooper's criticisms are too wide, and need to be qualified. He objects, on p. 173, to the phrase

"the parties hereto", by asking, "are not the parties always hereto?" The short answer is that they may not be. The document in hand may very often refer to and cite the terms of another document, having different parties. It might be exceedingly ambiguous and misleading therefore to use throughout only the term "the parties." And again on p. 215 the recommendations of the National Conference of Commissioners on Uniform State Laws are referred to which pronounce that "the term 'provided' should be avoided." No reason why is given, yet it could well be argued that there may be occasions when it could be employed usefully and to effect.

In short many of the observations in this book are too categorical. It is impossible to control language by *ex cathedra* proscriptions and banishments. It is as well to remember too that in looking for absurdities of language it is possible to over-state one's case. Professor Cooper refers (p. 3) to a Bill introduced into Congress which provided that the present tense includes the past and future tenses, the masculine gender includes the feminine and neuter, and the singular number includes the plural. He then approvingly quotes a previous writer's comment on this, "Only to a lawyer might 'The men are beating him' mean, among other things, 'She is going to beat it'." This, of course, is a case of being too clever by half. The Bill actually provided that the provisions set out above were to apply *throughout this Act.* Within the context of the Bill, when it became an Act, no such absurdity as is suggested need be implied.

Some surprising observations are made when discussing the question of writing an opinion for a client in a case where there is doubt on what the Court's decision may be. One can only draw the conclusion from the manner of Professor Cooper's writing that he considers a certain amount of "hedging", to be taken as meaning at least some kind of evasion, as being justified. Insofar as he explains how this may be done on pp. 45-47, and recommends it again on p. 53, he may feel that he has discharged his immediate duty of teaching lawyers how to write. The question of professional ethics involved is not however raised, and his implication that a problem might sometimes be dodged and an answer avoided by skilful phrasing is not likely to commend itself to lawyers practising at any rate in British jurisdictions.

A final word on Professor Cooper's observations about prolixity of language. On p. 35 he says, "Lincoln needed fewer than 300 words for his Gettysburg address; to compose the Ten Commandments required some 290 words; but it is said that a Federal agency found it necessary to employ 29,711 words to set forth the regulations governing the prices that may be charged for fresh fruits." This sort of ap-

proach is deceptive and misleading. One can share Professor Cooper's dislike of long-winded verbiage and diffuseness of languge. At the same time it should be remembered that the length of a piece of writing will usually be determined by its purpose. The Gettysburg address and the Ten Commandments were concerned with laying down in general terms broad statements of principle; they are therefore short. The Federal price regulations were aimed at making detailed provisions, with an eye to their precise interpretation and enforcement in a court of law, for governing the minutest aspects of day to day transactions. To do this accurately and comprehensively in less than 29,711 words was doubtless impossible. When the situation is analysed in this way, Professor Cooper's objections fall to the ground.

The book is written in an attractive and easy style, though in one or two rare cases some jargonistic language appears. It is true that it must never be forgotten that language is always changing and what is repulsive to-day may be commonplace tomorrow. To an Australian ear (and eye) the verb "obligate" on p. 235 is still a novelty which adds nothing in meaning to the older verb "oblige." On a number of occasions Professor Cooper uses the expression "to breach a contract"; this expression is slowly creeping into Australian journalese, but is still frowned upon by our Courts which conservatively prefer to "break a contract" and to reserve the verb "to breach" for use in such expressions as "to breach a wall", and so on. Similarly, the Australian lawyer who spoke of "probating a will" (p. 189) instead of "proving" it would invite sarcastic reproof from the Bench. It only goes to show that we in Australia share the English reluctance to let new expressions creep into the sacred precincts of the law where there are older forms whose meaning is perfectly clear. Many of the American terms are much more vivid, but an Australian lawyer using Professor Cooper's admirable work would be wise to steer clear of them.

The case of *Peck v. Dow* comes up for discussion several times. In three instances, however, the name *Dow* is erroneously printed instead of *Peck* (p. 53, line 10; p. 70, line 30; p. 235, line 15), and should be corrected in future editions to avoid confusion.

L.J.D.

Theft, Law and Society. By JEROME HALL, Professor of Law, Indiana University. (The Bobbs-Merrill Company, Inc.: Indianapolis. 2nd edition, 1952. xix and 367 and (indexes) 25 pages. $10.00).

This is the second edition of a study which first appeared in 1935 and then attracted much praise. For this edition, the author has care-

fully gone over the whole work and brought it up to date. He has transferred what was formerly an Appendix to the beginning of the book, removed one of the original chapters and replaced it by another on a different aspect of theft, and added an Introduction dealing with the problems of method involved in the study.

Professor Hall is already known to many students of the criminal law for his very original study entitled *General Principles of Criminal Law*. In this work he devotes himself entirely to the law of theft, which he investigates not only from the standpoint of the substantive law, but also from that of its administration and practical effectiveness. He begins by a detailed study of *The Carrier's Case* (1473), Y.B. 13 Edw. IV f. 9, pl. 5, in which he endeavours to account for the decision by relating it to the conditions (political, economic, etc.) of the day (the word "endeavours" is used, not to disparage the discussion, but because, as the author readily admits, the historical materials are somewhat scanty). He then proceeds to an exhaustive account of the development of the law of larceny in the eighteenth century, again relating this to the conditions of that period. Next he discusses the problems which arise in deciding what can be the subject-matter of the law of larceny, and he concludes the first part of the book by discussing the part played by the use of technicality and discretion in the enforcement of criminal law. The second part of the book is devoted to a detailed discussion of the problems of dealing effectively with receiving stolen property, automobile theft, and embezzlement. The chapter on embezzlement replaces one on petty larceny which appeared in the first edition. In the discussion of these crimes, the author concentrates attention not so much on the relevant statutory provisions as on the difficulties which arise in enforcing the law, not only from the terms in which it is cast, but also from public attitudes to enforcement, such as the reluctance of an employer who has received full restitution from an embezzling servant to prosecute.

Despite an unpleasing style of writing, including an excessive use of jargon which makes the book in parts difficult to read, this work is a major contribution to the understanding of the criminal law. It has often been said that criminal law can only be properly studied by observing it in action in the courts, and that he who relies on a study of the reported cases will be misled. But it is one thing to make a statement of this kind, and quite another to demonstrate it. The author, however, demonstrates the point beyond any question. Not only does he show that large parts of the law of theft are completely ineffective in practice, he also succeeds in showing why this is so, and ends by proposing remedial measures.

This book is of the greatest interest not only to lawyers, but also to legislators, and, indeed, to all citizens who are interested in making the criminal law an effective means of social control. It furnishes an impressive warning to those well-intentioned but insufficiently informed people who abound in modern society and who believe that the best way to remove a social evil is to legislate against it. Here indeed is proof that what is needed to improve our criminal law—and it can hardly be denied that it is in need of improvement—is not so much an amendment of the substantive law as a reconsideration of the whole problem of enforcement.

The one regret which this reviewer had on laying down the book is that there is no similar illumination of many other important areas of criminal law. It is to be hoped that if the author does not propose to extend his researches further, others, emboldened by his example, will do so at no too distant date.

P.B.

The Law of Homicide. By ROY MORELAND, Professor of Law, University of Kentucky. (The Bobbs-Merrill Company, Inc.: Indianapolis. 1952. viii and 314 and (indexes) 23 pages. $7.50).

In this book, Professor Moreland has made an exhaustive study of the law of homicide as it exists today in the United States of America and England. He begins by tracing the history of the subject in considerable detail, and then carefully considers the various types of homicide at common law. He next discusses the various statutory provisions on the matter in the American States, and then deals with the various possible defences to a charge of homicide. Finally, in the light of what has emerged from this study, he offers a suggested homicide statute of his own for consideration.

The author's treatment of the subject is on orthodox lines, and the book may be warmly recommended to anyone who wishes to study the law of homicide from a lawyer's point of view. Gratifyingly, the author has included many references to the various English cases—that is, not only to those which form part of the common heritage of English and American law, but to the modern decisions as well. For example, he devotes a good deal of space to *Woolmington v. Director of Public Prosecutions,* [1935] A.C. 462, a decision of which he whole-heartedly approves. Indeed, it may be asked whether he does not treat this case as going farther than it actually does. For again and again he insists, in reliance upon it, that the jury must have the final word in deciding

what type of homicide, if any, has been committed by the accused. This would seem to go a long way beyond what the English courts would countenance and almost to support the proposition that if the jury do not approve of the law as it is given to them by the trial judge, then they can defy it and bring in a verdict which is not supported by the evidence. It is, of course, true that the judge cannot refuse to accept from the jury a verdict which in his view is unsupported by the evidence; but he is entitled to instruct them that in his opinion they ought not to return a certain verdict, in view of the state of the evidence (see, for example, *Beavan v. The Queen,* (1954) 28 Aust. L.J. 302).

It is possible, too, to quarrel with Professor Moreland's approach to the social issues involved in drawing the boundaries between the various types of homicide. Frequently, after discussing a line of cases, he appears to approve of the result on the ground that it accords with the sense of moral values held by the modern community. This overlooks the role of the criminal law as a moral educator. While it is true that if the law is too harsh, it will defeat its own ends and produce a crop of perjured verdicts, yet it is surely proper for the law to lay down and enforce a standard of morality which is slightly higher than that generally approved by the community at large.

The point may be illustrated by the author's discussion of adultery of a spouse as furnishing provocation which will "reduce" murder to manslaughter. While noting that the strict common law requires that the offending spouse should actually be caught in the act if provocation is to be successfully pleaded, he approves a number of United States decisions which allow the defence to be raised where there are circumstances which lead to the inference that adultery has been committed, though not actually seen by the accused. Yet one may wonder whether the rule of the common law is not itself an anomaly which might well be removed from our law. After all, modern law, unlike the Mosaic law, does not treat adultery as a crime punishable by death. In this, as in other matters, it would seem that a better approach is indicated by the observation of Viscount Simon (in *Holmes v. Director of Public Prosecutions,* [1946] A.C. 588, at 601) that "as society advances, it ought to call for a higher measure of self-control in all cases."

However, it is perhaps unfair to chide the author for failing to do something which he did not set out to do. His aim was to give an account of the law of homicide as it stands today, and this he has done in a manner beyond reproach. The result is a book which, we may say with confidence, will be recognised as a definitive study of

this branch of the law. Bearing in mind the magnitude of the task and the many anomalies which a long course of historical development has produced, no higher praise could be given.

P.B.

The Contracts of Public Authorities: A Comparative Study. By J. D. B. MITCHELL, LL.B., Ph.D. (London), Reader in English Law in the University of London. (The London School of Economics and Political Science (University of London), G. Bell and Sons, Ltd.: London. 1954. xxxii and 250 and (index) 6 pages. £1. 5. 0 stg.).

In this book Dr. Mitchell, who has recently been elevated to the Chair of Constitutional Law at Edinburgh University, has made a detailed study of the law governing the contracts of citizens with governmental authorities in England, the United States, and France. This branch of administrative law is becoming more and more important as time goes on, and for this reason alone, apart from the scholarship displayed by the author, the work is to be welcomed.

So far as English law is concerned, little thought has been given in the past to the peculiar problems which arise when a citizen enters into a contract, especially a long-term one, with a governmental body. For a fairly long period there was a strong tendency to treat such contracts as in no way different from those between private citizens. This, however, is an attitude which could not be maintained without the risk of involving the whole community in unreasonable loss. From time to time, accordingly, the courts have taken a totally different view, and held, as in the celebrated case of *Rederiaktiebolaget Amphitritre v. The King*, [1921] 3 K.B. 500, that the Crown cannot by contract hamper its future executive action in matters concerning the welfare of the State. This amounted to saying that the alleged contract had never been legally effective, with the result that the citizen-contractor had no rights whatsoever under it against the Crown.

Neither of these extreme attitudes is a satisfactory one. An acceptable compromise would be that suggested by Dr. Mitchell, namely, that the governmental authority should be able to enter into contracts but should not be as rigidly bound by them as would a private citizen; and that, should the government for reasons of State terminate or vary the agreement, then the other party should be able to obtain compensation, though not necessarily as large an amount as would be

awarded in an action by him for breach of a private contract on similar lines.

Dr. Mitchell makes a detailed review of the law relating to governmental contracts in the United States and in France. In the United States, there are a number of complications arising from constitutional attempts to ensure the sanctity of contracts, but the author shows that these have had to give way to the practical necessities of effective government. In France, as is well known, the peculiar position of the administration is recognised by law, and the Conseil d'Etat has over the years built up a body of doctrines which safeguard both the administration and the contractor. Indeed, some of these doctrines seem to go somewhat too far in "coddling" the private contractor.

In the light of these developments in other jurisdictions, the author feels that his compromise viewpoint may yet find acceptance in the English courts. The precedents dealing with these contracts are comparatively few, and Dr. Mitchell finds in them observations which would permit a development in the direction which has been outlined above. He therefore believes that the change may come about through the decisions of the courts, and that statutory intervention is inappropriate. While one may agree with him that legislation is probably impracticable from a political point of view, yet one may wonder whether the courts are really likely to make such far-reaching changes in the doctrines of the common law. It would rather seem that at present the prevailing atmosphere is one of rigid adherence to past precedent, and that this, coupled with the traditional dislike of any appearance of giving the State a privileged position, will work against any great change in the rules, at any rate for many years to come.

However, though the reader may not necessarily share the author's optimism regarding the future, he will nevertheless be grateful to him for the scholarship he has displayed and for producing, in a compact volume, a most interesting study of a very important branch of administrative law.

P.B.

Income Tax Law and Practice (Commonwealth). By N. E. CHALLONER, LL.B., A.C.A. (Aust.), Chartered Accountant, and C. M. COLLINS, B.A., LL.B., Barrister-at-law. (Law Book Co. of Australasia Pty. Ltd.: Sydney, Melbourne, and Brisbane. 1953. xliii and 991 and (index) 100 pages. £A7. 7. 0).

First Cumulative Supplement. By the same authors. (Law Book Co. of Australasia Pty. Ltd. 1954. xii and 174 and (index) 5 pages. 17s. 6d.).

Surely there is no subject which affects commercial transactions more than taxation; and of the many branches of taxation, income tax is the most important to the greatest number of people. No solicitor can afford to fail to keep up to date with the comprehensive and complex provisions of the statutes imposing the tax and the ever growing volume of decisions and phases of practice arising out of the statutes. Still less can he neglect to possess in book form of reasonable dimensions the means of readily acquiring or refreshing his knowledge.

A new publication of this nature is a welcome addition to the libraries of lawyers, accountants, and others whose work involves the planning and formulation of commercial and property transactions. Challoner and Collins' book is presented in a familiar form, namely, the statement of the full text of each section of the Income Tax and Social Services Contribution Assessment Act 1936-1953 and three associated Acts, with annotations under each section and a system of numbered paragraphs. The authors state in the preface that the volume incorporates all amendments to the principal Act to 30th June 1953, High Court decisions to that date, English decisions to April 1953, and certain important decisions of the Board of Review. They also record the publishers' intention to keep the work up to date with cumulative supplements, the first of which has now appeared and brings the work up to July 1954.

Few persons would attempt to assess the full value of a book of these proportions by reading it from beginning to end; but a critical assessment of its value is afforded by its frequent use in the practice of this reviewer. To the extent to which this relatively new publication has been used by him it has already proved to be of the greatest assistance, and demonstrates that the authors are dealing with a subject of which they have far more than an abstract knowledge. The Index seems generous in its scope and efficient, and the Table of Cases assists the reader by furnishing page and footnote number of the cases cited.

The subject of taxation may now be said to be of special interest in Western Australia since it has recently been added to the list of subjects prescribed for the professional examination (for admission to the bar) and lectures are being given in the University Law School. For that reason—among many others—this new work has found its rightful place in the library as a valuable reference work on income tax in the Commonwealth of Australia.

J. E. N.

Breach of Promise and Seduction in South African Law. By F. P. VAN DEN HEEVER. (Juta & Company, Ltd.: Cape Town. 1954. 74 pp. £1. 5. 0 stg.).

This is at once a scholarly and delightful little book. The author is one of the judges of the Appellate Division of the South African Supreme Court. He is already well known outside South Africa, at least to comparative lawyers, for his *Aquilian Damages in South African Law*. The present volume arose out of writing a work on the South African law relating to husband and wife which is still in preparation. The author comments in the preface: "There was a time when occupants of the Bench enjoyed a measure of *otium cum dignitate* which enabled them to engage in research and formative work. That, alas, is no longer so; they are kept moving on the treadmill by the stern daughter of the voice of God and are shorn of dignities as well as fleece."

The author confesses to pondering the propriety of publishing a law book after his appointment to the Appellate Division. Extra-judicial writing by English judges is common enough and we do not condemn judges for indulging in *obiter dicta*. Indeed it might aid the development of the law if they did so more readily. There is much to be said for the view that judges should pronounce on all points of law argued before them. And even if the judgments give full value, growth of legal principle should not be entirely dependent on the enterprise of litigants. It may be that the need to attain academic promotion inspires some hasty writing by law teachers, but there is no reason why extra-judicial writing by a judge should be any less maturely considered than his judgments. Mr. Justice van den Heever is in any event willing to be convinced of his errors: "Propositions of law and their application to facts cannot be measured with screw callipers and passed by the exciseman as indubitably right—for the administration of justice is an application of the philosophy of life. When elasticity goes and I cease to be conscious of human fallibility, I should, in the public interest, be removed from the Bench."

The author begins by tracing the history of espousals from Roman law through Germanic and Roman-Dutch law to the modern South African law. In Germanic law the contract to marry had the effect of an inchoate marriage. An espoused bride who had sexual intercourse with a third party committed adultery. In parts of the Netherlands *bruidskinderen* were regarded as legitimate. A jilt could be married by legal process at the instance of the abandoned one. The author remarks that if we remember that the contract to marry was an in-

choate marriage, the action for specific performance may not appear quite so barbaric as it tends to appear in retrospect. The prolepsis of Germanic espousals was received into ecclesiastical law. *Sponsalia de praesenti* had a character of indissolubility, though, where *copula carnalis* had not ensued, the engagement could be broken on papal dispensation being obtained. After the Reformation the canon law principles were taken over by the Hollanders, though modified to suit protestant doctrine. *Sponsalia de praesenti* became a new status of *ondertrouw*. Where the appropriate declarations had been made before ecclesiastical or temporal authorities, the union could be dissolved only for good cause shown. *Sponsalia de futuro* became specifically enforceable, in the last resort by forcible marriage. The action for damages was resorted to only in special circumstances. In modern South African law the status of *ondertrouw* has fallen into desuetude, and specific performance of a promise to marry has been abolished by statute in all provinces of the Union. An engagement is an ordinary contract, requiring no special formality. van den Heever rejects for modern law the view that the engagement must be proved beyond reasonable doubt; this view is suggested in some of the old Roman Dutch authorities, but, the author considers, these authorities were influenced by the prospect of specific performance if the engagement was established.

The author predicts that *Fender v. St. John-Mildmay,* ([1938] A.C. 1) will not be followed by South African courts. He submits that a married person has no capacity to contract a valid engagement. On his view there is no contract though one or even both parties are ignorant of the subsisting marriage. He thus rejects the conclusion recently reached by the Court of Appeal in *Shaw v. Shaw* ([1954] 3 W.L.R. 265). But South African law will not leave an innocent party without remedy—there will be an action for *injuria*. Where, however, both parties are innocent, as was the case in *Shaw v. Shaw* up to the time when the man discovered that his first wife was not dead as he had supposed, no action in contract or delict will lie. This is not to say that the South African Courts would not have been able to come up with the same result as in *Shaw v. Shaw*. A valid contract surely came into existence when the man learned of the death of his first wife and thereafter continued to live with the plaintiff.

Whether or not an incapacity to consummate is curable for purposes of the rule rendering the marriage voidable must, in the author's submission, be judged not in the light of modern surgery, but in the light of knowledge at the time of the historical origin of the rule. The reviewer has no sympathy with this submission; the recent case of

B. v. B. ([1954] 3 W.L.R. 237) indicates that English Courts do not agree with van den Heever. Crosskey has recently put forward a similar approach to constitutional interpretation and has drawn some heavy fire.

One party may resile from the engagement for just cause. The just cause may refer to some circumstances existing at the time of the engagement (the contract is *uberrimae fidei*) or arising afterwards. South African males will be relieved to learn that, in the author's view, modern courts will not hold fastidiousness in the choice of a mate against the defendant, and the fact that the girl has contracted chronic halitosis may be just cause.

The measure of damages in the action for breach of the contract to marry is the actual and prospective pecuniary loss. Actual loss will include, for example, loss of a post relinquished in anticipation of marriage so far as equally lucrative employment cannot be obtained, and the loss of a trousseau so far as it has been acquired *ad pompam.* Prospective damages include the financial benefit to be derived from the marriage, abated to take count of the likelihood of marriage to another. We are familiar with a similar principle in assessing damages under Lord Campbell's Act. Concurrently with the action for breach of contract there is an action for *injuria.* English law seeks to achieve a solatium for the emotional hurt by permitting the award of exemplary damages, but van den Heever insists that the English precedents are not necessarily relevant in South Africa. The commonest circumstance of aggravation warranting punitive damages in English law is seduction under promise of marriage. To this extent English law gives the woman a remedy for seduction. In South Africa, while the action for seduction may be joined with the action for breach of promise, it is, we will see, a quite distinct action available to the woman.

We have become accustomed to the historical curiosity which is the action for seduction in English law, so accustomed indeed that the reviewer feels that we cherish it just so that we may be able to marvel at the antiquity of our law. South African law gives a distinct action to the woman seduced. According to van den Heever the action has a biblical origin; it was received into Roman-Dutch law *via* the canon law—the biblical text required the seducer to endow *and* marry the woman seduced. Difficulties created by philandering defendants in a monogamous society were resolved by the Dutch commentators by giving a discretion to the seducer to endow *or* marry. The action raises some difficulties of classification, for *volenti* is no defence; Grotius was content to put it in the class of *actiones injuriarum.* The action requires that the plaintiff must have been a virgin, but the onus of

showing that she was not will be on the defendant; van den Heever considers that the requirement of virginity should not be understood in a physical sense, and that the action should be available to a widow who has led a chaste life.

In *Bensimon v. Barton* ([1919] A.D. 13) the Appellate Division held that it was no defence that the defendant to the knowledge of the plaintiff was a married man. The author accepts the decision as a binding authority but points out that it was a pure piece of legislation and inconsistent with the old authorities. A moment later he is vigorously attacking decisions which have held that there must be corroboration of the plaintiff's evidence. These decisions he considers are based on recollections of English statute law and misunderstanding of Roman-Dutch authorities, and embody an "unreal and unreasonable doctrine." The author's deference to *Bensimon v. Barton* is perhaps sufficiently explained by the fact that it is a decision of the Appellate Division. But the reviewer suspects and applauds a readiness on the part of the author to judge the old authorities in the light of modern circumstances.

The action is *reipersecutory* as well as for *injuria*. The seducer's obligation is to endow the plaintiff—to provide her with such a sum as will make her as attractive in the marriage market as she was before the seduction. The woman's social position is relevant—apparently virginity is prized more highly among the upper classes. Damages for *injuria* will take count of the circumstances and may be aggravated by the relationship between the parties, for example, where they were teacher and pupil.

Distinct from the action for seduction is the action for lying-in expenses and for maintenance of the child (this action has a Germanic origin). It is irrelevant that the plaintiff was not a virgin; the action is thought of as in the interests of the child.

It may be that our actions for breach of promise and for seduction have become outmoded in modern society by changes in the institution of marriage. But one who reaches that conclusion will have made a sounder judgment if he has considered the nature and operation of actions directed to similar purposes in other systems. In the interests of this sounder judgment this book is commended to students of the common law.

R.W.P.

Living Law of Democratic Society. By JEROME HALL. (The Bobbs-Merrill Company, Inc.: Indianapolis. 1949. 146 pp. $2.50).

" . . . a common fault of historians, and, one might add, of social scientists generally, has been to ignore legal institutions or, at best, to

attend only to their obvious aspects" (page 9). According to Professor Hall, this was Maitland's observation, but most of us will not need to be convinced.

How far law is critical in determining the democratic nature of a society will, of course, depend on what meaning we give to 'democracy.' The political scientist may be content with a meaning which will enable him to limit his study to machinery for the selection of law-making and law-enforcement officials. Professor Hall insists on a meaning which demands a close concern with other legal institutions and provisions. Fundamental is the idea of "self-rule" which is more than majority rule for it involves protection of the liberties of the minority. Such protection Professor Hall believes is to be achieved by law which conforms with the values embodied in the Bill of Rights (page 90). It is, of course, open to the political scientist to say: "Your deep concern with legal institutions and provisions depends on your meaning for 'democracy.' We who adopt a different meaning can do without it." But Professor Hall might fairly reply: "The continuing functioning of your machinery is dependent upon the legal institutions and provisions to which I direct attention. Stand on your definition if you will, but if you would understand the conditions of the continuing functioning of your machinery you must come along with me."

The reviewer's criticism of the book is that the political scientist who has the goodwill to go along will find that goodwill put to unnecessary trial. Professor Hall is not content with the objective of showing the law necessary for the continuance of democratic society, he chooses at the same time to establish that such law is alone properly to be described as 'law' and the use of the word to describe any other phenomena is improper. "Law", he insists, "is a distinctive coalescence of form, value, and fact" (page 131). In the result, his message to the social scientist is more often than not in a state of total eclipse.

The first part of the book is devoted to showing that power is an essential aspect of the proper meaning of 'law.' But we are warned that it is not the only essential. "Law is power; but from the beginnings of Western history in the city-states of the ancient Greeks, the major thrust of the greatest thinkers has been that law is more than might" (page 8). The modern meaning of law—"sheer power norms"—is the product of the restrictive view dominant in Anglo-American jurisprudence since Hobbes.

Part II opens with a reference to the "perennial perspective" of the Stoics who insisted that justice is an essential attribute of positive law. The history of legal philosophy, the author asserts, is largely com-

posed of a series of attacks on this foundation of Stoic jurisprudence and the refutation of those attacks. But, apparently, value as an essential attribute of positive law is not satisfied by conformity with ethical principle. He says: " . . we include the democratic ideal in the essence of our positive law" (page 85), and again: "Thus, the major jurisprudential consequence of modern democratic society is the indicated additional insight into the nature of positive law (and, accordingly, into that of all positive law)" (page 87). Yet he continues: "The law of modern democratic societies is a distinctive type of positive law" (page 87). The reviewer may be forgiven for a momentary impatience —is the democratic ideal essential or is it not?

In Part III (Law as a Cultural Fact) the author asserts that a rule must be factual if it is to be law properly so-called. It is not enough that we have a power-norm which is ethically valid. "From the delivery of standardized milk by a member of a regulated union to driving the car in traffic to the purchase of inspected food, sending the children to school, employing their teachers, as well as the latter's supervision of the children, and so on and on, the legal institution includes vast reaches of daily conduct. Indeed, it is in such innumerable, inconspicuous daily acts, that people "live the legal institutions" and determine, in large measure, and far beyond voting or other formal expressions of will, what the law actually is" (page 117). The ethically valid power-norms must have the quality of Ehrlich's 'living law.'

The concluding pages of the book are devoted to defending the author's restrictive meaning of 'law.' His answer to the practising lawyer who asks, "Are not innumerable laws unknown, unsupported in the mores, and of dubious ethical validity?" is simply that it is an improper question for it assumes these are rules of law when this is the problem to be solved. The reviewer inclines to the view that the author has merely set up another assumption against the practising lawyer's assumption. But the practising lawyer's assumption is not to be trusted, for "the problem is a *theoretical*, not a practical, problem. For the practitioner, the entire question of the nature of law is usually insignificant. The lawyer's thinking is in terms of power-norms enforced by courts . . . " (page 134). And is the practising lawyer hereafter to be called a 'power normer'?

We are assured that a considerable portion of the norms which practitioners commonly recognize as law, are in truth law. "Objective ethical validity . . . depends neither on knowledge of detailed rules nor on emotional support" (page 137), and "to assert that a norm is supported in the mores does not therefore imply either that the most

violent resentment imaginable follows its violation nor that the moral wrong involved is as obvious as it is in the deliberate killing of a human being. These represent the maximum peaks of feeling and value, the nuances, down to the slightest appreciable points, must be taken into account" (page 136). But many of the practitioner's norms are not law. "Thus many, perhaps most, rules governing the involved aspects of corporate activity and tax liability, rules of procedure, technical rules concerning the interpretation of statutes and instruments, obsolete rules, and ethically invalid rules—all of these and many other rules fall outside the scope of the criteria of selection" (page 142).

The author claims that because of the Stoic tradition the word 'law' has remained a term of honorific import, and it is misleadingly honorific if applied indiscriminately to all power-norms and, especially, when applied to sheer power-norms. The reviewer wonders whether in popular use the word has in fact this honorific import. There may be respect of *the* law but rules of law often attract popular scorn. Perhaps Professor Hall is striving for a prize that is not worth having.

But if being taken on a chase for a wild goose is a frustrating experience, there may be compensations to be gathered on the way. The reviewer found that there were. It may set us thinking again about the birth and life of ideas to be reminded that "Legal Positivism had its modern origin in the monarchial State, ruled by kings claiming divine right. Yet it flourished and gained wide acceptance in the golden age of liberalism and the rise of modern democracy" (page 29). Of the decline of extreme realism in jurisprudence the author writes: "The *coup de grâce* was the rise of dictatorship which revealed the political implications of the theory that judges first arrive at decisions emotionally and then use the legal opinion, adorned with rules and citations, as mere window-dressing. It was one thing for sincere democrats to take that position when criticizing the conservative Supreme Court of a vital democracy. It was something else when Hitler substituted the "feelings of the people for the rule of law" (page 49). The author's criticisms of Duguit (page 63) and Pound (pages 65-7) emphasise the impossibility of a programme of action which seeks to exclude valuation. It may be unfair to Pound to suggest that in his early writing he lacked any theory of values, but it is true that he tended to conceal it beneath his 'engineering' interpretation. And there is a case for Pound to answer in the author's comment: "Pound's theory implies that those who inhibit their interests get nothing while the might of the state is enlisted in behalf of those who demand satisfaction. Accordingly, the "task of the law" should be the cultivation of widespread asceticism, which would raise few problems for the engin-

eers, rather than the encouragement of abundant value experience" (page 66).

R.W.P.

Jurisprudence—Its American Prophets. By HAROLD GILL REUSCHLEIN. (The Bobbs-Merrill Company, Inc.: Indianapolis. 1951. 464 and (appendix and index) 63 pp. $7.50).

All reviewers no doubt begin with a glance at the table of contents. Possibly some of them read no further. The present reviewer felt compelled to pause for a moment to ask the significance of the fact that four-fifths of this work which is devoted to a survey of the course of American juristic thought is given over to "Our Contemporaries." It is not that the author has selected the contemporaries for special study; it is rather that there are so many of them. It is true, as H.L.A. Hart has observed (2 Am. Journal of Comp. Law 355), that American lawyers are many and there are generous opportunities for publication. And Pound reminds us in his introduction to the book under review that "the ambitious teacher who must gain a full professorship by striking original writing has not been unknown in jurisprudence" (page x). Yet these do not seem sufficient explanations of the number of American lawyers concerned with juristic enquiry and the depth of their concern. The American lawyers seem so much readier than others to take a stand on fundamental questions.

Professor Reuschlein does not intend a critical work. He is content with stating the views of those he has selected as the prophets of American jurisprudence. His own sympathies are with neo-Thomism, but he has succeeded in preserving an objective approach.

He insists on the importance of Holmes in "fathering" the thought of "Pound, Frank, Llewellyn, Rodell and scores of other socio-economic legal thinkers, realists and iconoclasts" (page 95). There is currently much argument about what was Holmes's position on fundamental questions. Reuschlein seeks to avoid the argument by presenting Holmes through a series of familiar quotations. He would not, of course, claim that he had thus settled the argument, but at least we are encouraged to go back to the source material.

There is a substantial account of Pound's teaching, but we are warned that "since he did not bring together the tenets of his creed between the covers of a single book, it is difficult to make an adequate presentation of his complete philosophy" (page 104). Pound may some day be the focus of an argument as Holmes is now, and it may be well to remember an observation which Pound makes in his intro-

duction to Reuschlein's book: "If I have sometimes been given pause by what I have found in some juristic writing that has seemed out of line I have had to remember that I have had occasion to wish that the statute of limitations would run on some things I have said in print in the past fifty-six years and have had to ask leave to amend some others" (page ix).

The reviewer found the most interesting part of the book in the concluding chapters of Part III. The scientific scepticism which Holmes fathered has made and continues to make its contribution. But scepticism is not enough. In the words of Edmond Cahn, "it seems a bit strange that intelligent men who would smile at believing for the sake of believing induce themselves to disbelieve for the sake of disbelieving" (28 N.Y.U. L. Rev. 842, at 849). A renewed search for a theory of value is the most striking characteristic of post-war American legal theory. It is not confined to the Neo-Scholastics. Outside their ranks Lon Fuller, Jerome Hall and Edmond Cahn are important figures.

Professor Reuschlein has not pretended to offer us more than a convenient survey of American jurisprudence. Certainly he has achieved that. And the book is a valuable guide to further reading. There is an appendix wherein Professor Reuschlein has given some biographical detail of all the thinkers mentioned in his survey along with a select bibliography.

R.W.P.

Cases on the Law of Torts. By CECIL A. WRIGHT, Q.C. (Toronto: Butterworth & Co. (Canada) Ltd. xix and 880 and (index) 16 pp. £A3. 8. 6.).

Dean Cecil A. Wright needs no introduction; his penetrating writing, directed to an understanding which goes beyond the conceptual pattern in which judicial pronouncements are made, has earned him a reputation which places him among the outstanding scholars of the law of tort in our generation.

The present work is a casebook. Inspired by visits from Dean Erwin N. Griswold of Harvard and Professor C. O. Gregory of Virginia, there is a real interest in casebook teaching in this country; law teachers in Australia will therefore look closely at Dean Wright's book. He has chosen mostly English, Canadian, and American cases; but Australia is represented by *Aiken v. Kingborough Corporation, Davis v. Bunn, Gibbons v. Duffell,* and *Insurance Commissioner v. Joyce* in the High Court; by *Mitchell v. John Heine & Son Ltd.* in the Supreme

Court of New South Wales; and by *Meldrum v. Australian Broadcasting Co. Ltd.* and *Nicholas v. Thompson* in the Supreme Court of Victoria. There are also references to *Chester v. Waverley Corporation, Victoria Park Racing Co. v. Taylor,* and *Attorney-General for New South Wales v. Perpetual Trustee Co.* among the more important cases included in the author's comments. The inclusion of these decisions of the High Court and of two State Supreme Courts in Dean Wright's comprehensive selection is a compliment to those Courts and a tribute to their work. That Australian courts can and sometimes do contribute to the development of common law principles has long been known to Dean Wright; may we hope that others will now follow his example of keeping a watchful eye on the decisions of the major Australian courts?

The cases are tightly packed; over two hundred are reproduced at some length, and as many again are abstracted. Beyond these there are references for the student to explore and hypothetical fact situations to provoke him. "A choice had to be made", says the author in the preface, "between a multiplicity of fact situations with a limited reproduction of Court judgments on those facts, and a complete presentation of a few judgments more or less in full. The choice in favour of the former was deliberately and unhesitatingly made" (p. 5). The author's choice reflects an attitude which contrasts with the disposition of the English and Australian lawyer to treat the judicial pronouncement much as if it were the words of a statute. Dean Wright's primary concern is with fact situation and result, not with the detailed rationalization of the result. He says:—"The cases in this book should not be read in isolation in order to memorize what a given court said or did—the search must always be, why did the court do what it did? Might the court within the framework of existing common law method and principles have done something else, and how?" The view of the judicial process implicit here does not accord with our experience. However much we may wish it to be otherwise, English and Australian judges at least seek the law not by induction of a principle from fact situations and results but rather from the words of judicial pronouncements in the most senior court that has so far considered the matter. It is not that the reviewer disagrees with Dean Wright's assessment of the degree of predictability of results in tort cases (Introduction, pp. 5-6, 10); it is only that he considers that the centre of gravity of reliable prediction tends to be in judicial pronouncements rather than in fact situations and results.

The scheme of arrangement of the cases is based on a classification of interests seeking protection and the kind of conduct which

results in harm to those interests. But the conceptual apparatus is not forgotten. While Dean Wright insists that "to continue speaking of 'trespass to the person' is to use the language of mediaevalism and to obscure the search for principle", the courts do use the language of historical formalism and, the author believes, an examination of the concepts involved is necessary in order to assess their power to control future development.

Each chapter is introduced by an outline of what follows, with some comment. There are chapters where the student is launched into troubled waters with very little to keep him afloat. Thus Chapter VII (The "Duty of Care" of Occupiers and Owners of Land), Dean Wright admits, cuts across the traditional treatment of the English textbooks. The reviewer shares the author's contempt for the traditional categories. But how is a student to understand that contempt save by a study of the old learning, and how is he to persuade the courts to follow new learning unless he can show the futility of the old? No doubt Dean Wright came to the law of tort via Salmond or some other textbook; there are times when the reviewer feels that the author assumes that to-day's student has done the same.

The ultimate assessment which a reviewer makes of a casebook must depend on his faith, if any, in the virtues of casebook teaching and his preference for a particular technique. This reviewer has yet to make a profession of faith and therefore declines to make an ultimate assessment. But he would like to say, as a continuing student of the law of tort, that he found a great deal in Dean Wright's book that is immensely stimulating.

R.W.P.

Better Employment Relations. By ORWELL DE R. FOENANDER, LL.M., Litt. D. (Law Book Co. of Australasia Pty. Ltd.: Sydney, Melbourne, and Brisbane. 1954. xxiv and 225 and (indices) 19 pp. £A1. 10s.).

A Treatise on Labor Law. By MORRIS D. FORKOSCH. (Bobbs-Merrill Company, Inc.: Indianapolis. 1953. xiv and 1000 and (tables and index) 196 pp. Our copy from the publishers).

For more than half a century the Commonwealth of Australia and the six States have refused to allow disputes between employers and employees to be regarded as a private fight in which the organised forces of the community have no part to play but that of an unenthusiastic and inexperienced referee. The concentration of power in ever larger industrial units—and in still more closely knit industrial

unions—makes a prolonged slugging match between them too expensive a luxury for the modern community; hence it is a maxim of Australian politics that both forces must be subjected to strict control through the process of compulsory arbitration so as to resolve their differences in quick time—if possible— and with minimum loss to the non-contestant, the general public. It is indicative of the established place which industrial arbitration holds in our political mores that Dr. Foenander, whose many valuable contributions to this field have established him as its leading exponent, needs little more than 200 pages in which to set out with admirable clarity and succinctness the nature and working of Australia's seven systems of arbitration. The United States, on the other hand, appears to have set its face against most forms of compulsion and to have limited itself to re-defining the rules for the opposing forces to observe; even this measure of state intervention is comparatively recent. Is it equally indicative of the uncertainty in the minds of American legislators and judges as to how far state intervention should go—or may be permitted by the rigidity of a written constitution to go—that Professor Morris D. Forkosch, of Brooklyn Law School, requires no less than 1000 pages to set out his study of American Labor Law?

The title of Dr. Foenander's latest work is also the title of his first chapter, in which he offers some shrewd advice both to industrialists and to trade unions. He criticises the survival of the 19th century concept of the employer's quasi-divine right "to hire and fire" as he pleases, as if the objects of that right were merely an inanimate part of his machinery or of his stock in trade and not human beings with basically the same needs and aspirations as his own. He criticises equally the obstinacy with which some, though not all, of the trade unions persist in regarding the average employer as a soulless robot whose only motive power is profit. The former attitude is breaking down much more rapidly—partly under the impact of continued full employment, which the employer optimistically hopes will continue, but which is a phenomenon of such recent appearance that the unions pessimistically conclude it cannot last—than the latter; but on both sides there is evidence of a more promising development in the discovery that trade union claims are usually made because the great mass of the members think them reasonable, and that the last answer that the intelligent employer of to-day—who wants above all a co-operative and contented working force—is likely to make is a blunt and uncompromising "No." But there is still too much suspicion harboured by both parties, which face each other across a fence instead of trying the experiment of sitting on it side by side to discuss problems which

they would, in a less restrictive and more candid atmosphere, find it of mutual interest to solve.

Dr. Foenander's homily on "better employment relations" is brief but pungent; he then goes on to survey in broad outline the various systems of conciliation and arbitration as they function to-day. To most of his fellow citizens—indeed one might say to all of them except the relatively few who are directly concerned in the operation of our arbitration system—and to all who are unfamiliar with the Australian scene his compact and easily read summary is the best available guide to a very important aspect of our community life. It is also happily free from the obscure and ugly jargon which some contemporary writers seem to think is the most certain way of establishing their competence in any technical subject.

Professor Forkosch does not offer advice, but he does provide a wealth of varied information. He interprets his subject much more widely because, after a brief analysis of what "security" means to the average worker and a short historical survey of the labour law—such as it was—that the first colonists took with them to their new home, he deals with the Social Security Act of 1935, workers' compensation Acts, and similar legislation—all of which have become so much part and parcel of Australian life that we do not normally associate them with any form of "labor law." He then proceeds to examine, under the head of "The Worker in his Collective Capacity", the formation and structure of labor unions and the difficulties which the unions met—as in England—in obtaining status and recognition in law. The use of the injunction, and the constitutional limitations which are largely peculiar to the United States, are fully discussed before the author goes on to delineate the National Labor Relations Board and its functioning. To express any view on the accuracy of Professor Forkosch's word-picture would be presumptuous on the part of a reviewer who has not as yet had the opportunity of visiting the United States and seeing its industrial system, in all its manifold phases, in daily operation; he would confidently assert, however, that after reading that eminently lucid and dispassionate treatise he has a much better appreciation of American difficulties and experiments than he had before. It only remains to express one reader's gratitude to the author for the comprehensive list of articles and the bibliography given on pp. 1107-1168.

F.R.B.

Australian State Public Finance. By W. J. CAMPBELL, Auditor-General of New South Wales. (Law Book Co. of Australasia Pty. Ltd.: Sydney, Melbourne, and Brisbane. 1954. xi and 300 and (index) 11 pp. £A2. 10s.).

This book is at once narrower and wider in scope than its title suggests. Narrower, because the author candidly states in his Preface that it deals "primarily with financial theory and practice as followed in the State of New South Wales"; it makes few significant references to possibly divergent practices in other States. It is wider, because it does not deal merely with budgeting techniques and Treasury practices in the chosen State but covers also the varied sources of revenue and the dependence of every State upon federal subsidies since uniform income taxation became an apparently permanent feature of the Australian fiscal system. Though the arguments for and against uniformity of income taxation are as much political as economic, Mr. Campbell, in keeping with the traditional impartiality of his office, has adroitly sidestepped the political issues at stake, though he is obviously aware of them. In relation, however, to matters which are past history he does not feel the same need for restraint; for example, when dealing with the land settlement policy of New South Wales, he does not hesitate to describe as "illegal process" the dubious methods by which in the earlier days the "squatters" obtained a freehold title to vast areas of the colony.

Australian State Public Finance fills a gap in the literature on government in this country; the gap has existed because no one, no matter how freely he were given access to the necessary documents and records, could write such a book from the "outside;" it could only be written, and has been written very well, by a highly placed Treasury officer of long experience or by an Auditor-General. While no doubt Mr. Campbell would disclaim any special competence to discuss such matters as federal grants, the problems of transport and of public highway management, etc., nevertheless he sees as no layman could see their impact upon State finances and upon the perennial problems of balancing the budget and of obtaining adequate loan funds for financing capital construction in a rapidly developing and changing community.

Mr. Campbell, as has already been said, is alive to the advantages —as well as to the disadvantages—of the system of uniform income taxation; but he is discreetly silent about the fact that some of the States have only themselves to blame for its having become a key element in the Australian fiscal structure. Uniform income tax, solely as a war measure, had been recommended by an all-party (and there-

fore no party) committee appointed by the federal government; the first blunder made by the States was to refuse to agree to it even for the duration of the war (and at a time when the war was going very badly against us), and the second was to challenge in 1942 the scheme which the Commonwealth Parliament had enacted in the face of State opposition. Eminent constitutional lawyers had certainly expressed some doubts as to the validity of the scheme even as a war measure; in the absence of a war-time challenge it is more than probable that the scheme would have been automatically abandoned as soon as the war was over. Moreover, it is unlikely that even a successful challenge would have enured to the permanent benefit of the States; more likely would have been a successful referendum to transfer to the Commonwealth powers judicially denied to it. But the four States (New South Wales remaining aloof) which supported the challenge got more (or less, perhaps) than they bargained for, because a unanimous High Court, as might have been expected in the dark days of 1942, upheld the validity of uniform income taxation not as a war measure but as a necessary consequence of the primacy given by the Constitution itself to federal legislation. It is true, as Mr. Campbell says, that the State of Victoria talks of renewing the challenge; but it would be very difficult to persuade the High Court, changed though its composition is (only two of the judges who took part in the 1942 decision are now on the bench), to overrule a unanimous judgment. Hence there is some ground for the cynical view that the Victorian government's threats are merely a polite form of blackmail, made solely for the purpose of getting a larger share of the revenue from this particular tax. In his heart of hearts Mr. Campbell would probably agree that the States do not want the power to impose income tax returned to them; in fact they can take the power now without asking the Commonwealth's leave, though in so doing they would forfeit any claim to share in the revenue collected by the Commonwealth. What they really want is to have a blank cheque payable out of that revenue; the Commonwealth can have the odium of being the tax-gatherer so long as the States get the money.

But it is unfair and improper even to appear to criticise Mr. Campbell for not doing what he did not set out to do; his object is to describe things as they are, not as they might be or might have been. This reviewer cannot but express his gratitude to Mr. Campbell for his illuminating account of the fiscal system of New South Wales, and for the valuable contribution he has made to a very important, perhaps the most significant, aspect of Commonwealth and State relations in a federation such as ours.

F.R.B.