

## BOOK REVIEWS

FAMILY LAW IN AUSTRALIA, by H. A. Finlay & A. Bissett-Johnson. 1972. Butterworths, Melbourne. li + 608 + (index) 30 pp.

Family Law having beyond doubt become a branch of the law in its own right, a good practitioners' and students' text has for some time been needed in Australia. Neither *Joske* — now almost the traditional text on divorce law — nor the excellent and scholarly *Toose, Watson & Benjafield* gave a complete view of the whole of Family Law, and it was not until Hambly and Turner had produced their outstanding *Cases and Materials on Australian Family Law* (in spite of its title much more than a mere collection of materials) in 1971 that the Australian practitioner and student have had a convenient source to work from.

Accordingly the text provided by Mr Finlay and Mr Bissett-Johnson of Monash University would seem at first sight to provide what many have been looking for. They will see, from the authors' Preface, that the authors have set out to relate the law "in its social context", to show "something of the setting within which the law operates and of the social conditions with which it interacts", to provide a book which, as well as being a university text-book, "may also answer the needs of a much wider public" and be of interest to social workers, psychiatrists, marriage guidance counsellors, welfare workers, legislators and social reformers.

Ambitious aims indeed to be compressed into 600 pages of text. It remains now to see whether the reality lives up to the expectation.

The first question to be asked is whether the general principles of law are stated accurately and adequately. On the whole the book passes this test well, although there is some preoccupation with minutiae, and, more seriously, some lack of balance which will be referred to later. Much of the text is concerned with the provisions of the Matrimonial Causes Act, and the chapters on this contain a summary of the legislation which readers will find useful, although if they want anything more detailed they will of course have to look at the two other major texts mentioned earlier.

But Family Law is not all divorce and ancillary relief, and it is probably true to say that if it were ever possible to take a census of Family Law problems, divorce in itself might not take a very high place. For surely the emphasis today, from the social point of view, is not so much on the technical grounds for divorce, but on exactly what can be done when a marriage breaks down, whether or not there is a divorce. What of the children? What of maintenance? What of the spouses' property? The Matrimonial Causes Act is not the only source of discussion on these matters.

So bearing in mind the range and ambit of Family Law, it is disappointing, for instance, to see the authors' quite extensive coverage

of restitution of conjugal rights (pp. 404-409) and jactitation of marriage (pp. 409-411) (the former hardly ever used and the latter virtually obsolete) when, by way of contrast, topics of mounting practical importance such as wards of court (pp. 202-203) — an aspect of the courts' inherent jurisdiction over infants of the utmost value because of its great flexibility, the importance of which is now becoming appreciated in some areas — and summary separation proceedings (pp. 468-469), are dismissed almost casually. And in regard to wards of court, a glaring omission is the failure to cite the extremely valuable and detailed article by Cross J. in (1967) 83 L.Q.R. 201, dealing at length with the modern advantages of this type of proceeding. These problems of balance in the book are only examples. Other examples can be found in other parts of the book, and one inference which can be drawn is that unless there is a substantial body of reported authority on a particular point it is not considered by the authors as particularly important. The practitioner who has to deal with Family Law matters on a day-to-day basis will of course know that this is not always by any means the case.

Then too, as some may think, the book is unreasonably lengthened by overlong citations from judgments (many of them at first instance) and statutes. Many of the lengthy quotations (e.g., on pp. 45, 58, 97, 169, 170, 171, 210-2, 226, 423, 426-7, 459, 460, 484-5, 485-6, 490-1, 503-4, 504-5, 505-6) could surely have been excised altogether for the most part or summarised. If one wants *ipsisissima verba* there is always *Hambly & Turner* (to which frequent reference is made) or — as a last resort — the statutes and reports themselves. And why, in dealing with maintenance in summary proceedings, was it necessary to set out, *in toto*, and occupying almost two full pages of text, the New South Wales Act of 1840 (4 Vict. c. 5) when no question of interpretation of later maintenance statutes seems to depend on it? And when, in a footnote on p. 478 (which runs on to occupy more than half of p. 479), we are given a list of countries to which reciprocal enforcement of maintenance orders legislation applies, why are we given Victoria's list by way of "example", taken complete from the *Gazette*, including the heading and the name and designation of the person who signed the *Gazette* notice?

The book is full of this kind of unnecessary detail, which seems to demonstrate an unwillingness to prune or apply strict standards for the selection of material to be cited. This applies also to passages such as that on p. 55 where, in connection with capacity to marry, we are told that Pope Innocent III in 1215 defined the prohibited degrees to be any within the fourth degree of consanguinity. It is a little baffling to know what use this kind of information is to the practitioner, the student, the welfare worker, or the psychiatrist.

It seems to be a convention in text-writing that cases to which special attention is to be paid are named in the body of the text, while less important references are placed in the footnotes. The authors do not seem to have followed this convention, although of

course it must usually be a matter of individual judgment which cases are important and which are not. It is however sometimes hard to see what test the authors have used in this respect, and this must be confusing for the student, the social worker, and other persons, apart from the practitioner, to whom this book is addressed.

In a book which purports to place the law in a social context one would have expected to find the authors' commentary on the law integrated with their social commentary. However this is not always the case: often the "social" side is dealt with entirely separately. Whether this rather disjointed and disparate treatment is considered adequate may be a matter of preference; but what is alarming is that a good deal of the "social" commentary consists of pages of statistics which are spattered throughout the text. While these statistics contain some interesting information, it is not always easy to relate them to whatever social thesis the authors are attempting to develop: it might be suggested that a better approach would have been to place the statistics in an appendix and in the text replace them by a concise statement of the social trends they appear to indicate. But in any event there is the added disadvantage that by their very nature statistics have a habit of going out of date very quickly. While the authors' statistical information helps us to understand some of their comments as at 1972, it may not be so helpful in 1973. And there is also the question whether statistics in themselves really prove anything of real significance in this field.

On some occasions when the authors have to get away from strict legal principle and into areas where the courts' jurisdiction is discretionary, their approach seems sometimes to falter. In their chapter on Custody, for example, they seem to rely very heavily on extremely generalised theories about a child's dependence on its mother (relying, it seems, on the writing of Dr John Bowlby) without emphasising that it all depends what kind of mother the particular mother is: nothing can be more dangerous in this area than broad general statements which may appear to the uninitiated to have some kind of universal validity and application. In this particular respect it is rather surprising that the authors did not give prominence to the important case of *In re L.* [1962] 1 W.L.R. 886 and to the extremely forthright judgments of Lord Denning M. R. and Harman L. J., which should be engraved on every practitioner's and student's heart because they introduce some fundamental common sense into an area where there is sometimes far too much muddled thinking and misplaced sentimentality. It is no substitute to mention *In re L.* (as the authors do) in a footnote and in a somewhat different context which gives little indication of its importance.

The writers are obviously very interested in law reform, and recent developments and proposals for development in England are given some prominence. But, with this interest in reform, it is astounding that hardly one word is said about the radical reforms which have taken place in New Zealand within the last ten years.

New Zealand is not far away: its social conditions are much closer to Australian conditions than those in England. It must surely have been possible for the authors to discover what had been happening in New Zealand and how the reforms there were operating in practice. Certainly the authors mention briefly the Status of Children Act 1969; but why is there no mention of the Domestic Proceedings Act 1968, which virtually sets up a system of Family Courts with mandatory conciliation, unique grounds for relief, and specialist judges? Why is no mention made of the conspicuous success with which these courts have been operating? And why did the writers not draw attention to the Guardianship Act 1968, which revolutionises the procedure in custody and guardianship disputes? And why is there no mention of the Matrimonial Property Act 1963 and its amendments, which lay down fundamentally new standards and techniques for dealing with matrimonial property matters? In a book which seeks to lay emphasis on a social context and necessary law reform, these omissions are as inexcusable as they are inexplicable.

It will be clear from all this that the book has some considerable drawbacks and limitations in it. Whether these are due to haste (for which the authors may not be wholly responsible) is something which cannot be known. It is however something of a pity that what could have been a major pioneering achievement should have so many disappointing features.

A final comment, left to the last because some readers may not consider it of much importance. Of all branches of the law, Family Law contains perhaps the most human interest. It has tremendous potential for gripping and absorbing the student. But no-one would think so from the way the subject is treated here. The writing is almost incredibly turgid, and the whole subject creaks along with a pompous solemnity which surely cannot have been deliberately designed to kill any interest in the subject, but just as surely has that effect. Practitioners will not object to this, because they will be using the book as a quite valuable source of references. But for the student and other non-practitioners seeking more general enlightenment the writing and style may be difficult to digest.

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**LAW AND CRIME : ESSAYS IN HONOR OF SIR JOHN BARRY**, edited by Norval Morris and Mark Perlman. New York, N.Y. : Gordon and Breach. 1972. Vii and 245 and (bibliography and autobiographical notes) 14 pp.

This collection of essays was originally intended to be presented to Sir John Barry to mark the occasion of his seventieth birthday. Unfortunately Sir John died in November 1969 before many of the

essays were completed and just before he was due to deliver a series of three lectures in New Zealand. (These lectures have subsequently been published by the Government Printer as "The Courts and Criminal Punishments".)

True to Sir John's wide interests in criminal law, criminology, penal history and other fields this collection covers a considerable amount of ground. In some ways this is perhaps a mistake for it leads to a certain lack of unity and to at least one essay resembling a very sore thumb. One cannot help feeling that the editors would have been better advised to select one area of concern to Sir John and commission a series of interrelated essays which could form a lasting and original monument to his memory. As it stands this book will probably be referred to by readers interested in one or two particular essays who will be unlikely to view the book as a whole and thus celebrate Sir John's memory as the editors intended.

The book is divided into four main parts. 'Law and the Legal System' contains four essays covering Sir John's judgments, the assessment of credibility, the concept of recklessness in the criminal law and the increasing interaction between scientific knowledge and legal thought and practice. "Criminology and Penal Institutions" also contains four essays. Barbara Wootton briefly outlines the changes that have taken place in the English Criminal Justice System since 1968. Norval Morris discusses the role that the community can and should play in the correctional system and Alan Shaw and Gordon Hawkins discuss transportation and the life and work of an early American penal reformer respectively. "Economic and Socio-Economic Relations" contains only one essay by Mark Perlman entitled "Some Reflections on Theorising about Industrial Relations". The final section constitutes a memoir to Sir John Barry and contains two essays, one by Sir Eugene Gorman and the other by Professor Zelman Cowen.

These essays are unfortunately a rather motley collection. In particular Mark Perlman's essay on industrial relations is completely at odds with the rest of the volume. Although this reviewer is not really competent to judge, the essay is probably useful to the student of industrial relations. However it is doubtful whether it is of much value to the ordinary reader or even to the lawyer or personnel officer involved in this area. Furthermore one tends to doubt whether it fulfils Peter Brett's plea in an earlier essay for increased bridge-building between the legal and the scientific 'cultures'.

Apart from this, the other essays are of rather uneven quality. Barbara Wootton's brief survey of the changes wrought in the English criminal justice system by the Criminal Justice Act 1967, the Theft Act 1968 and the Criminal Law Act 1967 is perceptive in parts but overall rather superficial. This is partly because the survey has been undertaken prematurely and thus, for example, can produce little hard data on the functioning of the suspended sentence or the new

parole system. Peter Brett's essay on 'Law in a Scientific Age' is also rather disappointing. The initial part of the article vindicates Barry J's judgment in the celebrated "Whose Baby?" case (*R. v. Jenkins, ex parte Morrison* [1949] V.L.R. 277), and convincingly demonstrates that the appellate majority which reversed the initial decision did so largely as a result of a complete failure to understand the relevant scientific evidence. From this the writer goes on to examine three areas in which legal and scientific thought is in conflict. These relate to the trial process, the common law picture of man and the role of precedent. It is strongly urged that legal procedures and concepts in these areas fly in the face of modern scientific thought and indicate a serious discrepancy between the law on the one hand and social and scientific reality on the other. Unfortunately this part of the essay never really rises above the superficial assertiveness of a good student essay. Brett attacks a variety of venerable legal institutions such as the indecipherable exclusion clause, the notion of foreseeability and the dogmatic acceptance of a system of authoritative precedent, but this is all covered very briefly and with a paucity of references which is rather surprising.

Similarly Shaw's essay on "Reformatory Aspects of Transportation" consists mainly of a rather superficial survey of the whole subject of transportation as it was administered in the Australian colonies. Shaw is concerned to stress what he calls "the progressive and beneficial aspects of this form of punishment". To this end he cites Maconochie's work at Norfolk Island, the Point Puer penal settlement for boys and the assignment system. Much of this is of value but the essay is really only a preliminary sally towards the rehabilitation of the transportation system. As an analytical discussion of transportation, the essay is a failure, for while it cites numerous statements and schemes of "reformatory" intent it nowhere analyses even what is meant by "reformation" in this context.

It is difficult to know quite where to lay the blame for these deficiencies. One tends to suspect that the format of the book itself is at least partially to blame. The authors have only limited space available and generally try to cover too much ground for their own good. In addition, perhaps the need to tailor one's outpourings to the work and interests of Sir John Barry has served as an inhibiting factor.

This is not to say that any of the essays mentioned so far are bad. The criticism is simply that they are incredibly frustrating. This is not in itself a bad thing for all such writing should stimulate thought and discussion, the more heated the better, yet such writing must at least lay a proper foundation for further discussion. This some of the essays palpably fail to do and one is often left with the feeling that: "Yes, that's an interesting idea but I need more data and more supporting argument before I can really get to grips with it and even attempt an evaluation."

Nevertheless there are some very real gems in this volume. In particular Norval Morris' essay on "Corrections and the Community" is a thoughtful and provocative analysis of community involvement in the correctional process. Morris has in fact taken one of the perpetual clichés of penology, that correctional work must be community based, and indicated practical measures which can go some way towards achieving this goal. In the process he demolishes the celebrated "principle of less eligibility" and places correction firmly in its political setting. Also of importance is his discussion of the increasing tendency in industrial countries to delegate judicial and correctional power to local communities. This can be seen in the moves in England, Scandinavia and America to involve the community in non-criminal juvenile processes to the exclusion of the traditional court structure. It can also be seen in such schemes as the California Probation Subsidy Program. One further example, which Morris does not mention, would perhaps be Senator Birch Bayh's introduction into Congress late in 1971 of a bill designed to subsidise the abolition of all prisons built in rural areas, thus endorsing the concept of community corrections.

Several other valuable essays should also be mentioned here. In particular Howard and Elliott's article on "The Concept of Recklessness in the Criminal Law" is a very valuable analysis of the difficulties inherent in this rather neglected area. Finally Gordon Hawkins' essay on "Thomas Mott Osborne: 1859-1926 — Pioneer in Penology" serves once again as a valuable reminder that in penology, as in all else, there is little new under the sun. This essay deserves to stand alongside Barry's own preliminary essay on Maconochie published in 1956. In this context it is interesting to note the similarities between Osborne and Maconochie. In particular it is evident that both their achievements lay mainly in producing workable systems and persuading the authorities to let them try them, rather than in producing original ideas. Hawkins' essay is perhaps the most fitting tribute to the memory of Sir John Barry contained in this book.

All in all, this is a valuable book and well worthy of the man to whom it is dedicated. What criticisms there are emerge only because of the high expectations engendered by the eminence of the contributors. Nevertheless one final comment must be made concerning the actual production of the book. Unfortunately the book is littered with typographical errors of various sorts. Letters disappear from words with startling frequency — see e.g. p. 91, "conflictng", p. 100, "Loren" (for Lorenz) and on p. 117 the obsolete offence of "champetry". These examples have not been culled with a reviewer's usual academic pedantry but have been selected by opening four pages at random. Three bore fruit. One particular piece of gobbledygook perhaps deserves to be preserved in full for posterity. On p. 129 the unfortunate Norval Morris can be found saying: "Much that is valuable and creative in community-based corrections is the product of this type of lay cooperation in corrections community based and act on the belief that correctional to divide probation and after-care super-

vision between full-time professional officers and part-time volunteers.”

A further annoyance lies in the footnotes. Apart from the fact that they appear at the end of each chapter which is, I'm sure, economical but which is absolutely infuriating it is unfortunate that authors are permitted to use different systems. Thus the majority number the footnotes in order of reference; Perlman numbers his footnotes in alphabetical order and makes liberal use of the asterisk at the foot of the page; Hawkins produces a list of selected references instead and Sir Eugene Gorman puts his in the text. All these methods are individually perfectly acceptable, but is it not part of the editor's job to ensure that there is at least some consistency in presentation? These are certainly minor criticisms but they tend seriously to affect one's easy enjoyment of this book.

NEIL CAMERON.

EMPLOYEES' MISCONDUCT AS A CAUSE FOR DISCIPLINE AND DISMISSAL IN INDIA AND THE COMMONWEALTH. By Alfred Avins [Allahabad, India: The Law Book Co. 1968. cxxiv and 731 pp. incl. indices.]

Clearly, Professor Avins did not waste his time at Cambridge walking to Grantchester or listening too often to the King's choir. Instead he burnt the midnight oil examining and cataloguing a prodigious number of cases from “the law courts of every portion of the British Commonwealth which seemed relevant and which could be found in any law library in London, Oxford, Cambridge, Edinburgh, Glasgow, Dublin . . . Harvard, Yale, Columbia and the Library of Congress.” Only reports in English were studied so that some materials from Ceylon, India and Burma were excluded. (At the same time it is rather odd to find 219 South African and 86 Irish cases included in a list of British Commonwealth cases.) One can only marvel at the sheer drudgery of Professor Avin's task. For example he points out that Indian Gazette material was neither digested nor indexed but was mixed up with tax assessments, examination results and situations vacant notifications. The end result is a weighty compendium of 731 pages of text and indices plus a table of cases (6022 in all) running to 124 pages.

Cases are classified according to their fact patterns and although the author states that about 90% of the cases contain “nothing more than a statement and discussion of the facts and a result and have no useful rationale whatever”, all cases have been included “even if they duplicate others”. (Introduction pp. iv, v.)

The book thus largely consists of a collection of fact situations along with many lengthy quotations from decisions prefaced by “The Court observed” or “The Court declared”. Many important cases

are not treated satisfactorily. For example there are no less than four references to the decision of the New Zealand Supreme Court in *Deynzer v. Campbell* [1949] G.L.R. 444 as authority for the proposition that "a government employee who refuses to inform his employers whether he is a communist may be transferred to a non-sensitive position" but no attempt is made to draw any wider principle from the decision. Comments by the trial judge or the Court of Appeal on the Crown's right to dismiss a public servant at pleasure are not referred to. In fact the judgment of the Court of Appeal ([1950] N.Z.L.R. 809) is ignored completely.

The most important New Zealand case on employee misconduct, *Clouston v. Corry* [1906] A.C. 122 which went on appeal to the Privy Council is dismissed in a brief passage at paragraph 346 under the rubric "Public Drunkenness". No mention is made of the crucial point made by the Judicial Committee at p. 129 of its judgment, viz. "There is no fixed rule of law defining the degree of misconduct which will justify dismissal", even though the latter part of the paragraph where these words occur is quoted in full. One is led to suspect that the statement was inconsistent with Professor Avins's whole approach and was omitted for that reason.

Professor Avins has performed a useful service in collecting together and classifying a multitude of decisions. But he has merely identified the sloughs and quagmires through which the traveller must pass. He has not charted a course or mapped a route through the morass of decisions and indeed the quicksands of differing fact situations may make the collation of such an itinerary impossible. Nevertheless the traveller would have preferred more guidance in a wilderness of single instances.

From the book's appearance it would seem that Professor Avins has merely parcelled up his Cambridge doctorate thesis and mailed it off to Allahabad. Rigorous pruning would have improved the book immensely and much of the text might have been advantageously omitted in favour of an attempt to erect some sign posts. The case list would have been much more helpful if cases had been listed according to jurisdiction and not all jumbled up together. As it stands the work may assist a legal adviser to rake up a decision on similar facts to those confronting him but it will do little more than that.

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