BOOK REVIEWS

SIR JOHN DID HIS DUTY *by Garfield Barwick* (Serendip publications 1983) pp xi, 129.

It is impossible to read *Sir John Did His Duty* without a sense of disappointment. Sir Garfield Barwick was the acknowledged leader of the NSW Bar for many years. He was the Attorney-General of the Commonwealth for 6 years and the Chief Justice of Australia for nearly 17 years. The very least which one would expect from so distinguished a source is a persuasive legal argument. He has not provided one. The book is, as the Australian Financial Review editorial of 11 November, 1983, commented, "his apologia for Sir John Kerr's and his own actions at the time".

According to Sir Garfield, his purpose in writing this book was to "assist the citizen to understand the constitutional interrelationship of the Governor-General, the Prime Minister, the Executive Council, and both chambers of the Parliament, in so far as these relationships were involved in the events of 1975". (pp viii-ix) He demurely suggests that "To those who are familiar with the Constitution, much of what . . . [he] has written will appear trite". (p ix) Trite this version of the "constitutional fundamentals" is not. Novel is the most charitable description which springs to mind.

Sir Garfield rests his defence of Sir John's actions upon an analysis of the various branches of government and the events which culminated in the dismissal of the then Prime Minister. His "aim is to reach those who, though interested in the affairs of government, have no particular knowledge of the Constitution and of its operation". (p ix) Some of his more interesting discussions are examined below.

1 "The First Event – Failure of Supply" (p 1)

According to Sir Garfield, the Senate refused to consider the motion for the second reading of the appropriation bills. He notes that there "was no prior occasion on which the Senate had failed to pass a bill appropriating revenue or money for supply, though it had threatened to do so. The Senate's action was unique." (p 2)

The Senate did not reject the appropriation bills. It voted for the deferral of consideration of the Bills. Cooray, *Conventions, The Australian Constitution and the Future* (1979) commented (p 117), "There is a substantial distinction between *deferring* the *Appropriation Bill* and rejecting it, which has not been given sufficient prominence and consideration". Sir Garfield apparently does not consider this distinction worthy of note.

2 The Prime Minister "challenged the Senate's power to fail to pass the appropriation bills for supply, asserting the predominance of the House over the Senate at least in respect of such a matter. This course of action raised a constitutional crisis." (p 2) This point is emphasised elsewhere in the book (eg on p 4: "But it was the Prime Minister's course of action which created the crisis"). Is it not interesting that it was the action of the Prime Minister and not that of the Senate which precipitated the crisis?

3 Sir Garfield argues that "in times which are out of the ordinary, it is essential to have regard to the constitutional actuality. When we do so,

we shall find . . . that the legal power to govern the country is vested in the Governor-General with the advice of the Executive Council over which he presides". (pp 5-6) He develops this thesis later in the book to assert that it is "the Governor-General's power and his duty to have as his advisers a ministry which can secure supply". (p 111)

The present Governor-General, Sir Ninian Stephen, appears to hold a rather different view. In his address to mark the 75th anniversary of the Constitution Sir Ninian (then a Justice of the High Court of Australia) discussed the federal Constitution and attempted to distinguish between the monarchical theory and its actual working. He concluded:

> "Then, lying beneath the surface and almost wholly unexpressed in the words of the Constitution, the great area of so-called convention, much of it inherited somewhat inappropriately from the differently constituted Parliament in Westminster but which yet continues to give to its actual working the reality of representative government as we know it, with the Prime Minister and his Cabinet at the apex."

4 Sir Garfield dexterously evades the problems inherent in the appointment of a Prime Minister who did not have the confidence of the House of Representatives. He simply comments that "By [the time the Speaker informed him of the no-confidence motion] the Governor-General had signed the proclamation dissolving the Parliament". (p 13) He passes no comment on this action (nor does he comment on the fact that the proclamation was jointly signed by Malcolm Fraser as Prime Minister). Later in the book, however, he does discuss, in the abstract, the significance of a vote of no confidence. He states that "Conformably with parliamentary practice and constitutional requirement, that ministry [ie one in whose Prime Minister the House of Representatives had passed a vote of no confidence] will then resign". (p 106)

In his letter to the Queen dated 12 November 1975, Gordon Scholes, the then Speaker of the House stated:

> "I would point out that Supply was approved by the Senate prior to 2.55p.m. Mr. Fraser announced that he had been commissioned as Prime Minister in the House of Representatives at 2.35p.m. The House expressed its view at 3.15p.m. by 64 votes to 54. I sought an audience with the Governor-General immediately following the passage of that resolution. An appointment was made for me to wait on the Governor-General at 4.55p.m. The Governor-General prorogued the Parliament at 4.30p.m."

For a book designed to assist the citizen to "appreciate [the] . . . constitutional consequences or possible consequences for our system of parliamentary democracy" (p viii) this is an interesting omission.

5 In Sir Garfield's view the power of the Senate to withhold supply is vital to our system. Without it "We could no longer properly refer to our system of government as being one of parliamentary democracy. We would be experiencing the possibility of tyranny." (p 21) Central to Sir Garfield's thesis that the Senate has, and indeed should have, the power to send the government to the electorate is the claim that the Senate is an "elected representative body". (p 46)

In this context it is perhaps surprising that he fails at any stage to comment upon the constitution of the particular Senate which deferred the supply Bills in 1975. Two of its members had been merely appointed

by their respective State Governors rather than elected. Further, neither of those members were of the same political affiliation as the (elected) members whom they purported to replace.

As from 1911, the House of Lords has been unable to reject, amend or delay for more than one month Money Bills (Parliament Act 1911 (UK) s1). It would be difficult to argue from this that the British system was not a "parliamentary democracy". Yet the sole distinction which Sir Garfield offers is that the "House of Lords was neither elected nor representative : but the Senate is both". (p 44) A somewhat dubious distinction, it is submitted. According to theory the Senate is an elected body. In reality this is not always the situation. And on 16 October 1975, the Senate which deferred supply included two non-elected members.

6 Sir Garfield asserts that he "felt sure of the propriety of giving advice to the Governor-General on a non-justiciable question". (p 77) There are two issues here: (1) was the matter a non-justiciable question? and (2) was it proper for the Chief Justice to advise the Governor-General on any matter, justiciable or not?

Sir Garfield's assessment of the matter on which he was called upon to advise is that "The question was as to legal — constitutional — authority and duty and did not involve in its answer any political considerations. It was as a non-justiciable question of Vice-Regal authority under the Constitution that . . . [he] considered and answered it." (p 82) One can only assume that his conception of "political considerations" is very narrow.

Whether or not a matter is justiciable is itself a justiciable question. Until such time as the High Court has pronounced upon the matter Sir Garfield has no authority on which to base his view that the matter is non-justiciable. True, as Chief Justice he was in a position to hazard an educated guess as to how the question might be decided. However, the Chief Justice, no matter how eminent, is merely one of seven judges. Indeed, he had announced on an earlier occasion

> "it is not the case in Australia . . . that the judiciary will restrain itself from interference in any part of the law-making process of the Parliament . . . It seems to me that in an appropriate, though no doubt unusual case when moved by parties who have an interest in the regularity of the steps of the law-making process at the time intervention is sought, the Court is able, and indeed in a proper case, bound to interfere." *Cormack* v *Cope* (1974) 3 ALR 419, 428-429.

In the same case the present Chief Justice, the then Justice Gibbs, commented "I am disposed to think that this Court has jurisdiction to interfere at any stage of the special law-making process permitted by s57 . . ." (p 439)

Sir Garfield addresses himself to the issue of whether the Governor-General may seek the advice of the Chief Justice. This is a different question from whether the Chief Justice may advise the Governor-General. He in no way meets the criticism offered by the dismissed Prime Minister writing in 1977: "It means that a Chief Justice of a court not entitled to give advisory legal opinions can give advisory political opinions to a Governor-General." (Whitlam, "The Labor Government and

the Constitution" in Evans (ed) *Labor and the Constitution 1972-1975* (1977) 236.)

There are many other statements in this book with which it is possible to take issue. There is little point in doing so here. Sir Garfield's avowed aim was to provide an examination of "the events of the time calmly and without the disturbing influence of partisanship". (p ix) In this he has failed.

*S J Gibb**

APPLICABLE INDUCTIVE LOGIC *by A G Prys Williams* (Edsall 1982) pp 178.

This book is one of a growing number that attempts to apply a formal system of logic to legal reasoning. The book is not primarily concerned with a discussion of legal reasoning. Rather, examples of legal reasoning, along with examples from other disciplines, are selected to demonstrate the practical use to which the system developed by Prys Williams can be put.

The book is divided into three parts. In the first, Prys Williams introduces a variety of logical concepts and gives a brief account of a formal system of deductive logic which forms the basis of his theory. He also discusses a number of examples of legal reasoning that are meant to demonstrate the inability of classical deductive logic to account for the inferences that are typically relied on by judges in deciding cases. In the second part, Prys Williams gives a rigorous account of the system developed by him. The system is intuitionistic in the technical sense. That is, in contrast to classical deductive logic, it does not contain as a theorem the law of excluded middle (tertium non datur), P v -P (translated as "either P is the case or not P is the case"). The system is also inductive. It is concerned with measuring the strength of inferences that are not all certainly true and the reasonableness of making those inferences. The normal form of a theorem of the system, then, is C (r, Q/P) (which translates as "given P, Q has (strong) confirmation r (where r is a rational number between 0 and 1") (see pp 66-7, 71) and *tertium non datur* becomes (P v -P) = C(P) + C(-P) = 1. In developing the theory the utility theory and the concept of opportunity cost are drawn on heavily. In the third part of the book, several applications of the theory are given. Of interest to lawyers are Chapter 8, which deals with legal foreseeability, and Chapter 9, which deals with the assessment of damages. The book has a useful glossary of frequently used and important terms. Unfortunately, it has no index.

For anyone who thought that it might have made a significant contribution to the debate about the nature of legal reasoning, the book is likely to be a disappointment. It does not deal at all with the fundamental question of legal reasoning: namely, whether legal reasoning (like a social science) can be analysed in terms of deductive and inductive logic or whether, given its moral nature, such an analysis is bound to be inadequate. Moreover, it makes no attempt to deal with better known rival theories, such as McCormick's analysis in terms of deductive logic or Cohen's in terms of a non-mathematical system of probability. The

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reader is largely left guessing as to where the author thinks these accounts fail. True it is that these comments simply point to the fact that the book is written primarily for logicians not lawyers. That alone is no fault in the book. However, even bearing in mind the perspective from which the book is written, Prys Williams's analysis is disappointing.

In Chapter 2, in a little over five pages the possibility of analysing legal reasoning in terms of classical logic is dismissed. But Prys Williams's examples seem inadequate for the task. For example, he claims that negation as used by courts obeys the rules of intuitionistic not classical negation. According to classical, but not intuitionistic logic it is a logical truth that if --P is the case then — is the case. But, says Prys Williams, for a lawyer to assert that --P is the case is equivalent to an assertion that "it is held that P cannot be rebutted" (p 25). The conclusion, we are told, is apparent:

> "It is immediately clear that the *tertium non datur* does not hold generally, for a plaintiff trying to rely on such a finding to establish P would normally be told that that was not enough, the burden was on him to make out a case, and that was a positive obligation." (p 25)

Why we should assign the meaning to --P given above, however, is not clear. Suppose P stands for the proposition "X was negligent". -P, then, stands for the proposition "It is not the case that X was negligent", which is equivalent to "X took reasonable care". --P, then, stands for the proposition "It is not the case that X took reasonable care", which, of course, is equivalent to "X was negligent". Whether plaintiffs choose to rely on the assertion of P or on the assertion of --P, they still bear the onus of proof. Contrary to what Prys Williams claims, it seems that it is not the absence of the inference in question but rather its frequent and obvious use that explains why only rarely is it explicit in legal reasoning. the argument here simply seems to rely on a misinterpretation of the proposition in question.

Similarly, Prys Williams also objects to classical disjunction. According to classical, but not intuitionistic logic, -(-P & -Q) implies P v Q. That is, if you can prove that it is not the case that both P and Q are false, then classical logic says that you are entitled to infer that P or Q is true. Relying on the following passage from the judgment of Pollock CB in *R* v *Hook* 169 ER 1138, Prys Williams says that such an inference is not always open to a lawyer:

> "it was not sufficient to charge that on one occasion or the other the defendant committed perjury, but you must allege, and the jury must find, on which occasion he did commit it; . . . I believe that it was in a recent case that in an indictment for murder it was not sufficient to allege that the death was caused either by burning or by stabbing the deceased, although it might be quite clear that the death was caused in one way or the other" (p 26).

What Pollock CB is saying here is that it is not sufficient to show that the defendant is guilty of one crime or another. Rather, the prosecution must prove a particular offence. Whether and to what extent Pollock CB is correct is undoubtedly an interesting question — one that has generated a considerable amount of academic debate. (See Cohen, *The Probable and the Provable* (1979)). However, it has no bearing on the inference with which Prys Williams is concerned. The issue concerning

Pollock CB is whether you are entitled to infer the guilt of the accused from a disjunction, not whether you are entitled to infer a disjunction from some other complex proposition.

From a lawyer's point of view the chapters dealing with the application of Prys Williams's theory are no more satisfactory. Chapter 8 is concerned largely with analysing various decisions in terms of the concept of opportunity cost. But the analysis here lacks altogether the rigour of the preceding chapters. Indeed, it is simplistic and sometimes obviously inaccurate. For example, Prys Williams appears on occasion to confuse negligence with the general law of torts (p 103). He fails to distinguish at all between the concepts of duty of care and standard of care. He goes to some lengths in the earlier part of the chapter to show how the decision in *Bolton* v *Stone* [1951] AC 850 might be justified on the ground that the costs to the cricket club of building a fence to prevent escaping balls was far greater than the loss Miss Stone would suffer if she were badly hurt multiplied by the (very low) probability of injury. Yet, in the last part of the chapter he concludes that the decision was mistaken because it failed to take into account the fact that the club could take out liability insurance and was, in fact, in a better position to insure against the risk than Miss Stone. Criticisms of particulars decisions in these terms can be found in any elementary textbook on economics and law. The result is that legal readers are left wondering why they should try to master such a complicated technical theory as Prys Williams's undoubtedly is if this is all it has to tell. Similar points might be made about the conclusions drawn in Chapter 9 in relation to the assessment of damages.

Prys Williams's theory undoubtedly is of some interest to logicians. Unfortunately, as presented in this book, it is of little interest to lawyers.

*Michael Ball**

FEDERAL ADMINISTRATIVE LAW *by G A Flick* (Law Book Co 1983) pp xxvii, 251.

This book is no more than a compilation of recent Administrative Law legislation, viz the Administrative Appeals Tribunal Act 1975 (AAT Act), the Ombudsman Act 1976 and the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) together with commentary. One's first thought is for what reader the book is designed and what purpose it sets out to achieve. Many of the actual provisions of this legislation are not particularly worthy of comment, so that Dr Flick has to delve into scarce resources in order to provide one (eg, the comment on s5 of the AAT Act establishing the Administrative Appeals Tribunal is largely confined to giving the addresses of the Tribunal in the respective State centres). Numerous recent decisions are referred to on the affect of the Acts, but these will no doubt soon be overtaken by other cases — the loose-leaf supplements will here serve the practitioner's need much better. It is also disappointing that the commentary contains virtually nothing covering the philosophy of Administrative Law that these Acts embody. In particular the reader is not told that s25 of the AAT Act introduces the revolutionary concept that an administrative decision is open to attack on

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the merits of the decision — that there is no need to prove a ground that would give rise to judicial review under present procedures (although the commentary does point out that where that type of ground exists this does not exclude the jurisdiction of the Tribunal).

There is no attempt in the commentary to make critical comparisons between the two main Acts. Why, for example, does the duty to give reasons contain significant differences in s28 AAT Act from s13 ADJR Act? Why does s27 AAT Act require merely that the appellant be one whose interests are affected by the decision whereas s5 ADJR Act requires that the applicant be a person aggrieved? Surely s9 ADJR Act merits some commentary since it affects the main purpose of the Act, ie to transfer original State jurisdiction over Commonwealth administrative decisions to the Federal Court? In this book the section is studiously ignored by the commentary.

The gist of the above criticism is on the whole that the need for the book is misconceived. There is on the other hand a palpable need for a critical academic account of the Administrative Law philosophy embodied in the various Committee Reports and the manner in which this has been carried into effect in the consequential legislation. Such an account could valuably be updated every 5 years or so in the light of mature appraisal of the effect of the (no doubt) voluminous case-law that the legislation produces.

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CHITTY ON CONTRACTS 25th edn Vol I General Principles, *edited by A G Guest and others* (Sweet & Maxwell 1983) pp cclxiv, 1190.

THE LAW OF CONTRACT, *by G H Treitel* (Stevens 1983) pp lxxvi, 810.

The new editions of these celebrated English works on contract arrive at an opportune time for Australian students, teachers and practitioners. As a developing body of common law rules contract appears to be more dynamic now than ever, as indicated not only by the spate of recent House of Lords decisions but also and perhaps more significantly by the increasing number of High Court pronouncements on subjects such as frustration, mistake, promissory estoppel, relief against forfeiture, unconscionability and so on. At the same time a trend towards greater legislative intervention, and not just in specialised spheres such as employment, has become apparent. The need for books which consolidate and reflect on this mass of new material, if only from the English point of view, is perhaps greater than ever.

The new edition of Chitty, published one hundred and fifty-seven years after its inception, maintains the high standards set by its immediate predecessors. Since its renaissance in the 1960s it has been almost exclusively an Oxford University product; and that flavour is maintained in this, the first of two large volumes on the law of contract. (Volume II deals with specific types of contract, including those of agency, bailment, employment, insurance, sale of goods and so on, often governed by

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legislation that is peculiar to the United Kingdom.) Professor Guest, the general editor since 1968, heads a distinguished team of editors who are each responsible for the updating or rewriting of a number of chapters. The list reads like a Who's Who of English contract law, including as it does Professors Treitel and Atiyah, not to mention Messrs Harris, North, Beatson and Prentice.

The six years since the twenty-fourth edition have seen no radical changes in the book's format or function. It still has a tendency, in the eyes of some, to fall uncomfortably somewhere between the competing roles of a student's textbook and a practitioner's handbook. Perhaps it would be better to say that it combines the merits of both. Certainly its price and size tend to remove it from the range of the average student's finances: but it can certainly serve as a valuable reference book. The exposition of the principles of contract is in general lucid and soundly based and will often provide a useful starting-point for research. While naturally there is space for little more than a simplified and orthodox account of each subject, careful perusal of the footnotes reveals critical comments or reference to other views. The organisation of material is in many respects superior to that of the more pedestrian English or Australian textbooks: and some individual chapters can be highly recommended for their treatment of difficult areas, including Atiyah's account of Mistake (chapter 5) and particularly chapter 29, which is devoted to Restitution and could almost be a book in itself. There are inevitably errors, typographical and otherwise, but given the general excellence of the work indulging in the book reviewer's standard practice of pinpointing one or two seems pointless.

Treitel's own work, on the other hand, is the classic textbook. Where Chitty generally opts for orthodox views backed by comprehensive citation, Treitel combines adequate though skimpy examination of the more straightforward areas with penetrating and complex analysis where it is really required. It is this latter feature which sets it apart from other contract textbooks. While the overall coverage is generally excellent, what attracts the attention is the detailed and thought-provoking treatment accorded to difficult areas such as construction of exemption clauses (pp 171-190), discharge for failure to perform (pp 569-620) and frustration (ch 20), to name but a few. If there is any disadvantage in using it, it is to the lazy student. The book does not devote a great deal of space to bare repetition of the original source-material: rather it assumes that students will glean that knowledge from the reports for themselves. The pattern is not to discuss cases unless a bare citation for an easily ascertained proposition will not suffice. Space is thus reserved for decisions necessary to illustrate a point, or whose effect or weight is in doubt. Whilst this approach demands at least a superficial knowledge of the case-law before the book can be effectively used, its advantage to the more discerning student is that, having served to introduce the material on a topic, it can often be returned to for the sort of detailed dissection more commonly found in the pages of the legal journals.

Naturally both books contain changes of detail and emphasis from their previous editions. Whilst some relate to English legislation (for example the operation of the Unfair Contract Terms Act 1977) there have also been significant developments in the common law. As one might expect, the case having the greatest single impact is *Photo Productions Ltd* v *Securicor Transport Ltd* [1980] AC 627, dealing

principally with exemption clauses but also indirectly with discharge for breach and inequality of bargaining power. Unfortunately, however, both books came too late to consider the subsequent House of Lords decision in *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] 3 WLR 163. Other areas significantly affected include promissory or equitable estoppel (both books now carry excellent accounts of the recent expansion of the doctrine and its relationship with other forms of estoppel), privity, frustration and duress. The coverage of the latter topic incidentally is one of the few disappointing features of Treitel, which, in contrast to Atiyah's penetrating and unusually extensive analysis in Chitty, gives little more than a superficial account of the recent "economic duress" cases. One area which of necessity escapes both books is that relating to relief against various types of contractual forfeiture, the spate of decisions on the subject (especially *The Scaptrade* [1983] 2 AC 694 and the High Court case *Legione* v *Hateley* (1983) 46 ALR 1) again coming too late for inclusion.

Mention of *Legione* leads onto the inevitable question of the value of an English book to an Australian readership. It is of course to the point that the differences between English and Australian law remain slight, so far as general principles rather than specific applications (to employment contracts, for example) are concerned. Thus even though almost all the leading Australian cases are, with the perennial exception of *McRae* v *CDC* (1950) 84 CLR 377, omitted by Treitel and footnoted in Chitty, both books remain fairly safe sources of reference. Care should naturally be taken that Australian authorities are consulted (through the Australian Digest, for example), as the law does exceptionally differ — as for instance with the stringent requirements for establishing a collateral contract laid down in *Hoyt's Pty Ltd* v *Spencer* (1919) 27 CLR 133. There are also areas which have been considerably modified by Australian legislation, such as infancy and privity: particular attention must of course be paid to the wide-ranging provisions of the Commonwealth Trade Practices Act 1974 and the New South Wales Contracts Review Act 1980. Nevertheless, until an Australian textbook is produced to match the quality of Treitel and Chitty, one or both should continue to occupy an important place on any contract lawyer's bookshelves.

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