as acceptably used, sheds light not only on the terms themselves, and on the facts, social or otherwise, to which they refer, but also upon the psychological factors affecting the persons who use the terms? If this is so perhaps the Scandinavians[6] may be making a greater contribution to the understanding of the intricate workings of legal systems than this book would allow.

It has already been said that this book bears more the mark of a text for students than of a major jurisprudential work. The text is left uncluttered by detailed references and footnotes. The student who wishes to pursue the sources from which the author draws his material, or to gain a greater understanding of the works of jurists referred to or criticized in the text, is provided with extensive footnotes at the end of the book. Those footnotes, however, are designed to stimulate and guide student reading rather than to provide any complete collection of relevant references. This is not really a defect, of course; to provide such a collection would now be a major bibliographical task in itself.

DAVID P. DERHAM*

Precedent in English Law, by RUPERT CROSS, Fellow of Magdalen College, Oxford. The Clarendon Law Series. (Oxford University Press, Oxford, 1961), pp. i-viii, 1-268. Australian price £1 19s. 6d.

This work would be welcome in itself as the first full-length study of precedent by an English scholar. Now that the finding of the meaning and force of decisions has been acknowledged to be an art rather than a science, it is important that the canons of the art be thoroughly examined. Allen, Stone, Paton, Montrose and others have illuminated various facets of the topic in individual chapters and articles; the time was ripe, however, for a more systematic and comprehensive survey.

This is what Dr Rupert Cross has provided. He has read and weighed and sorted all the existing material, and arranged it in due order. He has resisted the temptation to dissect issues too finely—as well as the opposite temptation to hide them under some vague formula. When there has been a vigorous controversy he keeps a calm balance.

He has succeeded despite considerable handicaps. The Clarendon Law books are intended as a series of general introductions to different fields of law and jurisprudence 'designed not only for the law student but for the student of history, philosophy or the social sciences, as well as for the general reader interested in some aspect of the law'.

To lay the foundations for the non-lawyers, Dr Cross has had to set out the structure of the legal hierarchy and the elementary rules of the binding force of precedent; he could not assume any knowledge of even leading cases. Moreover, his audience includes first-year law students, others who are completing their course, law teachers and doubtless some practising lawyers.

All these groups will find the book very useful. Any individual, however, will have his own difficulties in making full use of it. The beginner in law will find topics being discussed that are presently beyond his reach; the senior student will skip over certain chapters; the layman will be

[6] *E.g.* Lundstedt and Olivecrona.

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plunged fairly rapidly into new and technical depths. Possibly it is the law teacher who will profit most from this book.

Dr Cross does not pretend to have drawn back the veil and disclosed the inner secrets of the art of case-lore. He is content usually to present the rules and decisions accurately, to listen to both sides and to sum up like a judge with a jury, leaving it to his readers to make up their own minds thus fortified by information and argument. He sets out no brilliant hypotheses; wields no axe. What he has done is to break up the whole subject into manageable parts so that we can look at them intelligently. We can then ask ourselves, for example, about the part played by deductive and inductive processes in the reasoning of judges, how they use analogy, what truth remains of the declaratory theory in this age. We have been apt to use all of these terms without analysing them closely. Dr Cross in chapter V has some excellent thoughts on these matters. He points out when discussing reasoning by analogy that:

> The discovery of the *ratio decidendi* of the previous case is primarily a psychological problem. The determination by judge A of the principle according to which judge B decided case C is very likely to be greatly influenced by the language used by judge B, but the very words ought not to be, and usually are not, decisive.[1]

Dr Cross does advance one new and interesting thought in chapter IV, 'Exceptions to *Stare Decisis*', concerning what he calls 'implied overruling'. This matter is of far greater moment in England than in Australia because of the formal refusal of the House of Lords, the Court of Appeal and (probably) even Divisional Courts to overrule their own previous decisions. The effect of *Young v. Bristol Aeroplane Co.*[2] on the Court of Appeal has encouraged a tendency to undermine quietly some older unsatisfactory decisions. To this has been added 'an increasing willingness on the part of the courts to recognise that past decisions of the same court may conflict with each other' (page 128). Again: 'courts are becoming increasingly reluctant to ignore conflicts of principle simply because cases can be distinguished on their facts' (page 129). He quotes one authority (Dr Schmittoff) as declaring that 'the qualifications which have been placed on the doctrine of *stare decisis* in the Court of Appeal have completely changed the character of that rule in modern English law' (page 121).

This is probably not the first time that the rule has changed in its history. It was doubtless not the same in the eighteenth century as it was in the fourteenth—and not the same in the early twentieth century as it was in the eighteenth. Happily our own appellate courts have left themselves more elbow-room and the rather tortuous process of implied overruling is less needed here. We are less rigidly in the grip of what the French describe as the 'superstition of cases'.

While being well aware of the defects of the present system—he regards as too optimistic Holdworth's suggestion that the English system hits the golden mean between too much flexibility and too much rigidity—Dr Cross is equally alive to its merits. He has little regard for the excessive criticisms by the American realists. The extreme realist position can in fact only be supported on the assumption that our judges are capable of the grossest hypocrisy (page 47). They do in fact follow

[1] Page 211. [2] [1944] K.B. 716.

many decisions of which they disapprove. Moreover, the real criticisms are concerned with the 'self-denying ordinance' of some English appellate courts and not with the more usual situation in which lower courts are following the decisions of higher courts (page 254). It is misleading, too, to be overimpressed by the difficulties in the 'fringe cases' and to forget that they constitute only a small fraction of the total.

The problem of interpretation of statutes is treated as part of the general judicial technique; here again the arrangement and discussion are excellent. There is the same clear analysis of cases, balanced comment, criticism within reasonable limits. Dr Cross generally has kept to his brief; he has produced a work of lasting value on which every reader can draw profitably. If he has said little that is novel, has not attempted to say the last word on anything, this does not detract in the least from the value of a work so well ordered, clear and helpful.

F. K. H. MAHER*

Oxford Essays in Jurisprudence, A Collaborative Work edited by A. G. GUEST, Fellow of University College, Oxford (Oxford University Press, London, 1961), pp. i-xviii, 1-292. Australian price £2 6s. 6d.

This book covers a wide field. It is a collection of ten essays by members (or, in one case, a former member) of Oxford University, in which the authors tackle some of the more important problems which vex our legal system at the present time. The essays cover various aspects of constitutional law, criminal law, and torts, as well as much more general topics such as the roles of logic and precedent in the common law system.

All the essays are worth reading; but, as is to be expected in a work written by several different hands, some are much better than others. The editor—who contributes an excellent essay in which he dissipates some hoary misunderstandings about the nature of logic and then clarifies its use and limitations in legal reasoning—has chosen to call the book a collaborative work. I feel, however, that this sub-title is a little misleading. It would seem, from reading the book, that a group of dons decided to publish a set of essays on various topics, and that the result is a collaborative work in the sense that each writer covers a field allotted to him and that the various fields make a coherent whole. But the essays show very different approaches to some problems, and there has apparently been no effort to attain a consistent theory throughout the book.

What I have in mind appears most clearly in the first two essays. In the opening piece, on 'Voluntary and Involuntary Acts', Mr Fitzgerald (now Professor Fitzgerald, of the University of Leeds) discusses the problem of defining an act and the nature of involuntary action, mainly with reference to the criminal law. He adopts the standard distinctions between mind and body, *mens rea* and *actus reus* which are to be found in any of the standard texts, and endeavours to refine them. My own view of such attempts is that they are doomed to failure, for they start with an uncritical acceptance of Cartesian dualism in a form which no modern philosopher would support. The point is highlighted by a reading of the second essay, on 'Negligence, *Mens Rea,* and Criminal Responsibility', in which Professor H. L. A. Hart neatly and briefly punctures this bubble and demonstrates the crying need for a complete re-casting of the basic

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