the issue was finally resolved in a clear and decisive manner'. Yet on these issues there had been open debate in the courts and the opposing views had been vigorously presented long beforehand: it was only a question of which view would be ultimately adopted; there was no astonishment when one proposition was accepted rather than its alternative. In the rest of the field the building of principles and rules has gone on according to plans now generally known and accepted. The High Court itself has avoided extremes; it has set out wide doctrines without freezing them in formulae; it has sought, and usually achieved, a certain balance of interests. This combination of flexibility with stability has helped the contributors to this volume, so that Mr Baker, for example, needed only to vary his original text on compulsory acquisition by some comments on the limits of the incidental power and on the problems of 'pooling' and 'just terms'. Mr A. J. Hannan, it is true, has withdrawn his striking passage in which he compared the delegates of the States to the Federal Convention to an 'infatuated bridegroom' handing over his sources of wealth to the Commonwealth. He admits, however, that section 96 has not been misused, that 'the Commonwealth has been just and indeed generous in appropriating money out of its Consolidated Revenue on such a scale' (page 264), and in general he stands his ground.

These considerations vindicate the view of Dr Anstey Wynes in the Preface to the third edition of his massive study: 'with the passage of time so much of the body of our constitutional law has become settled that an increasing number of decisions appear as illustrations of principle or applications of principle to particular facts and circumstances'.

The new edition of *Else-Mitchell* will then continue to provide light and food for law teachers, students and practitioners. It remains convenient in size: the new version is only about sixty pages larger, despite the two additional topics. All the writers express themselves in plain language and use sub-headings effectively as an aid to the reader. They describe the effects of the decisions without becoming too involved in the details of the judgments and they are restrained in their speculations as to the future.

Until the day when some hardy author is prepared to come forward with a student's text book on the subject, this volume of separate studies amply justifies the editor's hope that it would appeal not only to lawyers, but also to public administrators, economists and political scientists. Might one suggest that for the lawyer it would have been helpful to include a copy of the Constitution itself as an appendix?

F. K. H. MAHER*

Samples of Lawmaking, by SIR PATRICK DEVLIN (Oxford University Press, 1962), pp. 1-120. Australian price £1 9s. 9d.

It has been remarked, with perhaps a little cynicism, that one seeking the basal principles of the common law should look not to judgments in the law reports, which are mostly written *ad hoc* to settle the differences of the litigants, but rather to the great text books, the writers of which have devoted a life's work to their particular subjects. Lord Devlin certainly does not conform with the generalizations inherent in this comment. Both in his judicial opinions and in his published works he has never been unwilling to look beyond particular cases to the broader principles of law operating in particular fields.

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In *Samples of Lawmaking* Lord Devlin gathers together five lectures he has delivered on legal topics to audiences as diverse as the Norwegian Maritime Law Association and the Medical Society of London. He points out that they have in common the fact that they were delivered to audiences which had some interest in the subject matter but no profound knowledge of it. Moreover 'they are all concerned to some extent with the sources from which English Law has been and is being made and the way in which those sources have been used'. This has led Lord Devlin to add a most interesting preface in which he considers the sources of law in modern times. Here Lord Devlin discusses the slowness of development of judge-made law which he attributes in part to the hesitation of judges to lay down broad principles and their preference to advance from case to case. He illustrates this by the treatment of non-physical injury in the law of negligence and then canvasses the potentialities of malice as a basis for extensions in the law of torts. Perhaps, despite *Allen v. Flood*,[1] an opening exists for development in the tort of conspiracy, especially in relation to the acts of agents of a corporation. This leads Lord Devlin to some general observations on the doctrine of precedent by which the judiciary has accepted that is has only a limited right to make law and has in the main left lawmaking to Parliament. But Parliament is slow to act and not really interested in law reform in its more technical aspects. Lord Devlin considers that the remedy lies in law-reform committees, preferably a standing committee to keep the law tidy and plan new advances.

The first of the lectures, 'The Relation Between Commercial Law and Commercial Practice', considers what keeps commercial law in tune with the ideas of business men. Custom has been killed by the written contract but the latter is often drafted by the business man without legal advice. When unforeseen difficulties arise, the lawyer is expected to solve them. Lord Devlin illustrates this by considering the cases dealing with insurance cover for 'consequences of hostilities and warlike operations'. He quotes the aphorism of Mackinnon L.J. that lawyers had made more out of these six words than out of the whole of the rest of the dictionary. Law and commerce are kept together by such factors as the work of arbitrators and of the Commercial Court; but the law is slow in keeping up. Lord Devlin illustrates this by the law of C.I.F. contracts where tender of a certificate of insurance is insufficient unless specially provided for, although a separate policy of insurance is now uncommon. Likewise a delivery order, although common in practice, is not a sufficient substitute for a bill of lading. Here Lord Devlin makes the compressed comment: 'The delivery order is not a document of title and cannot therefore pass the property in unappropriated goods as can a bill of lading'. In relation to a bill of lading this may be a compression of the principle expressed by Atkin J. in *Groom v. Barber*:[2]

> It therefore becomes immaterial whether before the date of the tender of the documents the property in the goods was the seller's or buyer's or some third person's. The seller must be in a position to pass the property in the goods by the bill of lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender, nor need he have obtained any right to deal with the bill of lading until the moment of tender.

[1] [1898] A.C. 1. [2] [1915] 1 K.B. 316, 324.

But the notion of the property passing in unappropriated goods reads a little strangely since the tender of a bill of lading relating to certain goods would surely be itself an appropriation.

The next lecture, 'Principles of Construction of Charter-parties, Bills of Lading and Marine Policies', likewise discusses some fundamental rules of English commercial law, such as the attention given to the concluding document rather than antecedent conversations and dealings and the unwillingness of the courts to imply terms. Lord Devlin points out how a rule of construction like the *ejusdem generis* rule assorts ill with the tendency of a business man to write the things he considers most likely into a blank in a printed contract containing general words, for example 'a full and complete cargo of wheat and/or maize and/or other lawful merchandise'. The law must try to allow for the fact that business men write words into printed contracts without considering their overall legal effect. One may remark that English commercial courts have long been a popular forum in maritime law and may wonder what effects Britain's possible entry into the European Common Market may have in this area of law.

In his next lecture on 'Statutory Offences' Lord Devlin remarks that the judges have not developed specific defences in this area of law as they did in the case of common law crimes. He examines the problem of when *mens rea* is required and what is required by way of *mens rea* in particular cases. Is a careless state of mind relevant to or sufficient for *mens rea*? He appeals for more attention by academics to discovering fundamental principles in this field of law.

In 'Medicine and the Law' Lord Devlin considers the reluctance of the law to work out special rules to protect medical men, for example, in the case of treatment without consent of an unconscious patient. He attributes this to the reluctance of litigants to bring to court outrageous claims against doctors.

Finally 'The Common Law, Public Policy and the Executive' deals with the reluctance of the common law to protect the private citizen against improper action by the executive government. The courts have been anxious not to tread on executive toes and are tending to leave the field of public policy. This tendency is perhaps not so marked in Australia where a court like the High Court is accustomed to interpreting a Constitution imposing limits on the powers of otherwise sovereign legislatures. However Lord Devlin's thesis might be pointed by a contrast of the attitude of the majority of the Full Court of the Victorian Supreme Court in the recent case of Robert Peter Tait with that of the High Court. On the other hand, in the case of *Bruce v. Waldron*,[3] the Victorian Supreme Court preferred to follow *Robinson v. South Australia (No. 2)*[4] rather than *Duncan v. Cammell Laird Co. Ltd*,[5] which latter case is used by Lord Devlin as an example of judicial timidity. Lord Devlin attributes the trend to the possibility that common law principles are reaching the limits of their natural growth and the fact that Parliament is increasingly active. Since the common law has not the strength to keep the executive under proper control, Lord Devlin suggests that the remedies lie in a close Parliamentary watch on the powers of the executive and a new body of administrative law to control the way in which the executive exercises its powers.

It can be seen that every one of these lectures is full of provocative thought. Lord Devlin's style is urbane and witty and his latest book can

[3] [1963] V.R. 3. [4] [1931] A.C. 704. [5] [1942] A.C. 624.

be read with equal enjoyment and interest by both the novice law student and the experienced lawyer. The format and printing is up to the usual high standards of the Oxford University Press. Only one misprint was noticed, on page 69, line 30, where 'heals' should read 'deals'.

J. D. FELTHAM*

The International Law of the Sea, by C. JOHN COLOMBOS, 5th ed. (Longmans, Green & Co. Ltd, London, 1962), pp. i-xix, 1-836. Australian price £4 15s.

After less than three years *Colombos* has now come out in a new edition. This is the fifth edition in less than 20 years, an achievement which shows the favourable reception which this standard British text book on the Law of the Sea has gained. Its success has not been restricted to the English-speaking community, for within the last 10 years it has been translated into French, Italian, Russian, Spanish, German, Portuguese and Greek. Among the matters which the learned author has incorporated into his new edition the Geneva Conferences on the Law of the Sea deserve particular mention. Of special value also are the details of the new British fisheries agreements with Norway (1960) and Iceland (1961).

In some regard the book shows the difficulty experienced by a successful text book in a field where there has been much legal development. How much of the historical background of a rule should be preserved? If the survival of an old rule is doubtful, is it worthwhile to continue giving it detailed treatment? To what extent should a learned author deal with novel claims affecting recognized rules? For the reviewer, the learned author could reduce the number of references to state practices where one of the 1958 Geneva Law of the Sea Conventions has led to the acceptance of a new rule. Generally, the learned author's treatment of the achievements of the 1958 Conference does not appear to do full justice to them. Satisfaction over the defeat even of the British compromise formulae of a 6-mile belt of territorial waters at the Conference (page 98) does not appear to take into account the present, most doubtful position of coastal waters outside the three-mile limit.

For Australia the adoption of the Continental Shelf Convention was of course of greatest importance. The extension of the outer limit to 'where the depth of suprajacent waters admits of the exploitation of the natural resources of the said areas' may raise doubts because of its vagueness. However, in the reviewer's opinion it is a valuable attempt to forestall rapid improvements in fishing and drilling techniques. The learned author deals fully with Australian State and Commonwealth legislation on pearl fisheries and the continental shelf, and also Australia's dispute with Japan (pages 372-374). It might be added that Japan declared at the time that it would submit the dispute to the International Court of Justice. Australia then made its acceptance of the Court's jurisdiction subject to the existence of a *modus vivendi* (or, should it be '*modus piscendi*'?). The learned author refers to this step in another context (page 781), but does not indicate what finally prevented the dispute from being brought before the International Court of Justice.

Archipelagos are ably dealt with. The Ecuadorian claim to the Galapagos islands on an archipelago basis is rejected by reference to the

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