BOOK REVIEWS

Principles of Australian Administrative Law, by W. FRIEDMANN LL.D. (London), DR.JUR. (Berlin), LL.M. (Melbourne), and D. G. BENJAFIELD, LL.B. (Sydney), D.PHIL. (Oxford) 2nd ed. (The Law Book Company of Australasia Pty Ltd, Sydney, 1962), pp. i-xxiv, 1-264. Price £2 18s.

It has in recent years been a matter of embarrassment to teachers of administrative law that they felt obliged to discourage their students from relying upon the only Australian text in the subject, and that a text by so distinguished a figure as Wolfgang Friedmann. But Professor Friedmann's little book of 1950, always somewhat controversial, had in addition become too out of date to be really safe. All will welcome, then, the appearance of a new, revised and enlarged edition of the text, which has been largely the work of Professor Benjafield of Sydney.

The arrangement of the new edition is very nearly the same as that of the original, and there are still twelve chapters. It is, however, more than twice the size.

One of the most valuable portions of Friedmann's first edition was his final chapter on 'The Problem of Administrative Justice', with its classification of Australian administrative tribunals and its analysis of their powers and procedure. Such a survey appears again in the new edition, and on this occasion it is presented in the light of the (United Kingdom) Franks Committee recommendations of 1957. The authors' conclusion is that 'Australian administrative tribunals in fact measure up, in general terms, remarkably well to such standards as those suggested by the Franks Committee'.[1] Your reviewer would suggest that this final chapter is again perhaps the most valuable in the book, and should alone earn it a place on any lawyer's shelves.

Another excellent feature of the new edition is its expanded use of Australian cases, statutes, regulations, and other material. This, too, should make it a valuable book for the practitioner as well as for the academic lawyer and his students. Some may say that there is rather too much emphasis on the law of New South Wales, especially the statute law. But, in view of Professor Benjafield's role as co-author, this emphasis is understandable, and it can only be salutary if it induces lawyers in other States to search their statute books for themselves.

It is fair to say, however, that the authors sometimes show themselves a little *too* indifferent to the law of other States.

Take Victoria, for example.

The Crown in Victoria was made liable in tort by a statute of 1955, not in 1958, which is simply the date of the consolidated statute.[2] On the other hand, since that 1958 consolidation a reference to the 'Supreme Court Act, 1928' is really no longer appropriate, especially when the section referred to did not appear for the first time in that particular year, itself merely the year of a consolidation.[3]

It is, to say the least, misleading to state[4] that the Victorian Forests

[1] P. 250.

[2] The Crown Proceedings Act, 1955. Wrong dates are given at pp. 21, 76.

[3] N. 69. In the same footnote, Victoria is credited with a South Australian statute. The reference to the Local Government Act should be: Local Government Act, 1958, s. 232.

[4] P. 125.

Commission is entitled to the 'shield of the Crown', citing *Marks v. Forests Commission*,[5] and to ignore not only the doubts cast on the case in the High Court[6] but in addition the effect on the whole situation of the (Victorian) Crown Proceedings Act. Indeed, it seems inexcusable in a textbook purporting to deal with 'Australian' administrative law to make no mention at all of the important and still somewhat problematical provisions of that statute in the 'shield of the Crown' chapter. This must diminish its value to Victorian readers.

And then the statement of the argument in *Attorney-General v. Gill*[7] is wrong. It was wrong in the first edition,[8] and it is repeated without amendment.[9] Dixon A.-J. (for the Court) did *not* say, or imply, that 'public interests are not of a proprietary or quasi-proprietary character such as equity can protect'. He clearly supposed that they could be, and gave instances.[10]

Western Australians might complain at the omission of the instructive little case of *Bailey v. Conole*,[11] the only case known to this reviewer in either the United Kingdom or Australia in which a regulation made by a Governor-in-Council has been held invalid for bad faith. The decision should not be read as casting doubt on the general rule (as stated by the authors) that 'the *bona fides* of the Governor-General-in-Council or a Governor-in-Council cannot be impugned'.[12] In *Bailey v. Conole* the motive in the rule-making which the Court regarded as demonstrating bad faith was conceded by counsel. Thus the Court did not have to *inquire into* the possibility of bad faith, and it is probably the *process of inquiry* which is regarded by the courts as improper and unsuitable.[13]

In his first edition, Professor Friedmann described *Roberts v. Hopwood*[14] as 'deplorable'.[15] The epithet has disappeared, but the discussion of the case remains unsatisfactory. It is simply unfair to allow readers to imagine that because the Poplar Council's decision expressed no reasons, the House of Lords must just have taken a guess at them.[16] There was no need for the House to guess. It had a statement of the Council's reasons before it in the record, in a sworn affidavit.[17] Nor was the only vice in the Council's action the fixing of an equal wage for men and women, as the authors suggest; the House held that that wage itself was improperly high. Furthermore, there is a 'narrow ratio' of *Roberts v. Hopwood* which Lord Atkinson himself stated, and which has been accepted on a number of occasions since,[18] namely, that a public authority handling public

[5] [1936] V.L.R. 344. The Commission is wrongly described in the citation as the 'Forestry Commission'.

[6] By Fullagar J. (with whom Dixon C.J., Webb, Kitto and Taylor JJ. expressed general agreement) in *Commonwealth v. Bogle* (1953) 89 C.L.R. 229, 267.

[7] [1927] V.L.R. 22. [8] 1st ed. 76. [9] P. 187.

[10] [1927] V.L.R. 22, 29-32. [11] (1931) 34 W.A.L.R. 18. [12] P. 179.

[13] The case was cited, without apparent disapproval, by Dixon J. in *Yates v. Vegetable Seeds Committee* (1945) 72 C.L.R. 37, 84.

[14] [1925] A.C. 578. [15] 1st ed. 38.

[16] The passage referred to is ambiguous, and is at least capable of being so read; it runs: 'It is to be noted that the Council's decision expressed no reasons and that the decision of the House of Lords involves an assumption that the Council *must* have acted by reference to irrelevant considerations, even though the statute concerned was silent as to the considerations which the Council should and should not take into account' (p. 172).

[17] Quoted (for example) by Lord Buckmaster, [1925] A.C. 578, 588-589.

[18] *Attorney-General v. Tynemouth Union* [1930] 1 Ch. 616; *Attorney-General v. Smethwick Corporation* [1932] 1 Ch. 562; *Re Decision of Walker* [1944] K.B. 644;

moneys (and standing thereby in a fiduciary relationship to the public) has a legal duty to be reasonably prudent and business-like.[19] The authors give no hint of this, and do no more than quote the well-known and unfortunate (but delightful) remarks of the 81-year-old Lord Atkinson about socialism and feminism. It is true that, following this inadequate treatment of *Roberts v. Hopwood,* the authors do discuss English cases which accepted the narrow ratio, but they appear to regard it with considerable distaste. This your reviewer is unable to share. After all, the principle involved is not new to our law: an ordinary trustee can be restrained if he proposes to depart from the standard of 'a prudent owner and a prudent man of business', to use Maitland's phrase.[20] Once the public authority has spent the money, the ballot-box or any other *ex post facto*[21] procedure is just not a satisfactory remedy. Especially when there is no other way provided to challenge proposed expenditure before it is too late, why should not the courts be prepared to intervene as best they can?

The new edition repeats a mis-citation of another House of Lords decision which appeared before.[22] *Manchester Corporation v. Farnworth*[23] does *not* make a distinction between imperative and permissive authority the test for determining whether there will be liability for damage caused by the exercise of a statutory power. The significant thing about that decision is precisely that no such test was relied on, but instead the majority (Viscount Sumner and Lord Blanesburgh) asked the simple question—could the damage have been avoided by the exercise of reasonable diligence?[24]

A further error carried over from the first edition is the statement that *King Gee Clothing Co. Pty Ltd v. The Commonwealth*[25] and *Canns Pty Ltd v. The Commonwealth*[26] illustrate a rule that 'a by-law which so indistinctly or vaguely designates areas or premises or persons in relation in which it is to operate that it affords no direction to the citizen and is incapable of application by the court may be held not to be an exercise of the powers conferred by Parliament, and therefore to be *ultra vires*'.[27] This is just not the case. These important decisions turned on a finding that the particular parent statute there in question itself demanded a measure of precision in the regulations made pursuant to it, and in the Court's view this requirement had not been met. In neither case was it held that there was any general rule such as the authors describe.

One must also question the examination of the judgments in the leading case of *Yates v. Vegetable Seeds Committee.*[28] The authors state that the Court held that 'an investigation into motives will be made by the court only in the case of bodies which are not responsible to the electorate. . . . This type of investigation will not be undertaken by the court in the case of representative bodies'.[29] But all that Latham C.J. says on this point is that a rule which would have protected the Vegetable Seeds Committee from inquiry 'would have far-reaching consequences in protecting against challenge the abuse of power by administrative bodies and officials who

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Prescott v. Birmingham Corporation [1955] Ch. 210; *Taylor v. Munrow* [1960] 1 W.L.R. 1151. The Court in the last two cases actually applied this ratio.

[19] This statement of the rule is based upon the language of the Court of Appeal in *Prescott v. Birmingham Corporation* [1955] Ch. 210, 235. Lord Atkinson's statement is at [1925] A.C. 578, 595-596. [20] *Equity* (Brunyate edition, 1947), 93.

[21] Which might here be roughly translated—'after the horse has bolted'.

[22] 1st ed. 67; 2nd ed. 137. [23] [1930] A.C. 171.

[24] *Ibid.* 201, 202 *per* Viscount Sumner. [25] (1945) 71 C.L.R. 184.

[26] (1945) 71 C.L.R. 210. [27] P. 68. [28] (1945) 72 C.L.R. 37. [29] P. 67.

are not subject to those political sanctions which are relied upon to safeguard the citizen against abuse of power by Parliament, Ministers, or municipal councils'.[30] Rich J. has nothing to say on the matter. Starke J. would apparently allow investigation into the motives of a representative body,[31] and so too, quite plainly, would Dixon J.[32]

There are several points of a more general character that have caused this reviewer some concern.

It seems somewhat unsatisfactory to bury discussion on the important question of the limits of an authority's executive discretion in the section on 'Mandamus' under the heading 'Grounds upon which Mandamus may be Awarded'.[33] Of course, it must go somewhere, but the student will be gravely mistaken if he is led to imagine that the question can only be raised in mandamus proceedings. Further, the discussion itself leaves something to be desired. It may be right to argue that the basic principle is that of *'ultra vires'*, but some of the 'sub-principles' seem sufficiently clear and useful to be worth stating and examining. For example, there is the 'sub-principle' that if the exercise of a statutory power is conditioned on purpose, and an authority acts primarily (and honestly) to achieve an authorized goal, its action will be valid despite the fact that incidentally some unauthorized goal is also achieved;[34] whereas if its primary purpose can be shown to be an unauthorized one, then its action will be invalid.[35] Again, the question of 'bad faith', 'dishonesty', in administrative action would seem to deserve more than a passing mention in a footnote.[36] There does not seem to be a reference anywhere in the book to the important judgment of Isaacs J. on the general question of the *bona fide* exercise of statutory powers in *Jones v. Metropolitan Meat Industry Board.*[37]

Then there is the question of the authors' arrangement of their material. Chapter VII is entitled 'The Crown'. Nevertheless, in the subdivision headed 'Proceedings against the Crown', the authors, in fact, deal generally with the question of the liability in contract and tort of all public authorities whether part of the Crown or not.[38] Thus when one comes to Chapter IX, 'Legal Liability of Public Authorities', one is to be told that 'the liability of public authorities in contract and tort has already been covered generally in dealing with proceedings against the Crown'.[39] Chapter VIII is entitled 'The Legal Position of Public Authorities Other than the Crown'. It is, in fact, solely concerned with the question of 'what is the Crown?' All this is a heritage from the first edition. It seems a strange way to order the subject, and it is hard to see why it should have been thought worth perpetuating.

There are further criticisms one might make, but this review is already long enough.

[30] (1945) 72 C.L.R. 37, 67. [31] *Ibid.* 75. [32] *Ibid.* 82-84.

[33] The section on Mandamus begins at p. 166.

[34] *Westminster Corporation v. L. & N.W. Railway* [1905] A.C. 426.

[35] *Municipal Council of Sydney v. Campbell* [1925] A.C. 338; *Werribee Shire Council v. Kerr* (1928) 42 C.L.R. 1.

[36] At p. 178. The promise of n. 31, p. 138, seems hardly fulfilled. See de Smith, *Judicial Review of Administrative Action* (1959) 197-201; and note the examination of Canadian cases by Dixon J. in *Yates v. Vegetable Seeds Committee* (1945) 72 C.L.R. 37, 83-84.

[37] (1925) 37 C.L.R. 252. His Honour's distinctions were accepted and applied by Murray C.J. in *Ex parte Hill* [1926] S.A.S.R. 326 and by Draper and Dwyer JJ. in *Bailey v. Conole* (1931) 34 W.A.L.R. 18; both cases which have escaped the authors' attention. [38] Notice the case citations at 94-95. [39] P. 130.

The upshot of it all, then, is that one still cannot recommend the work unreservedly. The earlier embarrassment is not wholly dispelled. But no textbook is without its faults, and no author can hope to please everybody. It remains the reviewer's opinion that the book is a welcome addition to the current library of Australian law books. And he will look forward to the 'considerably longer' (and considerably rewritten?) volume which the authors promise in their Preface.

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Principles of the Law of Damages, by HARRY STREET, LL.M., PH.D., (Sweet & Maxwell Limited, London, 1962). Pp. i-xxii, 1-272. Australian price, £4 8s.

Many laymen who have moved from the view that all law is criminal law still entertain the notion that all civil law is concerned with the assessment of damages. Of course they are wrong, but to the lay question 'How important is that body of rules of law which is applicable to questions of damages', every lawyer must answer 'Extremely important'. One need only sit in those courts in Melbourne where the myriads of motor accident cases are tried to notice the large numbers of such cases wherein there is no dispute about the liability of the defendant, but lengthy and complex litigation about the damages he must pay. It is unfortunate that the rules which the court should apply, or instruct the jury to apply, to compute the amount which the successful plaintiff is to receive have not often been made the subject of serious academic study in England or Australia. Professor Street's new book may fairly be regarded as a first-rate addition to the existing collection. This work eschews any consideration of problems of causation; and is devoted solely to those questions which arise when it is decided that the defendant is liable to compensate for the various sorts of injury or damage alleged by the plaintiff and that these fall within the ambit of the particular cause of action in tort or contract (p. 2).

This is a book of principles, which the author believes underlie the plethora of reported and unreported decisions on damages, and as such it is not a mound of all the cases and the latest cases on every aspect of damages. It contains other treasures which makes it so much more valuable than a book which collects every decision; *Street on Damages* has closely-reasoned argument, exposition of what are considered to be fundamental principles; and this coupled with polite, lucid but often devastating criticism of judicial, professional and academic views on aspects of the law of damages. The author is properly not content to criticize without constructing; throughout the book there are his own suggestions for new rules, new modes of assessment, new solutions for old (and sometimes unrealized and unappreciated) problems.

In the first chapter, Professor Street postulates the general overriding principle that the aim of an award of damages is to put the plaintiff in that position he would have occupied had the defendant's wrong not occurred—the principle of *restitutio in integrum.* He then launches a broadside at the current English judicial view which goes to two matters: firstly, that awards for non-pecuniary losses in personal injury cases, (that is, pain and suffering) must be based on previous awards in similar cases;

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