BOOK REVIEWS

The Law of Partnership in Australia and New Zealand, 1963, by P. F. P. HIGGINS (The Law Book Company of Australasia Pty Ltd), pp. i-lvi, pp. 1-362. Price: £3 16s.

This book achieves two valuable objects. In the first place it succeeds in disproving a popular theory, currently held by many academic and practising lawyers, that the days of partnership trading are numbered and that the law of partnership is slowly becoming a moribund and obsolete branch of our legal system. This theory asserts that it is only a matter of time until the law of partnership is completely superseded by the more vigorous and progressive company law. The author of this book admits that there is much to be said in support of these assertions. The spectacular rise of limited liability companies with their easily attainable status of incorporation since the middle of the nineteenth century, the contemporaneous denial of similar limited liability to persons trading as partners and the imposition of an arbitrary restriction on the number of members in partnerships are only some of the many factors which have seriously curtailed the further expansion of the law of partnership. After these events, and particularly since the enactment of codifying partnership legislation in the 1890's followed by a marked reduction of judicial authorities, the law of partnership has remained virtually static whilst its formidable rival, the company law, has developed with considerable force until, today, it has become the principal branch of law dealing with the regulation of business associations. But as the author pertinently points out, the time for final burial of the law of partnership has not yet arrived. The method of partnership trading is still firmly established in our commercial practice and is still widely used by small businesses and many professions. The author also mentions that whilst the basic concepts of partnership law have not changed during the last one hundred years considerable development has taken place on its periphery with such other subjects as taxation, bankruptcy and the law of procedure. For some time now the law of partnership has needed a thorough re-examination in the light of these developments. Unfortunately, all earlier works on the law of partnership have ignored the existence of such developments and have confined themselves to a treatment of this subject in its nineteenth century form although much of what they discuss has been effectively settled by the partnership legislation of the 1890's. It gives the reviewer considerable pleasure to note that such re-examination is now finally achieved in a highly competent and informative manner by the author of this book.

The second achievement of this book is that, for the first time, there is an Australian work on the law of partnership which relies for its authorities predominantly on Australian judicial decisions. The collection and classification of such decisions must be acknowledged as a major contribution to the study of Australian law.

The book is divided into three parts. The first part commences with an interesting discussion of the historical development of partnership law in England and Australia. In the course of this discussion the author asserts (p. 4, footnote 5) that the law of mortmain has no appli-

cation in Australia. It is suggested that with the exception of Victoria, where the list of applicable pre-settlement English statutes is fixed by the Imperial Acts Application Act 1921, this matter is by no means settled. The decision referred to by the author in support of his assertion[1] does not decide this point. Furthermore, in dealing with the evolution of limited liability partnerships the author does not mention legislation enacted in New South Wales, South Australia and Victoria in the early 1850's authorizing the formation of partnerships with limited liability.[2] But the omission is understandable. This legislation was repealed soon thereafter[3] and then disappeared into obscurity.

The first part then continues with a discussion of the main characteristics of partnership agreements. These are compared with companies, and their respective advantages are evaluated. The author then discusses at some length matters pertaining to statutory interpretation of partnership legislation. This is followed by a chapter on formation and formalities of partnership agreements, their legality, and the capacity of different classes of juridical persons to enter into partnership agreements and to act as partners. These are all matters which are not regulated by partnership legislation, and it is very convenient that they are assembled and discussed in one place.

The second part of the book, which represents its major portion, is concerned with a detailed analysis of partnership legislation. The author adopts here the customary pattern of earlier works on this subject and deals with each statutory provision in the sequence in which it appears in the majority of Australian Partnership Acts. The provisions are set out in bold print, and are followed by the author's comments and explanations.

One need not say much more about this part of the book except to compliment the author on the admirable quality of the work he has done here. His comments and explanations are scholarly, exhaustive and highly instructive.

But the most interesting and useful section of the book is Part III, which for the first time examines the topics of partnership taxation, partnership bankruptcy and procedure in partnership actions in the context of the general partnership law. The book concludes with a chapter on the recently enacted uniform Business Names Acts.

It cannot be said that this book is entirely free of omissions. But, so far as the reviewer can detect, these are few and of minor importance. In the course of dealing with the dissolution of partnerships, for instance, the author could have mentioned the alternative method of dissolution pursuant to sections 314-318 of the uniform Australian Companies Acts. The comments on the statutory provision prescribing that, in the absence of an agreement to the contrary, ordinary matters of partnerships are to be decided by a majority of partners[4] could have been followed up by a discussion of such important practical matters as calling of meetings, quorums, proxies and voting. The discussion of partnership taxation could have been augmented by references to

[1] *Mayor of Canterbury v. Wyburn* [1895] A.C. 89.
[2] N.S.W.: 17 Vic. No. 9 (1853), S.A.: 17 Vic. No. 20 (1853), and Vic.: 17 Vic. No. 5 (1854).
[3] N.S.W.: 37 Vic. No. 19 (1874), S.A.: 30 Vic. No. 4 (1866), and Vic.: 27 Vic. No. 190 (1864).
[4] *E.g.* Partnership Act (1958) (Vic.) s. 28 (8).

relevant provisions of Commonwealth and State death duty legislation. Finally, the book does not mention that in some States partnership agreements require stamping.

The following misprints are noted by the reviewer: 'brought' instead of 'bought' (second-last paragraph on page 93), 'ths' instead of 'the' (last paragraph on page 102), 'orginally' instead of 'originally' (second paragraph on page 134, and 'Latham J.' instead of 'Latham C.J.' (second paragraph on page 283). It should also be noted that since the publication of this book the Australian Capital Territory has introduced its own partnership legislation which appears now in the Partnership Ordinance 1963.

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Les Forces Creatrices du Droit by GEORGES RIPERT. (Librairie Generale de Droit et de Jurisprudence—R. Pichon et R. Durand—Auzias, Paris, 1955. pp. 1-431.

The keynote of this book is a phrase which the author quotes from Ihering: 'Law is formed amidst struggles, but peace is the aim it pursues.' Professor Ripert, after 40 years of teaching law, wants to reassure his colleagues about the 'value of the law they are teaching or applying'. These forty years have seen tremendous changes in politics and lawmaking in France—the combat between those who want to keep too much of the past and those who would destroy all of it. We in the common law systems have discussed at length the dilemma that Pound proposed long ago: how law can change and yet stand still. It is interesting to see the same sort of anxious debate in a country where 'lawmaking' is much more a process of legislation, the work of politicians. The finished statute represents the calm after the storm. The innovating legislators hand over the product to the lawyers, who are by instinct and training conservative. So existing law tends to be static: jurists, practitioners and judges are keenly aware of the value of stability. Professor Ripert frequently recalls the work of the great Gény, who expounded the role of the lawyers' techniques in balancing change and tradition. But today the forces making for change are dominant: law, he believes, has been too much recently the creature of Power.

Professor Ripert who, like most French jurists, has been well trained in political science, discusses at length the practical elements which help to 'create law'. They are moral and religious influences, the struggle about material property, and the rival economic demands of social groups: employers versus workers, city folk versus farmers, administrative bodies versus private citizens. All look to the law to give them justice. Therefore the legislator, even when endowed with Power, must respect 'juridical principles' as well as 'commonsense techniques'. In this pluralist society he must not press his legal authority too far: some of his laws must necessarily represent compromises.

The author sees other dangers in this incessant law-making to meet everybody's claims. The State organizes everything, protects the citizen against everything—but at the price of total submission (p. 414). It invents its own 'morality', so that the worst sin becomes disobedience of a positive rule (p. 179); and the test of good actions becomes, not the

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