former Dean of the Yale Law School, on "State Law in the Federal Courts". Dean Clark, however, reverses the order of surprises from that of our outing with Cardozo. Setting out with Clark on what promised to be a dull and technical expedition to explore the impact of *Erie Railroad* v. *Tompkins*[2] on *Swift* v. *Tyson*[3], we find ourselves, long before the homeward trek, wandering amid lofty vistas commanding the nature and functions of law, the judicial role in tempering law with justice, and the relation of judicial creativeness to the *Volksgeist* and to the law which springs from the *Volksgeist.* Dean Clark was apparently just finishing this piece of writing as World War II drew to its close, and he was perhaps unnecessarily moved to "Erieandtompkinate" even the meaning of atomic weapons for the more perfect union planned by his forefathers. But he has shown us so much more than we ever had a right to expect, that we can look even on that as manifesting qualities of the heart without reflecting on those of the mind.

For scholar, student and busy practitioner alike, this volume makes available in convenient form some essays of the modern period which, though they are already approaching the stature of classics, have up to now lain scattered in back volumes of reviews, introductions to larger volumes, or proceedings of bar associations, and the like. To have on hand the full text of Cardozo's main theses on "Law and Literature" and the "Nature of the Judicial Process", of Holmes' "Path of the Law", and of Maitland's "Prologue to a History of English Law", would itself warrant the moderate cost (as prices go) of this volume. But the purchaser gets substantial bonuses as well. The British lawyer not yet familiar with the judgments or writings of Judge Learned Hand will certainly never again pass them by after reading his "Contributions of an Independent Judiciary to Civilisation". And while the English lawyer might not feel a great deal of interest in the problem of the "State Law in Federal Courts" or in the reality of that "brooding omnipresence in the sky" which Holmes was concerned to debunk, the careful Australian or Canadian lawyer will leave the reading of Dean Clark's essay on that subject a wiser (and certainly an unsurer) man.

There is, of course, room for wide divergencies of opinion as to what should or should not have been included in a volume of the present design. British and American lawyers respectively will not take with equal seriousness the respective theses of Goodhart's "*Ratio Decidendi* of a Case", of Radin's "Permanent Problems of the Law" or, for that matter, of Charles P. Curtis' "Better Theory of Legal Interpretation". Yet when all national as well as personal divergencies of interest have been discounted, the volume retains so full an amplitude of ideas, and so warm an inspiration about the tasks and techniques of lawyers, as to place it firmly and well-thumbed on the lawyer's shelves wherever the common law is practised, learned and loved.

JULIUS STONE*

Criminal Law: The General Part, by Glanville L. Williams, LL.D. (Cantab.), Quain Professor of Jurisprudence in the University of London; of the Middle Temple, Barrister-at-Law. London, Stevens & Sons Limited, 1953. xliv and 719 pp. Index. (£4/8/0 in Australia.)

The purpose of this work, which is the fourth major contribution to the learning of the common law emanating from Professor Williams' pen, is "to search out the general principles of the criminal law, that is to say those principles that apply to more than one crime." Like his other contributions, the book displays on every page evidence of the author's great industry, tireless research, and ingenuity of reasoning. And as with his other works, the author

[2] (1937) 304 U.S. 64. [3] (1842) 16 Pet. 1.

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has chosen to discuss a branch of the law which is sadly in need of clarification.

The student of criminal law is faced from the outset with difficulties which do not arise for students of other branches of the common law. The absence, until a very late stage of development, of an adequate system of appeals in criminal cases, and also of an adequate system of reporting decisions on points of law arising in criminal trials, has meant that, to a far greater extent than in other branches of the law, the student has been forced to rely almost entirely on textbook discussions. He was of course compensated by being able to consult the writings of such masters as Coke, Hale, Hawkins, Foster, and Blackstone. The more modern texts, however, such as those of Archbold and Russell, have concentrated on discussing details of specific crimes rather than the general principles of the criminal law. And even the classic texts give only a sketch of these general principles. There has accordingly been great need for a work such as this, in which these principles are garnered from a careful study of cases, dealing with specific crimes, which have required an application of some one or more of them.

At this point, however, a further problem arises. The English Court of Criminal Appeal, as is well known, has no power to order a new trial. Its predecessor, the Court for Crown Cases Reserved, was similarly hampered in its work. The effect of this is apparent in many decisions. The Court, faced with a technical error of some kind at the trial, but realising, from a study of the evidence, that the appellant was undoubtedly guilty of the offence charged, has often strained the law in order to hold that no error occurred. The Criminal Appeal Reports are replete with illustrations of the maxim that hard cases make bad law. One result of this is that criminal law as practised in the trial courts is often very different from the criminal law preached in the Court of Criminal Appeal. Perhaps the best illustration of this is the defence of insanity. The *McNaghten* rules have come in for a great deal of criticism from both the legal and the medical professions. The criticism, however, usually relates to the exegesis of the rules in the Court of Criminal Appeal. In trial courts they apparently work fairly satisfactorily; at all events, that opinion has been recently expressed by an eminent English psychiatrist (Dr. Henry Yellowlees).

These factors make the task of the writer on criminal law a hard one. Is he to study the working of the criminal law in the trial courts? If so, from what source is he to gather his material? If he concentrates on appellate decisions, what is he to say of the many decisions that appear to strain the law? Can he say of a decision which has stood unreversed for a fair period of time that it is erroneous? Does it not in fact create law, however wrong it may appear to be? Professor Williams refers to this problem[1] but he does not state his own answer. It may, however, be inferred from his trenchant criticisms of a number of cases that he does not regard an authoritative precedent as sacrosanct.

Australian Courts of Criminal Appeal are able to order a new trial, and are accordingly less tempted than their English counterpart to strain the law. The High Court, moreover, has only a limited appellate jurisdiction in criminal cases. And all Australian appellate courts are, I believe, much more ready to reverse their judgments than are the English courts—probably because they are not oppressed by the weight of business which they are called upon to dispatch, to anything like the same extent as the English courts. Consequently the contribution made to criminal jurisprudence by Australian courts is, though not as large as that of English courts, no less deserving of respect.

This brings me to my first criticism of the book. Australian readers will be somewhat troubled by the scant attention paid by the author to Australian decisions. It is true that the author cites forty-six Australian cases, although against this one must put one hundred and thirty-nine American decisions. But the Australian citations are usually no more than bare references. I would

[1] At 37.

have thought, for example, that a discussion of *mens rea* in relation to bigamy would be enhanced by an exposition of the High Court judgments in *Thomas.*[2] But the author merely tells us that in that case *Wheat*[3] was dissented from. Again, in the discussion of strict responsibility there is no reference to the analysis made by Dixon J. in *Proudman* v. *Dayman.*[4] It is, of course, unreasonable to expect a writer to be exhaustive in his case citations, except where he sets out to prepare a text on the American pattern, extending through several volumes. And I certainly would not criticise the author for failing to refer to cases in the State courts of this country. But the criminal cases which reach the High Court are comparatively few in number, and they almost always receive the most careful consideration. I feel, therefore, that they should have been given greater prominence, it having been the author's decision to refer to any Australian cases at all. In fairness, however, I must add that my colleague Mr. A. L. Turner, who recently reviewed the book[5] in (1955) 7 *Res Judicatae* 125-27, considers that the author's references to Australia afford matter for congratulation rather than criticism. His view is no doubt prompted by the fact that until recently it was only on rare occasions that an English writer cited Australian cases.

My second criticism is that the author, though ingenious in propounding problems and test cases, is at times so unpractical as to be irritating. I instance the discussion[6] entitled "mistake as to divine command"; the observation[7] that a man who pushes another off a plank in the sea is a trespasser; and the raising[8] of the question whether, if one has been chosen by lot to take one's chance in the sea rather than in a lifeboat after a shipwreck, one would be under a duty not to resist. The author himself apologises, in effect, for mentioning the latter two points; then why raise them at all? In my view they merely mar a work the tone of which is, for the most part, extremely practical.

Turning to the substance of the book, I found Chapters two and three, dealing with intention, recklessness, and negligence, the least satisfactory. The author's view is that it is usually necessary to prove either intention or recklessness on the part of the accused. He notes that other writers, e.g. Stephen, have taken a different view, though he does not give us a detailed exposition of his reasons for disagreeing with them. Intention he defines as "a state of mind consisting of desire that certain consequences shall follow from a party's physical act or omission". There is respectable authority for this way of defining intention (e.g., Markby, Salmond). I believe, however, that it is misleading to stress the desire for certain consequences as the main element in intention. For example, a soldier in a firing-squad may or may not desire the victim to die (indeed, the alleged practice of issuing one blank round among the ammunition suggests that he probably does not); but he certainly intends his death when he fires his rifle. Surely the meaning of "intention to kill" in a situation such as this is "will to perform an act, coupled with a belief that certain consequences will follow from its performance". The author is not unaware of this problem, for he says that where a consequence is foreseen as substantially certain, but not desired, it is "deemed to be intended". But why "deemed to be"? If the desire for consequences is not a necessary constituent of intention, why bring it in at all? It is, I submit, harmful to define intention as involving desire, because sooner or later one is forced to deal with cases in which there is clearly an intention without any desire for the consequences. We then get led into the bog of "constructive intention" or "deemed intention"; and from there it is only a short step to the so-called presumption that a man intends the natural consequences of his acts (a proposition which the author very properly denounces).

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[2] (1937) 59 C.L.R. 279.
[3] (1921) 2 K.B. 119.
[4] (1941) 67 C.L.R. 536.
[5] See (1955) 7 *Res Judicatae* 125-27.
[6] At 148.
[7] At 578.
[8] At 586.

There are similar difficulties with the author's treatment of recklessness. This, he says, is distinguished from intention in that the consequences of one's act are not desired, but are foreseen as possible. He stresses that the enquiry is into the actor's mental state; but if so, it is difficult to follow his proposition that recklessness presupposes a duty to take care. There would here appear to be some confusion between a subjective and an objective use of the term, although the author is at pains to warn readers against the risk of any such confusion. My main objection to the author's definition, however, is that neither the judges nor the man in the street use the term "recklessness" in the author's sense. They use it to indicate a very high degree of carelessness. If this is true, the definition can only lead to confusion when the cases come to be discussed.

The chapters which deal with these matters occupy some seventy out of the first hundred pages of the book. Thereafter the author deals with ignorance of fact and of law, insanity, drunkenness, duress, principals and accessories, strict and vicarious liability, and many other topics bearing on criminal responsibility. The authorities are marshalled, and the arguments set out, in a way that commands admiration. Almost every problem which may arise in practice is adverted to and carefully analysed. I know of no other book in which these matters are assembled and discussed with anything approaching the care which they receive at Professor Williams' hands.

This is a pioneer work in one of the more obscure areas of the common law. It has its faults—a book of this kind could hardly be beyond criticism. But no one who is interested in criminal law can read it without deriving from it both pleasure and profit. The practitioner in the criminal courts cannot afford to be without it. The author in his preface announces that he hopes to follow it later with a companion volume on specific crimes. The reader cannot but hope that the appearance of that volume will not be long delayed.

PETER BRETT*

Voelkerrecht, by Alfred Verdross. Vienna, Springer-Verlag. Third Revised and Enlarged Edition 1955. xx and 546 pp. with index.

The second edition of Verdross' *Voelkerrecht* appeared as recently as 1950, and was (as might have been expected) virtually a new book in relation to the first edition of 1937. The distinguished Professor of the University of Vienna has long been a leader of its school of juristic thought, and his standing throughout the world makes the appearance of any work from his pen an important event, especially one which brings up to date the results of Professor Verdross' thirty years of fruitful teaching, study and thought.[1]

This new edition is organised, like the second, in three main parts: Foundations of Public International Law (pp. 1-83), General International Law (pp. 84-424), and Law of the Organised Community of States (pp. 425-530), the middle section embracing the traditional law of peace, war and neutrality. The new edition varies or adds to the author's earlier treatment on numerous points. Discussion of the foundations of international law has been extended especially in relation to "the basic norm" (pp. 18 ff.), the notion of "inter-

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[1] For a list of Professor Verdross' principal publications (more than fifty items) see (1953) 83 *Hague Recueil* 3-5.