Denning L.J. in *Bater v. Bater*[23] of correlating the standard of proof of a fact with the gravity of the consequences which flow from such proof, conclude that since it is agreed on all hands that the standard of proof in matrimonial causes is a high one the continued refusal of the Judges of the High Court to accept in terms the equation of this standard to the criminal standard is not of great importance.

As a whole these essays invite two generalisations. The first is that bad history makes bad law: in several different contexts[24] the authors show how the law of evidence has been marred in its development by the amount of bad history which has been written into judgments and perpetuated by the doctrine of *stare decisis*. The second is that as our law develops the fewer become the restraints on the admission of logically relevant evidence: perhaps this is not surprising with the gradual disappearance of the civil jury to guard against the frailties of which much of the old law excluding similar fact evidence, opinion evidence, evidence of criminal convictions and the like was evolved. Although in the nature of things they can never coincide, the scientific and the legal methods of proof seem to be separated by a gap which is steadily narrowing.

PHILIP JEFFREY*

The Civil Law System, Cases and Materials by A. T. von Mehren. New York: Prentice-Hall, 1957. xxii + 922 pp. (£4/19/0 in Australia.)

The title of this book is misleading; it would be better described as "Five Standard Topics of Comparative Law in Search of a Teacher." In fact the book does not give an account of a system at all but gives very ample materials for the examination of certain well-known segments of foreign (in this case French and German) law commonly investigated on a comparative basis. These segments include, of course, the differences arising from the historical backgrounds of the common and civil law systems, the way in which the separation of powers has been affected by the growth of administrative law, the changes imposed upon theories of tortious liability by the development of the automobile and of machinery generally, the concept of a contractual obligation and the function of judicial precedent. These five topics form the main sections of the book and it must be said at the outset that they are not all given equal treatment; indeed the section on contract (the most extensive and at times the most wearisome of the book) covers 355 pages, some four-ninths of the whole. By contrast, the last section on judicial precedent, of 33 pages, is little more than a merger of two papers originally published in 1953 and 1954 and previously combined in a condensed form in 1956.[1] Of the three remaining sections, there can be no doubt that the most stimulating is that on Torts (123 pages), of which the greater part is concerned with the effects of the industrial revolution. Here the author shows very clearly how the French courts juggled skilfully with Article 1384 of the Civil Code so as to produce an alleviation from the burden of proof, which would normally lie on the injured plaintiff, in cases where the defendant had under his care some machinery or an automobile.

Yet even here, even in connection with this most informative section, one may well query the advantages to be gained from a heavy accumulation of materials. There can be no doubt that the average student will not be certain how far he can give credence to foreign case law in preference to the juristic writing or *vice versa*, and it is submitted that the author could have more

[23] *Supra* n.17.

[24] E.g., pp. 3, 43, 159.

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[1] (1952-53) 22 *Revista Juridica de la Univ. de Puerto Rico* 235; (1954) 1 *Festschrift Fur E. Rabel* 67; (1956) 5 *Am. J. Comp. Law* 197.

usefully made a textbook by interweaving a useful comentary (as he has in fact done by "notes" on many other pages) and thus, by linking his materials together and by indicating how far some of them are superior to or more final than others, he could have assisted the reader without entertaining the fear of imposing upon him.[2] As matters stand some parts of the book are composed of long extracts from standard or easily accessible works, others are composed of staccato fragments of cases and comments the relative importance of which is by no means clear. A good example of the first tendency is in that part of the first section of the book dealing with the structure of the Civil Code where it is clear that Lawson's *A Common Lawyer Looks at the Civil Law*,[3] the Foreign Office's *Manual of German Law*[4], and three review articles[5], are quite adequate to cover the ground; pages 260-277 are entirely drawn from two well-known publications by Hamson[6].

Another point which will strike many readers as being unusual is the use made of translations. Although it has been said elsewhere "one cannot hope to study modern law comparatively without some knowledge of French"[7], it is obvious that when dealing with materials of the size of this book translation must be the order of the day. Yet, by contrast, the titles of the many books from which citations are taken, books both in French and German, are not translated at all, with the result that the student must go to a dictionary, find out what type of book and the name of the book from which the quotations are taken. It may be suggested that the effect of this is to spoil the force of the quotations because the reader will not immediately realise from what book they are taken nor appreciate the type of material with which it is their author is dealing. A more important, though a more curious error, occurs on page 577 where there is a citation from the Code of Justinian.[10] Not only is the translation of the title of the quotation wrong in so far as it says "a dowry without consideration" whereas is should be "a dowry promised in an informal way", but also the date of the extract is quite incorrect. For it is stated to have been enacted on the Kalends of March, whereas the true date is ten days earlier, and the date 428 is put in at the end as though part of the original: an obvious error because the Christian method of dating had not been invented.

Leaving aside these obvious defects, however, we may say that for the first time the good teacher of comparative law will have an extremely useful textbook upon which to base his conclusions. He will have to bear in mind that his students will need guidance upon the quality and worth of these extracts, but at least he will be able to point to the actual words of the Code or the actual decisions of the Courts and know that they can be accessible to all. From the student's point of view perhaps one of the first and most lasting impressions will be the extreme dullness and tediousness of the French law cases. He may even be able to compare them, to the advantage of the latter, with the reports of his own courts which he commonly has to read. Particularly in the cases in

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[2] One may compare F. H. Lawson's *Negligence in the Civil Law* (1950) from which a number of extracts are taken in the present work. Indeed 40 pages of Lawson's introduction (27-65) could be well recommended to students as a key to the 100 much larger pages of the present work. Furthermore Lawson's book has a most valuable note on how a student should treat *Jurisprudence* and *Doctrine*.

[3] (1953). [4] H.M.S.O. 1950 and 1952.

[5] (1950) 10 *Louisiana L.R.* 107, 265; (1955) 16 *id.* 1; (1955) 4 *Am. J. Comp. Law* 485.

[6] (1952) 69 *L.Q.R.* 60; *Executive Discretion and Judicial Control* (1954).

[7] F. H. Lawson, *op. cit. supra*, n. 2, Preface. [8] *Elements of Roman Law.*

[9] Other matters of minor importance are the translation "Thesis Grenoble" (for "*These Grenoble*") on p. 621, and the rather unnecessary use of *sic* on p. 53 where it is immediately obvious that a minor printing error has been made in the original. Again we may notice that on p. 498 the reference to s. 17 of the Statute of Frauds is, of course, quite wrong. For some strange reason the translations used of Roman Law are drawn from Lee's elementary textbook. Yet even here consistency is not maintained for, on pp. 566-571, the third edition of 1952 is used and from then on the fourth edition of 1956. Here one can feel a certain untidiness in the revision of the book.

[10] C. 5. 11. 6. (A.D. 428).

the first section of the book on administrative law and separation of powers, where no facts are given in the decision, he will find that the French method of clause following upon clause without any attempt to set out an ordinary narrative, is extremely wearisome to read and not always easy to understand. Another impression which will, of course, not strike the American reader is the jargon which the author has found necessary to use to title his various subdivisions. One would have preferred simpler titles than "the screening of contractual obligations for actual or potential unfairness", "whether a contracting party can divorce the legal effects of an obligation due him from the factual and motivational contingencies on which it is based and from collateral agreements"[11]. But it must be remembered, in fairness, that in cases like these the author is dealing with topics which are rarely present to the minds of English lawyers.

J. A. ILIFFE *

[11] Pp. 514 and 553.

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[1] See generally Note, *supra* pp. 602-610.

LETTER TO THE EDITOR

Dear Sir,

In a note on the Matrimonial Causes Act 1945-1955 in the *Sydney Law Review* of January 1957, Mr. Howard considers the extent to which divorces granted under Part IIIA of the Act will be recognised in other countries of the British Commonwealth. Applying *Travers* v. *Holley*[1] and *Dunne* v. *Saban (formerly Dunne)* he concludes that as far as New Zealand is concerned, divorces granted under Part IIIA will be recognised only if the wife, in addition to the three years' residence within the jurisdiction required by the Australian legislation, intends to live there permanently and is living apart from her husband.

I would point out that in New Zealand the common law as to the recognition of overseas divorces was replaced in 1953 by a statutory code which gets right away from the doctrine of reciprocity as expounded in *Travers* v. *Holley*. Section 12A of the Divorce and Matrimonial Causes Act 1928 as inserted by section 10 of the Divorce and Matrimonial Causes Amendment Act 1953 provides that any overseas decree of divorce is to be recognised as valid if the Court making it exercises jurisdiction on the basis of the domicile of either party in the country concerned or on the basis of the wife's residence in that country for a continuous period of not less than 2 years. The section goes on to enact the effect of the decision in *Armitage* v. *Attorney-General*.

Considered as a code, 12A is admittedly not as wide as it perhaps might be. For instance divorces granted on the basis of the residence of the husband are not recognised, although this basis of judisdiction appears to exist in Western Australia, nor are divorces granted in European countries on the basis of nationality recognised. It is to be hoped that Parliament will cure these defects in the not too distant future.

It does seem clear, however, that any divorce granted by an Australian court pursuant to Part IIIA of the Matrimonial Causes Act 1945-1955 will be recognised in New Zealand, notwithstanding the fact that domicile is still the sole basis of divorce jurisdiction in New Zealand.

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[1] Also n. 1 from p. 634.