BOOK REVIEWS

Textbook of Criminal Law, by Glanville Williams, London, Stevens, 1978, xi + 973 pp. $43.00 (cloth), $29.50 (limp.).

Professor Rupert Cross says that Glanville Williams is "without doubt the greatest criminal lawyer since Stephen".[1] This tribute is no reflection on Stephen. In *Vallance*[2] Sir Owen Dixon remarked that the introductory part of the Tasmanian derivation of Stephen's Code contained "wide abstract statements of principle about criminal responsibility framed rather to satisfy the analytical conscience of an Austinian jurist than to tell a judge at a criminal trial what he ought to do".[3]

Dr. Williams sets out to expound principles but he also tells students (and the practitioners of the law) how the judge at a criminal trial should direct a jury. In the Preface he writes: "My view is that a text book should not leave major problems unexplored; and the present state of the criminal law is such that major problems abound. Certain of them are here discussed in greater depth than in some other works, even works intended for practitioners".

Dr. Williams is not boastful in observing the "greater depth" of much of his exegesis. His sure grasp of principle, imaginative application, lucidity of style and concern for the social function of the criminal law will assist the solution of many practical problems for busy practitioners and circuit judges who have not the time nor the facilities for extensive reading. As to imaginative application of principle, see, for example, the reasoning (pp. 143, 144) to support the proposition: ". . . an unintentional act followed by an intentional omission to rectify the act can be regarded in toto as an intentional act".

Is is regrettable that, at least temporarily, the criminal law in England is diverging in many respects from that in New South Wales and Australia generally, with a consequent reduction in the utility of this textbook. It is anomalous, if not absurd, that the chapters on theft will be read in Victoria but not in New South Wales. There is much to be said for the Canadian constitutional arrangement under which a Code enacted by the Canadian Parliament is administered by the Courts of the Provinces. For serious crime (murder, rape, fraud, etc.) there should be one law for Australia. But accepting, as one must, the

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[1] *Reshaping the Criminal Law*, P. R. Glazebrook (ed.) (1977) p. 20.
[2] *Vallance* v. *R.* (1961) 108 C.L.R. 56.
[3] *Id.* at 58.

status quo, the Textbook has very considerable local value in respect of those crimes and cognate topics for which the law is the same as or similar to the law of England. Dr. Williams' irreverence for the judiciary and his citation of cases from Commonwealth countries and the U.S.A. enhance that value.

For a student, the Textbook has the unusual merit that it presents a comprehensive view of the criminal process at trial and on appeal from the trial court. Chapter 5 entitled "Judge and Jury" contains a concise statement of the burden of proof and the distribution of functions between judge and jury. The great majority of present practitioners would wish to have read such a practical compendium before entering into trial work. Dr. Williams also enlivens his exposition by introducing a sceptical layman (an "interlocutor") to pose questions and objections of practical and theoretical value.

It is difficult to find fault with Dr. Williams' work, but he may be accused of expressing himself too broadly when explaining the "large measure of freedom" available to judges "in deciding points of law" (p. 5). "There may be several possible interpretations of a statute" he says, as if to suggest that a judge has an unrestricted choice between competing interpretations. A qualifying footnote would have been appropriate to point, *inter alia,* to the common law presumption of *mens rea* in interpreting a statute.

Elsewhere Dr. Williams is a trenchant critic of the English decisions which he claims have reduced the crime of assault occasioning actual bodily harm to "one of half *mens rea*" (p. 160). The same criticism is made of the decision of the Court of Appeal in *Mowatt.*[4]

After reading Dr. Williams (p. 156) and *Vallance,*[5] what trial judge in New South Wales would unhesitatingly give a *Mowatt* direction on a charge of "malicious wounding" under s. 35 Crimes Act, 1900 (N.S.W.)? In *Mowatt* the court said:

> It is quite unnecessary that the accused should have foreseen that his unlawful act might cause physical harm of the gravity described in the section, i.e. a wound or serious physical injury. It is enough that he should have foreseen that *some physical harm* to some person, albeit of a minor character, might result.

A point against Dr. Williams may be that, if, as he argues, an intention to wound is one of the elements (alternative to recklessness as to wounding) to be proved upon a charge of "malicious wounding" then an intention to inflict grievous bodily harm should likewise be an element of a charge of maliciously inflicting grievous bodily harm under the same section, that is s. 35 Crimes Act (N.S.W.). But if the latter intention is a requirement for the s. 35 offence, it follows that the offence under s. 33 Crimes Act, 1900 (N.S.W.) of "inflicting grievous

[4] (1968) 1 Q.B. 42.
[5] *Supra* n. 2.

bodily harm with intent to do grievous bodily harm" would thereby become redundant. One way (I see no other) of avoiding that redundancy is to say that a direction under s. 35 for both "malicious wounding" and maliciously inflicting grievous bodily harm should not refer to intention but should be confined to recklessness as to the wounding or grievous bodily harm (as the case may be) under s. 35. One would conclude that the *Mowatt* formula was right in being confined to recklessness (foresight of what *might* result) but wrong in saying that it was unnecessary for the accused to have foreseen a wound (or serious physical injury) as a possible result of his actions. Is this conclusion reconcilable with the views expressed in *Vallance*[6] save those of Kitto, J. (at p. 64)? The more recent decisions of the High Court in *La Fontaine*[7] and *Pemble*[8] may indicate that, aside from murder (reckless indifference to life), there is no question of the propriety of a direction as to recklessness in terms of foresight of *possible* consequence as opposed to *likely* consequences of action. This view is consonant with the formulation in England in *Cunningham*[9] as follows: ". . . recklessness . . . i.e. the accused has foreseen that the particular kind of harm *might* be done and yet has gone on to take the risk of it".

Dr. Williams does not expressly state or argue whether the *Cunningham* formulation is of general application, but his "definition" (at p. 73) is that "it would not be unfair to the defendant in the ordinary case to tell the jury that recklessness means realization of the *probability* of the consequences and/or of the relevant circumstances". He concedes that "a possible objection to the definition (*supra*) is that it is too favourable to the defendant".

Recent case law may indicate that a clear distinction is to be drawn between murder and lesser offences when formulating the test appropriate for recklessness. What is sufficient for lesser offences (than murder) will not suffice for murder.

It seems unlikely that for murder the foresight of a mere *possibility* (the *Cunningham* formula, *supra*) of the particular kind of harm that might be done, namely, death, as the consequence of an accused's act or omission causing death, will gain general acceptance either at common law or under the Crimes Act (1900), N.S.W., s. 18, as being part of an adequate formulation of recklessness. Such a notion was strongly rejected by Gibbs, J. (p. 78) and Jacobs, J. (p. 96) in *La Fontaine*[10] although affirmed by Stephen, J.

Dr. Williams' proposed "definition" of recklessness (*supra*) is in very similar (if not identical) terms to those used at common law to extend the concept of intention which was acceptable as a form of

[6] *Ibid.*
[7] *La Fontaine* v. *R.* (1976) 136 C.L.R. 62.
[8] *Pemble* v. *R.* (1971) 124 C.L.R. 107.
[9] *R.* v. *Cunningham* (1957) 2 Q.B. 396.
[10] *Supra* n. 5.

"malice aforethought". "Malice aforethought" included the realization by the accused of death or grievous bodily harm as a probable consequence of his act or omission causing death (see *Hyam*[11]). This extended meaning of intention has been rejected in N.S.W. as part of the meaning to be ascribed to intention in the Crimes Act, s. 18.[12]

It seems that in this State a direction on a murder charge in terms of foresight of probable consequences would not be justified as part of the explanation of the meaning of intention, but would be appropriate in relation to "reckless indifference to human life" provided that death (not merely grievous bodily harm) was stated as the probable consequence allegedly foreseen by the accused.

It would require much more than the available space to give adequate consideration to other chapters of the Textbook which have immediate relevance in this State. Perfunctory though they may be, I make the following comments on some of those chapters.

1. His discourses on Attempt and Causation respectively will certainly be included amongst those chapters of the Textbook which will become standard sources of reference.
2. In Chapter 23, on Involuntary Manslaughter, Dr. Williams exposes the uncertainty and confusion which are manifest in the recent decisions of appellate courts in England, on this subject. Is there an elusive subjective element in manslaughter by criminal negligence?
3. It would be remiss not to mention the practical value of the chapter (ch. 27) on Automatism which contains a valuable collection of cases and medical references. Any lawyer who has to struggle with the medico/psychiatric concepts in this subject will find Dr. Williams' summary of states of automatism very useful indeed.

My final comment is that it is interesting and rewarding to make a comparative study of the Textbook under review and *Criminal Law—The General Part* first published in 1953. By introducing an interlocutor to pose questions, the textbook is rendered less formidable and more interesting for students, but by reason thereof and other factors, not so easily discernible, Dr. Williams' style of writing may have lost some of the crisp, compelling vigour which was so clearly evident in *The General Part*. The latter work is concerned with the general rules that is, rules which apply to more than one crime (see Preface to the Second Edition, 1961). The textbook under review does not supersede the earlier work but supplements it in the distinguished author's search for the "root principle of the Criminal Law".

J. K. FORD

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[11] *Hyam* v. *D.P.P.* (1975) A.C. 55.

[12] See *Barthow, Wheeler and Morrison* (1978) 2 Crim. L.J. 36 in which the Court of Criminal Appeal applied *R.* v. *Belfor* (1976) 1 W.L.R. 741.

* Q.C., a Judge of the District Court of N.S.W.