BOOK REVIEWS.

The Teaching of Jurisprudence: A Text-Book of Jurisprudence. By GEORGE WHITECROSS PATON, B.C.L. (Oxon), M.A. (Melbourne). [Oxford: Clarendon Press. 1946. x and 502 and (Index of Cases and Index) 26 pp.]. *The Province and Function of Law.* By JULIUS STONE, LL.M. (Leeds), S.J.D. (Harv.), B.A., D.C.L. (Oxon). [Associated General Publications Pty. Ltd. 1946. lxiv and 785 and (Indices, etc.) 133 pp.].

In the near future the teaching of Jurisprudence in university law schools seems bound to expand far beyond what has been usual in the past. This writer's dim recollection of studies in the subject in his student days is probably no exception to the general rule, and indicates the relatively minor attention given to it in legal teaching. The material contained in the standard text-books, such as Salmond and Holland, has marked the customary limits of the subject; and most lawyers have embarked on practice ignorant even of the existence of the major problems of legal philosophy. For most of them jurisprudence has meant the analytical jurisprudence contained in Salmond. Of course Salmond's analysis of legal concepts, and his survey of the major fields of substantive law, provided a very useful and attractive introduction to legal studies. But he is far from stimulating inquiry into the theory of justice, the relation between law and the State, the function of law, the processes by which law is expanded and adapted to the changing ideas, desires, and needs of men, and all the other problems that appear when the law is recognised as being an instrument of politics and not a mere natural feature of a static social landscape.

The concentration on analytical jurisprudence followed from acceptance of the *laissez faire* theory. When it was thought that social problems should be solved with as little legal intervention as possible, naturally little attention was paid to the function of law; so that, substantially, all that needed to be given to the student in the way of a theoretical apparatus was a sound understanding of the technical concepts used in the framing and application of legal rules. In fact of course the law was framed to secure certain objects, and judges and the legislature were guided by definite, if not always explicit, principles of public policy. But on the whole the attainment of these involved a relatively small amount of legal regulation. We are now seeking aims that require a great deal of legal regulation, and to complicate still further the problems that arise, we are compelled to build on foundations designed for rather different purposes. Hence not only is law being used much more consciously as an instrument of social policy, but its foundations and its established techniques have both to be critically re-examined.

Thus we find to-day that the working of the system of precedent is being closely analysed in a manner unthought of previously, while the greater use of law as a means of achieving social policy has led to a great development in the special studies generally described as socio-

logical jurisprudence. It has long been recognised that the law serves to protect interests, but a changed social outlook now calls for an examination of a greater and more contentious variety of interests than formerly. Again, the conscious use of law as an instrument of social control draws attention to other forms of social control, and raises questions as to the relations between the various forms, and the desirability or efficacy of using law in the place of some other control previously operating. It also raises questions as to the extent to which any particular law in fact achieves the object for which it was introduced. The tendency, indeed, is to give up treating jurisprudence as an isolated science, and to view it as one of the social sciences which cannot be adequately studied except in conjunction with other related social sciences.

These are some reasons why, as was said at the beginning, jurisprudence must, even in the schools of law, be given a wider scope than heretofore. This has been recognised, but the difficulty has been the lack of suitable text-books for students. For many years the results of recent researches have been spread through a considerable literature which only a specialist could undertake to cover. The need has been for someone to sum them up for students and other non-specialists. A big step has recently been taken in this direction by Professor Paton of the University of Melbourne and Professor Stone of the University of Sydney; and the existence of the need, and the extent to which they have satisfied it, is indicated by the manner in which their books have been acclaimed in leading legal journals in the English-speaking world.

It is not intended here to give formal reviews of these two books, which have now been before the public for some time, and which, in the writer's opinion, deserve all the praise that they have been given. It is proposed rather to consider them in relation to the nature of the course in Jurisprudence which in the writer's opinion (which he confesses is based on inadequate experience) should be included in a law school curriculum.

In the past it has been usual to give a simple course in Jurisprudence, in some cases near the beginning, in others at the end of the law course; while in some, as at Oxford, it is studied at the same time as other law subjects for a single final examination. The expanded and more advanced training in Jurisprudence now needed makes it impossible to give a satisfactory single course early in the student's period of study. Most of the work must be done after the student has obtained a considerable knowledge of the whole field of substantive law, for he cannot study legal materials scientifically and with profit until he has become acquainted with the materials. Another objection to early study is that most students still in their teens are not sufficiently mature for advanced study in the social sciences, including Jurisprudence. On the other hand some elementary instruction in matters that fall under the head of Jurisprudence is needed at the beginning of the course, for example, sources of law, with some discussion of the theory of precedent, fundamental legal concepts, and the principal classifications of the law.

Neither of the two books under consideration is designed for students beginning a law course, though selected portions of Professor Paton's book could be used by the better class of students to amplify the elementary instruction given to them. Whether it is adequate to the needs of a final year course depends on the view taken as to what should be included in that course.

The greater part of Professor Paton's book is concerned with much the same topics of analytical jurisprudence that form the substance of previous text-books, and it seems bound to replace them as the standard text-book. In this field its great value is that it incorporates the results of recent thought, which even in this well traversed field has made important advances, for example in the theory of precedent and the analysis of legal rights. The predominant attention given to this part of jurisprudence is justified by its importance for practical training. Nevertheless, the book does not leave students with any excuse for thinking that jurisprudence begins and ends with analysis, and this marks a further advance on previous standard works. The earlier chapters discuss the various schools of jurisprudence and introduce the student to theories of justice and of the function of law. Some indication also is given of the varying theories of the leading figures in modern juristic thought. Thus the student, although he will gain solid instruction only in the analytical field, is made acquainted with the other branches of the subject, and he at least learns of the existence of the problems with which contemporary thought is concerned, and is shown the way to the further studies needed for complete equipment as a lawyer.

It may be that for most students, who will be concerned only with the day to day practice of the courts, this is as much as can reasonably be done; and perhaps Professor Paton set the limits of his book with this in mind. It seems to the writer, however, that even for the pass student a final year course should give more attention to concrete problems in the field of sociological jurisprudence than is provided by Professor Paton's book. It is with this field that Professor Stone's book is specially concerned. This is a massive contribution to the science of law, drawing necessarily of course on the work of the great masters of legal science, but to a very great extent also, so far as this writer can judge from his limited acquaintance with the literature, making substantial original contributions on a broad front of new ground opened up. The industry involved, the wealth of reference to cases and texts, the variety of questions discussed and the additional ones propounded, and the general range of thought are more than impressive; they inspire something approaching awe, even where the conclusions are more tentative or obscure than might be desired.

In the first two Parts, "Law and Logic" and "Law and Justice," Professor Stone critically surveys the contributions made to juristic science by the leading thinkers in the fields of analytical jurisprudence and the theory of justice, the two fields most fully worked in the past. Here the very size of the work, at first forbidding (it runs to nearly 800 closely-printed pages), is a merit, for it gives him something approaching adequate space to set forth the thought of the writers dealt with; whereas most works, when they traverse a century of

thought in half a dozen pages, leave only a blur on the mind. These parts of the work, extremely valuable for their critical estimates of the theories dealt with, cannot be examined here in detail; but special reference must be made to Chapter VII, in which there is a brilliant analysis, one might almost say a thorough anatomical dissection, of the processes by which, despite the theory of precedent, the common law has been and still can be developed to meet the changing needs of society. This illustrates the point made earlier as to the need for a critical re-examination of techniques.

The third Part, occupying nearly half of the book, Professor Stone entitles "Law and Society." It would be hopeless to attempt here to indicate the comprehensive range of the author's study of law as an instrument of social control, concerned with the task of adjusting the conflicting individual and social interests of men, and of the non-legal factors which affect the design and working of the instrument. Anyone who is willing to make the intellectual effort the book demands will find the effort more fully repaid than he could have expected; and, if he is new to this kind of legal thought, one could almost promise that he will never, as a lawyer, be the same man again.

But, to return to the question of university training, the demand the work makes on intellectual capacity and mature social knowledge is such as to make one doubt whether most university students will find it to be within their grasp. At any rate it is fairly safe to guess that most law teachers will themselves find the book so far from being simple that they will hesitate to prescribe it as a text-book for their students. Whether the subject-matter can be simplified to something not far above the ordinary standard of a student text-book the writer would not venture to affirm, but if it could be, the abbreviator would earn the gratitude of all teachers of jurisprudence; and Professor Stone's work would have more of the influence it should have but will probably not have while confined to its present vehicle. One looks forward to the appearance of "The Student's Stone," to which the student will be ready to turn when he has mastered Professor Paton's book. However, only experience can show whether a satisfactory student's course in sociological jurisprudence can be devised. Teachers of the subject, as well as students, are going to have a difficult time for probably a good many years yet.

W. N. HARRISON.

The Crown Cabinets and Parliaments in Australia. By THOMAS PENBERTHY FRY, E.D., M.A., LL.M., B.C.L. (Oxon.), Sc. Jur. D. (Harv.). [University of Queensland. Processed Edition. 1947. xiii and 310.] [Printing, under the title *The Australian Parliamentary System*, is in progress.—Ed.]

The University of Queensland has published the abovenamed book in typewritten form, neatly bound with a cardboard cover. This is an entirely inadequate method of publishing such an important book, and steps should be taken as soon as possible to give it a more permanent form.

The author in his preface states that " an attempt is made in short compass . . . to provide for Australians what has been more adequately done for the United Kingdom by the late Sir William Anson in his *Law and Custom of the Constitution*, and by Dr. Ivor Jennings in his invaluable books on *Cabinet Government* and on *Parliament*."

The term " short compass " is rather misleading, as the work under review is a full-sized book of 310 foolscap pages of single-space typewriting.

Dr. Fry has supplied a long-felt need. Those of us who do the clerical work associated with Parliament have been compelled to acquire our knowledge from two principal sources, namely, books dealing with the British Parliament such as May's " Parliamentary Practice," and actual experience of the working of the Standing Orders and the Constitution.

Australia has relied largely on British practice, but has in addition built up a practice of its own based on rulings and convenience. Dr. Fry has embodied much of this practice in his book and has thereby made it available in attractive form for students.

The book consists of 52 chapters and covers every aspect of its subject. Authorities are extensively quoted in footnotes. The British and Australian systems of Parliamentary Government are compared, and the book then deals with the Cabinet system in Australia. Some of the chapter headings are intriguing ; for instance, " The Relationship of a Cabinet to its Parliament." The author sets out the means by which a lower House could dismiss a Cabinet in which it had lost confidence. In actual practice to-day, of course, such means are very rarely employed. The electors choose a Parliament, the majority party in Parliament chooses a Cabinet, and there it remains until the next election. The Party system has superseded the constitutional procedure which had been the feature of responsible government in Britain and the Dominions for generations. Dr. Fry's book does not attempt an analysis of what goes on behind the closed doors of the party room—perhaps because it is not easy to find out. This is the real place from which Australia is governed, once the electors have had their say.

The book deals with the electoral system and covers all aspects of this branch of the subject.

The chapters dealing with the working of Parliament give evidence of intense industry in their compilation. The author seems to have at his fingers' ends examples of all forms of procedure, knowledge of which is acquired by Parliamentary officers only after a life-time of experience.

The book as a whole is an extraordinarily valuable text-book, and is easily the most comprehensive work on the subject at present available.

Canberra. J. E. EDWARDS.

Outline of Law in Australia. By JOHN BAALMAN. [Law Book Company of Australasia Pty. Ltd. 1947. vii and 338 and (Index, *etc.*) 21 pp.]

Writing (as he tells us) mainly for " those members of the community who, without any intention of adopting law as a profession, regard some knowledge of the rules which regulate their daily conduct as a sheer cultural necessity," Mr. Baalman has set out to provide, within the small compass of this book, " a conspectus of modern law with an historical background, using detail only so far as it was considered necessary to illustrate some fundamental rule or principle." The rarity with which a task of this kind is attempted emphasises the difficulty of writing a synopsis of the rules of law which is intelligible to the lay reader, but Mr. Baalman's undertaking, if ambitious, has been marked by very considerable success.

The author's method is first to treat of the sources of law in England and Australia, and of the tribunals, officials and procedures employed in its administration, and then to outline the rules of substantive law at present in force in the Australian States, under the headings of Personal Relations, Property, Contracts, Torts and Criminal Law. With so wide a field to survey, it is an achievement much to the author's credit that the general statement is so accurate and errors of detail so few. Mr. Baalman has a gift of concise exposition, and his book gives a clear and readable account of the main principles of the general law. The examples which he uses—whether they are provided by the facts of leading cases or by his own invention—are well chosen to illuminate the propositions of law to which they refer. His style is lucid and terse, but not dull—on the contrary, for, fortunately, he has allowed an irreverent wit to enliven his prose from time to time.

In a work of this kind, one of the author's major problems must have been what to omit, and on the whole Mr. Baalman's decisions in including or rejecting a topic will command agreement. Certain matters which, it is suggested, might well have received the author's attention are mentioned below, but it is recognised that it would be too much for any reviewer to expect to find treated in this book every subject which he considers of importance. The author deals, to some extent, with the respective legislative powers of the Commonwealth and State Parliaments, but a more ample treatment of this question would have been beneficial to the average reader who lacks legal knowledge. In discussing subordinate legislation, Mr. Baalman does not mention the modern tendency of some Parliaments to attempt to exclude the power of the Courts to declare regulations void as being *ultra vires*, by providing that the validity of regulations " shall not be questioned in any proceedings whatever," nor does he refer to the practice of subdelegation, which sometimes results in legal rules being embodied in a confusing multiplicity of written instruments and being thus rendered difficult of ascertainment. These are matters which, it is felt, should be known to an intelligent lay student of the legal system. No mention is made of the *Deserted Wives and Children Acts* of Queensland (or of the corresponding legislation of other States), although the rights of an unhappily large section of the community are very materially affected by the results of applications thereunder.

The invalidity of contracts unreasonably in restraint of trade, and the defence of common employment in tort, which are not considered, seem to have sufficient importance in mercantile affairs to warrant some discussion. Mr. Baalman restricts himself largely to "lawyer's law"; he does not, for instance, deal with the system of industrial conciliation and arbitration which is so large a feature of Australian political and economic life, nor does he consider taxation law.

There are some minor points of criticism. In providing his "historical background," particularly in dealing with torts and crimes, the author has given unduly prominent mention to the Anglo-Saxons, suggesting that Anglo-Saxon rules of law had an influence on legal development in England much greater than that which they did actually exert. If the Bibliography is intended, as the Preface suggests, as a guide to readers who wish to pursue their studies further, it should be revised, being, in its present form, unbalanced and incomplete; it contains, for instance, references to ten works dealing with real property law, but to none on the subjects of companies, bankruptcy or (if Eversley's *Domestic Relations* is excluded) divorce, and although it mentions some works on evidence it does not mention Phipson's.

Mr. Baalman's book is not intended as a work of reference for the practising lawyer, and has no value as such. The practising lawyer can however read it with interest and—perhaps many will admit—not without profit. The book should be especially valuable to law students, particularly to those in their earlier years of study, giving them a perspective which they sometimes lack after weltering in the details of subjects studied piecemeal.

H. T. GIBBS.

The Future of Australian Federalism. By Dr. Gordon Greenwood. [Melbourne University Press. 1946. ix and 323 pp.]

In the main, *The Future of Australian Federalism* deals with the past, rather than the future. Its author is Acting Professor of History in the University of Sydney, and expert in the field of Australian constitutional history. It is natural therefore that he should have written ably about the past of Australian federalism.

There is no other book which gives as careful and clear an account of the history of the federation movement and working of federalism in Australia from 1855 to 1939. The 163 pages of Chapters 3 to 5 give excellent historical accounts of developments between 1901 and 1939 in respect of such major constitutional matters as the financial relations of the Commonwealth and the States (including the Commonwealth Grants Commission), the regulation of industrial relations, the effect of Section 92 of the Commonwealth Constitution on legislation concerning trade and commerce, and the political fate of each of Australia's twenty-one constitutional referenda. Dr. Greenwood was too close to the constitutional events of 1939-1944 to write a definitive history of them, although his attempt to do so in the seventy-nine pages of Chapter 6 is not without value.

Students of Australian constitutional law may find this book gathers together for them in very readable form many of the loose political and historical strands their constitutional law text-books leave untied.

The historical material is supplemented by Dr. Greenwood's fervent advocacy of unification in place of federation. It may well be that in emerging as a partisan in the cause of unification, Dr. Greenwood has chosen the side which will ultimately triumph; but he is not, because of that, necessarily on the side of the angels.

The financial provisions of the Commonwealth Constitution are so weighted in favour of the Commonwealth, that sooner or later the Commonwealth may be able to bring about unification by the exertion of intense financial pressure. One result of the fact that proposals for alterations in the Commonwealth constitution can be brought before the electors only by the Commonwealth Parliament, and not by the State Parliaments, is that, although there may be increases—even drastic increases—in the Commonwealth's constitutional powers, the States' constitutional powers will never be increased by referendum.

There seems to be no counteracting factor, unless it be found perhaps in some drastic new curb which the High Court may in the future place upon the Commonwealth's use of its financial powers. The first banking case, *Melbourne Corporation* v. *Commonwealth*, decided in 1947 after the publication of Dr. Greenwood's book, may be evidence of the High Court's intention to impose such a curb in order to preserve the existence and vitality of the States.

T. P. FRY.

The Principles of Income Taxation. By J. P. HANNAN. [Law Book Company of Australasia Pty. Ltd. 1946. xxxii and 505 pp.]

Dr. Hannan's book is primarily for legal practitioners and professional tax agents, but is written in so clear a style and is so freely and aptly illustrated by the facts of decided cases that any student or layman would find it easy to read, interesting and instructive. The author is entitled to have his opinions on any controversial points treated with respect, as a lawyer who has been from 1931 until recently a member of the Commonwealth Taxation Board of Review.

The degree of LL.D. has recently been conferred by the University of Melbourne upon the author substantially in recognition of the quality of this treatise.

The publication of Dr. Hannan's book should hasten the inclusion of Taxation Law as at least an optional subject in the curricula of those Australian Law Schools in which it is not at present taught. (Any University course on Taxation Law would, of course, also have to include material concerning other kinds of taxation.)

During a four years' course no University Law School can give its students a complete knowledge of law and of legal techniques,

What it can do is to train them soundly in whatever it considers to be essentials.

Jurisprudence is included in most curricula in an attempt to give students a conspectus of the whole field of legal ideas; Legal Method has a similar but supplementary purpose in the Melbourne Law School; one of the functions performed by Constitutional Law in Queensland is to give second-year students a conspectus of all contemporaneous Australian legal institutions of importance; and Legal History is included in most curricula to show how modern legal ideas and legal institutions have developed during the past.

These general surveys fulfil an important function. Without them students would not see the wood for the trees. Nevertheless, they are insufficient in themselves. Intensive study of particular sections of the law is also necessary.

Over the past century or so it has become traditional to select Contracts, Torts, Criminal Law, Equity, Real and Personal Property, Constitutional Law, and Evidence, for intensive study. Originally they were selected in order that law students would learn in some detail the most important bodies of legal principles. It was considered that any law graduate who had learnt those principles could, by consulting statutes, reported cases and specialist text-books, give a sound opinion on any legal problem. In recent decades, however, strong pressure has been brought to bear in Australia and the United States to remould the curricula and teaching methods of University Law Schools to ensure that their students are trained to be " practical lawyers "; and the Australian apotheosis of this idea was the Sydney Law School under the deanship of Sir John Peden. Many of the " traditional " subjects are now taught in Law Schools as " practical " or " vocational " subjects; and to them has been added a miscellaneous group of subjects whose main claim to inclusion is that they are " practical " or " vocational."

Amongst the latter are Bankruptcy Law, Company Law, Probate Law, Admiralty Law, Divorce Law, Industrial Law, Commercial or Mercantile Law, Taxation Law, and Pleading and Practice in superior and inferior courts. One of the main problems facing Law Faculties at the present time is whether to teach all these " practical " subjects, and more; to teach a few of them and omit the others; or to introduce a system of electives, which would give each student an option as to which of the " practical " subjects he would study during his University years. In the best University Law Schools in England and the United States " traditional " or basic subjects are compulsory but an elective system operates in respect of certain " practical " and " cultural " subjects. It is to be hoped each Australian Law School will soon introduce a limited system of electives. When that happens, Taxation Law will probably become at least an optional subject in all of them. Some already teach Taxation Law as a compulsory subject; and it would seem to have as substantial claims for inclusion as those bodies of law concerned with bankruptcies, companies, maritime prizes, probate, divorce, and industrial disputes.

In Australia taxation cases have provided many important decisions concerning trusts and mortgages; the High Court's inter-

pretation of the " peace order and good government " clause in Australian constitutions has been much discussed in taxation cases; the nature and incidents of patents, copyright, timber royalties, and similar kinds of property, have been the subject of numerous taxation decisions; and general jurisprudential questions, such as the nature of " residence " (especially the residence of a corporation), have been fully discussed in taxation cases, even though the result seems to have been something less than complete clarity. In modern times, when taxation jurisdictions yield so many decisions of fundamental importance to other branches of the law, it is of importance to students and practitioners that they should acquire at least a panoramic view of taxation law.

Apart from the synthesizing value of a short course in Taxation Law, it can claim to be one of the most important of the " practical " subjects, if the test of practicality is the number of taxation questions arising either directly or indirectly in the course of solicitors' and barristers' work. One manifestation of this is the high percentage of taxation cases in each recent volume of the *Commonwealth Law Reports*; and the publication both in England and Australia of special series of taxation reports.

T. P. FRY.