BOOK REVIEWS

ELEMENTS OF ENGLISH LAW

By W. M. GELDART

Edited by H. G. Hanbury. Sixth Edition, 1959. Oxford University Press. 222 pp. 11s. 3d.

First published in 1911 this book represents the hardy perennial of its field. When the second edition appeared in 1929, Sir William Holdsworth could say of it: "There is no other book in which these elements are so effectively stated in so small a compass", and this, so far as this reviewer knows, is still true. But one is left with the impression that the literal truth of this assertion has been maintained only by dint of a certain amount of cramming. A book which sets out to convey the elements of English law at once exposes itself to a cross-fire of criticism to which all the defences are two-edged. On the one hand, it can be said that such a work skims the surface of its subject thereby evading difficulties and giving a false impression of simplicity; on the other, that any exploration of those difficulties which the author may attempt lies outside the scope of his endeavour. In the event, therefore, such a book is almost as difficult to review honestly as it must be to write.

One thing seems clear: although this book may provide an introductory conspectus for the legal novice, its sheer value cannot be fully appreciated without at least a working knowledge of the law. In its technique of compression, of summary, and in most places of exposition this book is masterly. It could be, of course, that because of those characteristics the book presents the dry bones of the legal system rather than an exposition of a living dynamic institution.

Chapter 1 is excellent. There it seems Geldart and his editors have admirably negotiated Scylla and Charybdis. Chapter 2 is reminiscent of Maitland's treatment of the same subject—for an Australian reader the references to the 1925 legislation are more of a hindrance than a help, but that fault obviously lies in the eye of the beholder. The same comment applies to the chapter on Property, at least to that part of it dealing with realty. The chapters on Probate, Divorce and Admiralty, and on Persons and Personal Relationships are brief, lucid and, even to the relatively old hand, fascinating.

By way of minor criticism, the following points might be raised. No doubt the masculine gender will be taken to import the feminine, but in these days, phrases like the King's Proctor (p. 72), the King's pleasure (p. 73) and others (*e.g.*, pp. 82, 189, 197, 198, 202) strike a note of anachronism. It is no doubt an unreasoned antipathy which condemns

"Judgement"; and the assertion that the amount awarded under the Fatal Accidents legislation is "a matter of pure arithmetic" is one case in which simplification seems to have been carried to an extreme.

The book includes a useful bibliography, is neatly bound and clearly printed, and generally attains the technical standard expected of a volume bearing the "Oxford" imprint.

To revert to the opening note: this book has been kept within a reasonable size only by means of small print and merciless compression. After a life of half a century it has now to compete with such modern works as Hood-Phillips's *A First Book of English Law*, James's *Introduction to English Law*, and (in Australia) Baalman's *Outline of Law in Australia*. May one venture the suggestion that Dr. Hanbury's ability to see the field of law on a broad canvas and his power to describe in prose so eminently readable what he sees might be better employed in, perhaps, a series of essays designed to depict the spirit of that law rather than its skeleton?

E. M. Bingham

COMPANY LAW

By H. GOITEIN, Professor of Commercial Law, University of Birmingham. English Universities Press, 1960. 277 pp. 46s. 6d.

As a general textbook on Company Law this will be a useful addition to the library of every law school, and is qualified to take its place on the shelves alongside the similar treatises of Buckley, Palmer and Gower.

However, viewed from the particular position (which, in the opinion of the present reviewer, is the correct one) that the learned author himself has taken up, the work is indeed praiseworthy.

In the preface, the author states positively that he has kept before himself a threefold aim: "To make the book as readable and intelligible for the general reader as for the advanced student. To keep it as short as is consistent with a clear and comprehensive statement of the law. To make provision incidentally for the examination requirements of the principal professional bodies and the Universities as well as those who might be aiming at a career in the Civil Service".

Clearly, the book is written not only for the use of the law student, but also for students of Accounting and Administration of Economics. It is not the least of the learned author's achievements to have been able to select and edit his material so that, irrespective of the course of study, the student should be able to grasp and understand the principles of the subject.

The arrangement of the subject-matter is one which will commend itself to every reader for it follows in a logical sequence from "birth" to "death" of the corporate body.

Commencing with the formation of the company, succeeding chapters deal with capital, conduct of business, meetings, procedure, directors, annual audit, borrowing powers, alteration of articles, and reconstruction, concluding with a chapter on winding up.

Those teachers of the subject, as well as practitioners, who entertain the view that a thorough understanding of the historical background and development of Company Law is essential to a proper appreciation of the existing law, will be disappointed to find this aspect disposed of in eight pages as opposed, for example, to Gower who devotes two chapters to the same topic.

A similar line of criticism could be pursued in respect of the treatment of other parts of the subject. For example, the decision in *Scottish Co-operative Wholesale Society v. Meyer and Lucas* [1959] A.C. 324, is undoubtedly the leading authority on the new "oppressive manner" provisions (U.K. Act, s. 210—Tas. s. 128), and the reviewer would have liked a full analysis of that case. The author gives it a mere paragraph quotation on p. 261, and a footnote reference on p. 131.

Nevertheless, the author has adhered strictly to his self-appointed aims. To have engaged in a detailed analysis of those matters would have constituted a departure therefrom, particularly in connection with the second one mentioned above.

The author deals exclusively (and frequently) with the United Kingdom Act of 1948, and in his note to the reader (p. 11) emphasizes that the core of the whole work is "Table A" (1st Schedule of the 1948 Act).

Since the new Tasmanian Companies Act, 1959, incorporates numerous features of the U.K. Act, and seeing that the former contains references in the marginal notes to the corresponding sections of the latter Act, the book could hardly be more timely and helpful.

However, the Tasmanian student must be careful to remember that there are some fundamental distinctions between the two Acts. It would be well for him to take heed of the author's advice on p. 13, and when he has pen in hand to note down those differences.

Perhaps two only need be stated to emphasize the point. S. 15 (4) of the Tasmanian Act provides: "A company that has a share capital and that is registered after the commencement of this Act has, as incidental and ancillary to the objects specified in its memorandum, the objects and powers set out in the third schedule and those objects and powers shall be implied in the memorandum accordingly, except so far as they are expressly excluded or modified by the memorandum".

There is no corresponding section in the U.K. Act.

S. 118 (3) provides: "Shares held by a trustee in respect of a particular trust may, with the consent of the company, be marked in the register in such a way as to identify them as being held in respect of the trust, but no liabilities are affected thereby, and the company is not thereby affected with notice of any trust".

Here again, there is no corresponding section in the U.K. Act.

The same situation obtains in regard to the provisions of "Table A" in each of the statutes.

For example, the effect of s. 9 (Table A) of the U.K. Act is included in s. 65 (4) of the Tasmanian Act. Again, s. 77 (Table A) of the U.K.

Act provides, *inter alia*, that no shareholding qualifications for directors shall be required, whereas s. 70 of the Tasmanian Act states that the shareholding qualification unless and until fixed by the company in general meeting is one share.

S. 84 (3) (Table A) of the U.K. Act permits a director to hold an office or place of profit under the company (other than auditor), while s. 71 (1) of the Tasmanian Act restricts the director to the office of managing director or manager (and excludes the office of auditor).

This book could also occupy with profit a position on the shelf of the practitioner's library. He will no doubt regret that the leading Australian decisions are not referred to, but he will find a clear enunciation of the basic principles supported by the leading English decisions with footnote references to other relevant authorities.

A full index to the subject matter should aid both student and practitioner.

B. W. Nettlefold

FEDERAL JURISDICTION IN AUSTRALIA

By ZELMAN COWEN

Melbourne: Oxford University Press, 1959. xv and 212 pp. 40s.

Professor Cowen would be the first to deny that a study of federal jurisdiction in Australia adds significantly to the understanding of federal government or that it holds great interest for anyone outside professional legal circles. And conceding from the outset "that the Australian law of federal jurisdiction is technical, complicated, difficult and not infrequently absurd", he has not attempted to do the impossible by reducing the law to a logically consistent and rational system of rules. On the contrary, he appears to have set out with the express object of demonstrating that the existing rules contained in the Consitution, the Judiciary Act, and court decisions are exceedingly intricate, excessively complicated and in many respects irrational.

Until the appearance of Professor Cowen's book the problems of federal jurisdiction in Australia had been touched upon in various general works on the Constitution, but there was nothing approaching a comprehensive exposition and analysis of the existing law, its origins and development, and its relation to the American prototype. Nor could it be said that federal jurisdiction was a subject with which many Australian lawyers were well acquainted. There can be little doubt then that *Federal Jurisdiction in Australia* will serve for some years as a standard reference work.

The topics canvassed by Professor Cowen do not exhaust the problems of federal jurisdiction but his omissions are not serious. He has not dealt with the meaning of "the judicial power of the Commonwealth", but this omission is deliberate seeing that the matter had been discussed at length already by other commentators on the Constitution. Excluded also are choice of law problems in federal courts, but there is a hint that

this question may engage Professor Cowen's pen at a later date. The scope of the work is sufficiently indicated by the five chapter headings: *The Original Jurisdiction of the High Court, Jurisdiction Between Residents of Different States* (diversity jurisdiction), *The Federal Courts, The Territorial Courts and Jurisdiction with Respect to the Territories,* and *The Autochthonous Expedient: The Investment of State Courts with Federal Jurisdiction.*

Despite its slimness the volume is not easily digested by the casual reader. Professor Cowen has not wasted words and has tended to assume that the reader is assimilating every particular and is fairly conversant with the relevant provisions of the Constitution and the Judiciary Act. From the point of view of those who are consulting the work for reference purposes this style of writing is not without merit, but from the point of view of the non-Australian reader and the reader whose interest in federal jurisdiction in Australia is not immediate an appendix setting out the relevant constitutional and statutory provisions would not have been amiss.

The value and merit of *Federal Jurisdiction in Australia* reside not only in the fact that it is a painstaking analysis of a hitherto unexplored region of Australian law but also in its trenchant criticism of the jurisdictional arrangements which were inflicted upon Australian courts and litigants by the Federation Fathers. In some respects Professor Cowen's complaints are not novel and are merely a renewal of the pleas for reform which were made by Sir (then Mr.) Owen Dixon in 1927 before the Royal Commission on the Constitution. Both Sir Owen's and Professor Cowen's criticisms stem from what they have considered to be the unintelligent copying by the Australian Federation Fathers of the United States model. Although the architects of the Judicature chapter in the Australian Constitution devised two important departures from the American pattern, they failed, in Professor Cowen's opinion, to appreciate fully that these departures made the American precedents singularly inappropriate to Australian circumstances.

The two essential respects in which the Australian federal jurisdictional structure differs from that of the United States are in the conferring upon the High Court of general appellate jurisdiction as distinct from appellate jurisdiction in federal causes only, and in the investment of State courts with federal jurisdiction. Provision was made in the Constitution for the creation of federal courts similar to those in the United States. The Commonwealth Parliament has in fact established special federal courts such as the Bankruptcy Court and the Industrial Court but, from the outset, it was anticipated that the chief repositories of federal jurisdiction would be the High Court and the State courts. There was at no time any serious doubt that the State courts could be relied upon to adjudicate fairly between, say, residents of different states or in the application of federal laws. In contrast, the framers of the United States Constitution felt that the State courts could not be relied upon to act impartially, and that uniform application of the civil rights provisions in the Constitution would be jeopardised if jurisdiction in

issues concerning civil rights were vested in State courts. In these circumstances the only alternative was a separate system of federal courts.

According to Professor Cowen, once it was decided to utilise the existing State courts in Australia and to retain what was essentially a single court system, there was no reason why jurisdiction should have been bifurcated. Although he recognises that the advent of federation made it necessary for the jurisdiction of State courts to be supplemented by federal laws granting jurisdiction to entertain suits against the Commonwealth, he points out that even without the Judiciary Act, State courts already had jurisdiction over matters which by that Act became matters of federal jurisdiction. What the Judiciary Act did was to take away from State courts jurisdiction previously exercisable by them under State law only to restore that jurisdiction under the guise of federal jurisdiction. In short, the *source* of jurisdiction was altered whilst the *content* remained the same.

The practical inconveniences of such rearrangement are several, but one inconvenience pointed out by Professor Cowen deserves special note. This arises in diversity suits commenced in State courts exercising summary jurisdiction. In such actions the plaintiff has no alternative but to invoke federal jurisdiction, but if the matter be one involving a small sum his natural course will be to commence his action in an inferior court. Yet for a court of summary jurisdiction to properly exercise federal jurisdiction it must be composed in the manner prescribed by section 39 (2) (d) of the Judiciary Act, *i.e.*, by a stipendiary or police or special magistrate. Professor Cowen gives one example of non-compliance with this provision, but one wonders how many other State courts of summary jurisdiction have unwittingly entertained diversity suits without fulfilling the requirements as to composition of the court.

One of the theses which Professor Cowen hammers home is the faulty conception of the autochthonous expedient and the unnecessary complications to which it has given rise in the administration of justice. The remedy he does not spell out in detail, but it is clear that the reform he envisages is withdrawal by the Commonwealth Parliament of the grant of jurisdiction with respect to matters over which prior to federation the courts of the States had jurisdiction by virtue of State law. A grant of jurisdiction by the Commonwealth Parliament with respect to suits against the Commonwealth and orders against Commonwealth officers would still be necessary, but no grant of jurisdiction is necessary for State courts to entertain suits in which the Commonwealth is plaintiff, matters involving interpretation of the Constitution, or matters arising under federal laws. In Professor Cowen's opinion, section 5 of the Constitution which makes the Constitution and Commonwealth laws binding on State courts is a different basis for the exercise of jurisdiction by State courts in such cases.

Another feature of the Australian jurisdictional structure which Professor Cowen has singled out for special criticism is the extent of the actual potential original jurisdiction of the High Court. While conceding

that it is an appropriate tribunal for the trial at first instance of actions between governments, and that for the "speedy resolution of issues" it is desirable that matters arising under the Constitution or involving its interpretation should be removed to the High Court, he condemns as "a maldistribution of functions" the burdening of the Court with original jurisdiction in trade marks, patents and tax cases. Those, he suggests, are matters which could be disposed of as well by State courts or specialized courts.

Although *Federal Jurisdiction in Australia* does not purport to present any cut-and-dried answers to the predicament which the unthinking Federation Fathers thrust upon subsequent generations, it should not be beyond the competence of the discerning reader, who is impressed by Professor Cowen's arguments, to devise possible solutions. It is to be hoped that the book will commend itself to those within whose power it is to direct the course of constitutional and legislative reform, and that its author's wish that it be relegated "to the shelves of legal history" may be fulfilled before the accretion of further complexities in the law of federal jurisdiction obliges him to write a second and revised edition.

Enid Campbell

THE LAW AND THE CONSTITUTION

By SIR IVOR JENNINGS

Fifth Edition. London: University of London Press Ltd, 1958. x and 354 pp.

A quarter of a century has passed since this book was first published. During that time it has progressively lost its reputation as an heretical tract and its author has attained the status of a respected authority on matters constitutional. It is perhaps a tribute to the sagacity of the younger Jennings of 1933 that the elder Jennings of 1958 has not in the fifth edition of a now classic volume found it necessary to retract the main theses he argued so strenuously in the original edition. The object of the work was described in the first edition as being "to explain the fundamental ideas underlying the modern Constitution". Nearly fifty years before A.V. Dicey had written *Law of the Constitution* with a similar purpose, and as late as the thirties Dicey's work remained the orthodox and most widely accepted interpretation of British constitutional principles.

It was largely Jennings's conviction that the Dicey interpretation did not hold true entirely for twentieth-century constitutions which prompted him to record his dissent in *The Law and the Constitution*. The dissent has, however, long since ceased to be regarded as "slightly outrageous", and nowadays Jennings's strictures on Dicey tend to be regarded as eminently sensible if not self-evident truths. It is with this realization that Jennings now feels impelled to make apology for the appearance of yet another edition of a book which has to some degree fulfilled its original purpose. Clearly, however, there is still demand for an explanation of the fundamental ideas underlying the British Constitution in a manner comprehensible to the immature or unsophisticated reader. The value of the fifth

edition of *The Law and the Constitution* must therefore be assessed primarily in terms of whether it adequately serves the needs of those who seek no more than an elementary understanding of the British Constitution or a general introduction to the constitutional law of the United Kingdom.

For those who yearn for categorical definition and theoretical precision this book is disappointing if not at times exasperating. Sir Ivor Jennings deliberately shies away from metaphysical argument and does not purport to fit the British Constitution into a straightjacket of logical consistency or innate rationality. For him a consitution is a dynamic creation the true character of which is appreciated only through an understanding of the character of governors and governed, and the historical antecedents of the constitution. The theory that constitutions are historically and socially conditioned is not, however, reduced to any dialectic scheme, for the author's purpose is less to justify the end products than to demonstrate that the superficial irrationality and fiction-ridden fabric of British constitutional law is the outgrowth of pragmatic solutions to problems of the past and a manifestation of the practical wisdom which has been a feature of the British political life.

Although he qualifies even better than Jeremy Bentham for the title of Maker of Constitutions,[1] Sir Ivor Jennings offers no case for documentary constitutions and no golden rules for the drafting of dictator-proof constitutions. Indeed, the implication is plain that a documentary constitution cannot of itself guarantee good government, and that good government (however that is defined) depends more upon the attitudes, traditions and value of premises of the governors and the governed. By the same token a study of constitutional documents does not disclose everything about the operative constitution. One has to go behind the facade of forms and rules to discover what the working constitution is like.

If Edmund Burke were alive today he would probably find in Sir Ivor Jennings a kindred spirit. Both have revealed a singular distaste for abstract disputation and a deep conviction in the capacity of men of practical wisdom to work out just solutions. The latter's observations on the rule of law are not far distant in spirit from Burke's strictures on the rights-of-man doctrine elaborated by the philosophers of the Enlightenment and carried across the Channel by the indomitable Tom Paine. Constant appeal to the rule of law is today as often lacking in direction and empty of meaning as the invocation of the rights of man was at the turn of the eighteenth century. Without decrying the value of giving meaning to the notion of the rule of law, Jennings, as no doubt Burke would have done in similar circumstances, utters a timely warning that the search for precise definition is both futile and misdirected. His reason is that whatever the content of the notion, it presupposes commonly shared attitudes regarding the relations of men and political

[1] Sir Ivor Jennings has played a large part in drafting the constitutions of Ceylon, Pakistan and the Federation of Malaya.

authority. Those attitudes, he suggests, are derived from "liberal or liberal-democratic principles" which have been evolved by certain sections of the western community only. If the rule of law does depend for its being on a peculiar heritage of beliefs the earnest hopes of the starry-eyed for the establishment of a universal millenium of the rule of law must be far from realization.

Having dismissed the possibility of formulating a clear-cut or generally acceptable definition of the rule of law, Jennings adds that the notion does involve at least the limitation of all governmental powers, "save those of the representative legislature", "by reasonably precise law".[2] Whether an exception should be made in favour of representative legislatures is arguable, for it might be asserted that the preservation of democratic values requires some limitation of the powers of the legislative majority by, for example, a bill of rights. Free and frequent elections and the encouragement of criticism of the government for the time being may operate as a sufficient restraint upon the abuse of power by the British Parliament, but there is no assurance that such contrivances will operate so effectively in countries where parliamentary democracy is new or experimental.

Of the substantive revisions which have been made in the fifth edition of *The Law and the Constitution* two invite special comment, namely, the changes in the section concerning the supremacy of Parliament and the addition of a new appendix entitled "Was Coke a Heretic?". Although a number of events have occurred to warrant a re-writing of any pre-war analysis of the doctrine of parliamentary supremacy—notably the South African cases which followed the Union Parliament's removal of the Cape coloured voters from the common electoral roll in Cape Province, and the publication of monographs by J. W. Gough and Geoffrey Marshall[3]—Sir Ivor's revisions appear to have been inspired more by H. W. R. Wade's strictures on the analysis of parliamentary supremacy in the fourth edition.[4]

That the British Parliament is supreme means no more, according to Jennings, than that "the Courts will accept as law that which is made in the proper legal form". This is a rule of common law made by judges, and presumably one which can be unmade by judges. Contrary to Wade's inference, the doctrine was not, writes Jennings, originated by Coke in spite of the several statements in the Fourth Institute which seemingly lend support to that conclusion. While supreme in the sense described, the British Parliament is not, says Jennings, "sovereign", for sovereignty is an importation from political philosophy connoting powers which the British Parliament does not possess. Parliament's powers are derived from the common law and as such may be limited, whereas in the classical analysis of sovereignty, sovereign power is illimitable.

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2 P. 48.

3 Gough, *Fundamental Law in English Constitutional History*, 1955; Marshall, *Parliamentary Sovereignty and the Commonwealth*, 1957.

4 P. 152.

Although he does not go so far as to assert that Coke's famous *dictum* in *Dr. Bonham's Case*[5] represents the law of today, Jennings deliberately avoids stating that the British Parliament can override the common law without restriction. In his opinion all that can be said "is that there is no recent precedent for declaring an Act of Parliament to be *ultra vires* because it offends against the powers of Parliament conferred by the common law. There are *dicta* on both sides, but the modern trend is towards admitting the supremacy of Parliament over the common law, perhaps because we have never had to face an incipient dictatorship whether fascist or communist. In accepting this principle for the time being, however, we should be grateful for Coke's *dictum* that if the occasion arose, a judge would do what a judge should do".[6]

Equally significant is his conclusion that if Parliament expresses its intentions clearly enough it may tie its hands in the future by, for example, prescribing the manner and form in which certain classes of legislation are to be passed. For many years it was stated categorically by the textwriters that the British Parliament cannot bind its successors. Authority for the proposition was sought from such decisions as *Ellen Street Estates Ltd. v. Minister of Health*[7] and from the fact that Parliament had repealed statutory provisions expressed to remain in force "for ever".[8] But the case cited, Jennings notes, is no binding precedent on the question of whether Parliament may bind itself not to repeal an Act, and the repeals of "everlasting" statutory provisions only "show what Parliament thought of its own powers, and not what the court thought these powers were. At worst they were unlawful exercises of power . . . acquiesced in by everybody because they were sensible".[9]

Within the British context discussion about what attitude the courts might adopt if Parliament transgressed statutory requirements as to "the manner and form" of legislation or if it were to repeal statutory provisions expressed to be unrepealable tends to be academic. Sir Ivor Jennings is not the first to have raised such issues, but that he should have registered his agreement with those who have stressed that the doctrine of parliamentary supremacy is a judge-made creation which as such can be re-made or un-made is of itself noteworthy.[10]

In spite of its latter-day orthodoxy *The Law and the Constitution* retains much of its original interpretative and critical flavour. In consequence,

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5 "And it appears in our books, that in many cases, the common law will controul acts of parliaments, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed the common law will controul it, and adjudge such act to be void" (8 Co. Rep. 118b).

6 P. 160.

7 [1934] 1 K.B. 590.

8 *E.g.*, the repeal of provisions in the Union with Scotland Act, 1706, and the Union with Ireland Act, 1800.

9 P. 169.

10 *Cf.* the views expressed by Sir Owen Dixon in *The Common Law as an Ultimate Constitutional Foundation*: Australian L.J., 31 (1957-8), 240-5.

the reader who is taking his first bite at constitutional law would be well-advised to regard this book as less than gospel but something more than a synoptic view of the Constitution.

Enid Campbell

THE LAW OF AWOL

By ALFRED AVINS

New York: Oceana Publications, 1957. xxxi and 356 pp.

Few would disagree with the author that "AWOLISM has always been a major problem in the armed forces. The British have been plagued with it". But the uninitiated may rest assured that this book, far from being concerned with some obscure disease, is devoted to a painstaking and well-documented study of the problem of absence without leave, having particular reference to United States military law.

It is certainly prescribed reading for the barrack-room lawyer, although one trembles to think of the uses to which it may be put. Thus the learned author is unlikely to endear himself to members of courts-martial, not to speak of prosecuting officers, all of whom will in future be deserving of our sympathy.

D.