BOOK REVIEWS

ESSAYS ON THE AUSTRALIAN CONSTITUTION

Edited by the Hon. R. E. Else-Mitchell, 2nd Ed. (Law Book Co. of Australasia Pty. Ltd., 1961). XXI and 380 pp. £3/3/-.

In 1952 when Mr. Else-Mitchell, as he then was, edited a collection of eleven essays on Australian constitutional development, it was primarily the intention of the learned editor to present an occasional study in celebration of the first fifty years' Jubilee of the Australian Commonwealth. It must have been gratifying to Mr. Justice Else-Mitchell and the eminent contributors to have been called upon to prepare a second edition of this volume of essays. It is at the same time a reflection upon the utter lack of adequate student textbooks in this field that a collection of essays, in no way providing a comprehensive coverage nor intended to do so, should have come to play such a vital role in the teaching of Australian Constitutional Law.

The purpose of the second edition is mainly to bring the 1952 edition up to date. Only two new essays have been added, one by Professor Zelman Cowen on Full Faith and Credit and the other by Mr. Zelling on the Territories of the Commonwealth. Apart from this, the existing essays have been revised by their original authors save that Professor Derham has taken over the pen of Mr. Justice Menzies in describing the Defence Power, and that Mr. Phillips has relinquished the authorship of the chapter on Freedom and Preference in Interstate Trade to Mr. Menhennit.

The authors who revised their contributions did not have to deal with any radical new developments, for the intervening decade has not brought about any such radical change. Of the three major decisions of that period, *Hughes and Vale Pty. Ltd.* v. *New South Wales* [1955] A.C. 241; the *Boilermakers Case* (1956) 94 C.L.R. 254, (1957) A.C. 288; and *Dennis Hotels Pty. Ltd.* v. *Victoria* (1961) 34 A.L.J.R. 35, the first and last mentioned removed earlier inconsistencies with regard to general principles which had already been established at the time of the first edition. Only the *Boilermakers Case* could be said to have introduced any fresh development.

But the measure of the separation of powers effected by the *Boilermakers Case* does not fall squarely within the scope of any of the essays and the decision itself is only referred to in passing where it touches upon the particular topic under discussion.

The lack of new developments is even more pronounced in regard to the defence power of the Commonwealth. Nevertheless, the change to an academic author has led to a markedly different treatment of the

subject, despite Professor Derham's disclaimer. While Sir Douglas Menzies presented his readers with a largely chronological sketch of the interpretation of the defence power, a presentation no doubt in line with the original intention of the editor, Professor Derham has not only expanded the scope of the chapter considerably and integrated the material under 'problem' headings—which is indeed an improvement—but has allowed himself a much greater degree of speculation. However, he tends to wander a bit too far afield when moving on to discuss the extent of the defence power in peacetime and then concluding with a quite exhaustive discussion of the Commonwealth's power to carry on industrial undertakings generally.

On the other hand, the treatment by Mr. Menhennit of Freedom and Preference in Interstate Trade shows a reverse trend. In contrast to his predecessor, Mr. Menhennit's discussion of the subject is factual and terse. Too factual really, since it would have been interesting to hear the author's views as to why, for instance, insurance, State price-fixing and lotteries were held to fall outside the protection of section 92, instead of being merely told that they did. It is this topic, of all those represented in the earlier edition, which has seen the greatest development in the past ten years. The present author has therefore seen fit to devote a special sub-chapter to the Road Transportation cases, discussing *Hughes and Vale Pty. Ltd.* v. *New South Wales* and its aftermath.

Though the law now seems reasonably settled, there still remain question marks, notably, as the learned author points out the difficulties caused by the decision in *Hughes* v. *Tasmania* (1955) 93 C.L.R. 113, which have not been solved by the recent decision of the High Court in *Simms* v. *West* [1962] A.L.R. 211.

If the existing chapters all deal with questions which have by now been largely settled and only require filling out in detail, the authors of the new chapters open up fresh territories for discovery. Professor Zelman Cowen the more so, for, as he himself acknowledges, the Australian Full Faith and Credit clause has been barely considered by our courts. It is impossible to predict at this stage what shape the courts in Australia will give to the Full Faith and Credit clause, if and when they discover its existence; whether they will accept the absolute mandate of *Harris* v. *Harris* [1947] V.L.R. 44 or impose qualifications which, in the light of the difficulties created by *In re Paulin* [1950] V.L.R. 462, must seem inevitable. Whatever may happen, Professor Cowen has performed a great service in bringing attention to the existence of the problem.

Mr. Zelling had a greater body of jurisprudence to deal with, but certainly not an enlightening one. The latest pronouncement of the High Court in *Lamshed* v. *Lake* (1958) 99 C.L.R. 132 was worthy of the Delphic oracle. It is remarkable that a Court usually so attentive to American precedent has here overlooked American experience.

The editor is to be commended on this departure from the well-settled portions of constitutional law. It is a pity he did not go further.

There are many other topics, such as Federal Executive Power, which could quite well have been included. Perhaps we may look forward to this in the next edition.

P. E. Nygh

MATRIMONIAL CAUSES JURISDICTION

By Z. Cowen and D. Mendes da Costa (The Law Book Co. of Australasia Pty. Ltd., 1961). XX and 163 pp. £1/2/6.

The Federal Matrimonial Causes Act 1959 has, quite unlike its predecessors in English and State legislation, purported to define both the jurisdictional bases of the Australian courts themselves and the circumstances under which those courts will recognise foreign decrees. In doing so the draftsmen have not been content with restating the common law position, but have effected certain far-reaching reforms. This small explanatory book, written by Professor Zelman Cowen and Mr. Mendes da Costa, both of whom are well-known for their writings on private international law problems and, in the case of the former, Australian Constitutional Law as well, is therefore to be welcomed.

The book does not deal with matters of the substantive law of divorce and matrimonial causes, but rather with the law of jurisdiction, choice of law, and recognition of foreign decrees. In fact, the authors have been concerned in the main with questions of jurisdiction and recognition, which is not surprising since the statute itself, as the authors point out, in sections 22 (2) and 25 (3) largely preserves and maintains the existing choice of law rules. Nevertheless, they do touch upon this matter from time to time, notably in Chapter III where they point out that the Act has not solved the problems arising out of the early Victorian decision of *Cremer* v. *Cremer* [1905] V.L.R. 532, and in Chapter IV where they deal in a necesarily summary fashion with the problem of choice of law in nullity suits.

The function of this book is largely explanatory. It shows us the constitutional pitfalls which the draftsmen sought to avoid—sometimes rather deviously, and the injustices of the existing law which they sought to remedy. But this does not mean that the authors were not aware of the problems raised by the new legislation. As they point out, it leaves various gaps such as the relevant time at which the domicile of the petitioner must be considered, and jurisdiction to entertain a cross-petition or to make a declaratory decree. It is ironical to read the authors' statement to the effect that it is settled law that the *forum celebrationis* has jurisdiction to annul a void marriage. Though this was undoubtedly true at the time of writing, it was almost unsettled by the subsequent decision of the House of Lords in *Ross-Smith* v. *Ross-Smith* [1962] 1 All E.R. 344.

This reviewer can only agree with the authors' remarks about the undue restriction which the Act imposes with regard to the annulment of void marriages. Though the book refers besides the *forum celebrationis* to the common residence of the parties as a basis of jurisdiction at common

law, it makes no mention of the respondent's sole residence. This, however, was the sole jurisdictional base of the ecclesiastical courts ever since the Statute of Citations 1543, and the suggestion of the common residence as a jurisdictional base seems to have originated as a qualification by the Court of Appeal in *De Reneville* v. *De Reneville* (1948) P. 100 to the rigid insistence of Bateson J. in *Inverclyde* v. *Inverclyde* (1931) P. 29 that only the *forum domicilii* be competent to annul a voidable marriage. The speeches of the Law Lords in *Ross-Smith* v. *Ross-Smith* make it clear that at common law the respondent's sole residence will suffice as regards both the annulment of void and of voidable marriages.

It is regrettable that there is no discussion of the question whether foreign courts will recognise Australian decrees which rely solely on the petitioner's Australia-wide domicile. It may be that at common law such a domicile would be recognised, as Kriewaldt J. has suggested in *Fullerton* v. *Fullerton* (1958) 2 F.L.R. 391, 399. That the authors were aware of this problem is obvious from their discussion in the *Law Quarterly Review*, 78 (1962) 62. It is a pity that they did not see fit to include this material in their book.

But, apart from this omission, the book deals quite exhaustively both with the problems solved and left unsolved by the new Act. Readers will find it valuable in assisting them to understand the full implications of the jurisdiction and recognition provisions of the new statute.

P. E. Nygh

CASES ON CONSTITUTIONAL AND ADMINISTRATIVE LAW

By P. Brett (Butterworth and Co. (Australia) Ltd., 1962).

This is a further addition to the growing number of case books prepared and published by law teachers in Australian Universities and illustrates the changes, apparent in all Australian law schools, made consciously and as a result of experience and deliberation, in methods of law teaching. The emphasis has moved from lecturing and copious note-taking to individual class participation and argumentative discussion—what is usually called the socratic method of teaching. For some of those of an older generation this change which, whether by coincidence or otherwise, has gone hand in hand with a gradual replacement of part-time lecturers by full-time teachers, may not be fully understood and even where fully understood not at all appreciated. For these this book may well seem to serve little purpose other than perhaps as a ready reference to cases where the number of students makes access to the law reports difficult. But for others, and their number would no doubt be in the majority, it will be received as a case book well presented, its contents selected with judgment and authority. The author's introductory prefaces to each section of the work are concise and well done, whilst the student, if he uses the book properly, will obtain greater understanding of the subject from a consideration of the questions provided at the end of the various sections.

The opening chapter of the book, not surprisingly, deals with Dicey's rule of law and follows up with a discussion of the doctrine of the separation of powers; then, after a brief chapter on the supremacy of Parliament, there follows a much more substantial section on the executive power of the Crown. But it is the remaining portions of the work that are the most important and which will prove of most value to the student. In Chapter 5, Dr. Brett, under the heading of 'The Exercise of Statutory Authority', has set out materials covering the rules against divesting of powers and against exceeding powers, covering at length both express and implied limits, the obligations to observe the law, to act reasonably, to act in good faith, to act with care and to observe proper procedure, finishing with material illustrating the consequence of failure to keep within limits.

Then in the final chapter, the author, under the heading 'Remedies', sets out materials on the availability of remedies, attempts to oust judicial review, and the scope of review. As to the latter, two recent cases which might well be included in the next edition point the distinction between domestic bodies and statutory authorities when considering the question of exhaustion of remedies and the right of access to the courts. They are *Ridge* v. *Baldwin* [1962] 2 W.L.R. 717 and *Annamunthodo* v. *Oilfields Workers' Trade Union* [1961] A.C. 945.

Faults can be found with any book, but with this as a case book I have little to quarrel. However, I cannot pass by the assertion on page VI of the Introduction which reads: 'If the Judge's task is limited to following precedent, he is doomed; the task will ultimately be performed more cheaply and quickly by computers'. This obviously cannot be meant seriously for Dr. Brett knows as well as any lawyer trained in the Anglo-American system of jurisprudence that cases do not get into the Courts, leaving aside the dispute as to the facts, where the precedent is obvious and its binding effect clear. To apply the found facts to the law is often no easy task even for the most rigid adherer to precedent; the particular point may not have come before the Court before, the precedents may be many and conflicting. The difficulties referred to on page 345 provide a good example. But, whether meant seriously or not, I feel the sentence would have been better omitted.

Overall this is a well constructed, thoughtful case book that should be of great assistance to all teachers of administrative law and one which the practitioner will find useful for ready reference in a field in which there exists little modern writing on its major aspects.

R. W. Baker

CASES AND MATERIALS IN CRIMINAL LAW

By P. Brett and P. L. Waller (Butterworth and Co. (Australia) Ltd., 1962). 726 pp.

This book is one of the increasingly common class designated 'case-books', but in this instance the term does not carry the stigma with which it is sometimes associated; for the work is much more than a collection of extracts from the law reports. Its aim, as stated by the authors in their

preface, is to provide 'essentially a teaching tool, not a comprehensive text-book or a collection of leading cases'. The method employed is to arrange the material, about twenty-one problems, each illustrating some particular aspect of the criminal law, in such a way as to provoke the student to formulate his own solutions both to the problems specifically posed and to those which arise as it were by implication.

To this reviewer the work seems to have one substantial weakness: it contains no bibliography. It is suggested that provoking a student to consider the points raised by the authors is, although extremely valuable, only doing half the job. The other half would be completed by providing references to useful discussions in the text-book and periodical literature. Another criticism is that in most cases the authors give no indication of their own view of the matter under discussion. To avoid dogma is one (commendable) thing, but to emulate the mugwump is in the opinion of this reviewer, another.

Although the selection of topics may present a certain arbitrariness, this is not thought to be a valid criticism. It is in the main fair to claim, as the authors do, that the book reveals at least the skeleton and nervous system of the criminal law, if not all the flesh.

Having said so much, the reviewer must not be taken to deny the overall excellence of this book in relation to its announced purpose. Many fundamental questions are dealt with in a way which is both agreeable and stimulating to read. The material includes not only leading cases from England and various Australasian jurisdictions, but also matter from sources as divergent as the Supreme Court of Missouri and the correspondence columns of *The* (London) *Times*. There are extracts from Holmes, and also from the American Law Institute's Model Penal Code, as well as some excellent material written by the authors themseves. In the latter category is the extremely able 'Party Conversation' on insanity (p. 618 *et seq.*).

Finally, the book (received for review in April) contains such recent cases as *Attorney-General for Northern Ireland* v. *Gallagher* ([1961] 3 All E.R. 299) and is therefore really up-to-date. It deserves to be extremely successful. In Victoria—the authors are both members of the Melbourne University Law School—it no doubt will be. Its value, since it is orientated primarily towards the Victorian Crimes Act of 1958, may be slightly less in the other 'common-law' States, and is seriously diminished for those States in which Codes operate, of which Tasmania is one. But if we in Tasmania are unable to have unqualified recourse to this very good book, that is our misfortune. The printing and binding of the volume are equal to its contents.

E. M. Bingham

GREEN BELTS AND URBAN GROWTH

By Daniel R. Mandelker (University of Wisconsin Press, 1962). 176 pp. $5.

This study, in no way a legal textbook, is nevertheless one which law students would do well to read. It exhibits in Chapter V an aspect of practice which is found consistent with the reviewer's own experience of

many Town Planning Appeals and Inquiries. It imparts information and guidance which would be difficult to acquire otherwise than in practice.

So far there have been very few Town Planning Appeals in Tasmania. In view of the vast amount of land available this is scarcely surprising. Such, however, is not the case in England where this research was carried out. The writer has chosen as the subject of his study, the Green Belts. The latter manifest the *status quo*, for they are in definite opposition to economic conditions. The owner can witness neighbours outside the Green Belt receiving enhanced prices for plots of building land, whose main advertised attraction is that they overlook a Green-Belt area. Many thus deprived of considerable wealth quite naturally feel resentment. Builders, too, in the outer-London area, would like to see some Green-Belt land released for housing purposes; the general public, waiting for homes, joins in the attack.

It is axiomatic, therefore, that where the need for a Green Belt is greatest, namely, in proximity to a conurbation area, there is likely to be found the stiffest opposition. In Australia, the Sydney Green Belt has already suffered in this way.

Against this background, it is natural that the Green-Belt decisions of Planning Authorities must give rise to many appeals. It is not easy in such cases either to do justice or to be logical. An adverse decision in sentimental cases can lead to unpopularity, not only at the local level. A special decision based upon the peculiarities may be eagerly seized upon by the practitioners specialising in this branch of legal and technical work. The door is then open for further appeals and charges of inconsistency, if not of downright favouritism.

The writer of this book appears to favour the land owner, doubtless in tune with the recent reaction against administrative tribunals. However, as one who regularly appeared for the Planning Authority, it may be said that the appellant seemed to have all the advantages of fighting on interior lines.

There is criticism of the time taken by Local Authorities in deciding planning applications. But this is not altogether justified seeing that the majority of cases are routine and handled expeditiously. The difficult cases usually receive all the attention they appear to warrant. The wording of the decisions is also under fire and although this has the backing of the Franks Commission all lawyers know that the giving of reasons only tends to facilitate appeals. While not wishing to deprive any person of justice, the lawyer is taught to respect his possible antagonist and not to provide the latter with more ammunition than is necessary.

The system of delegation is satisfactory in those areas where there is a desire by the County Councils and the Borough Councils to make it work. Further, the Minister for Housing and Local Government, who in England is charged with the duty of planning at Government level, did not grant greater autonomy to the Borough Councils in order to enervate them; in fact, quite the contrary.

J. E. Siddall

THE LAW OF AGENCY

By S. J. Stoljar (Sweet & Maxwell Ltd., 1961). 341 pp. £2/9/6.

Dr Stoljar, who is Senior Research Fellow in Law at the Australian National University, has produced a book which cannot fail to delight those of us who teach commercial and mercantile law in the university law schools. Too frequently those subjects are treated as purely technical branches of the law to be taught only because of professional demands and not as integral parts of the academic study of law. In consequence, the syllabus often extends over such a wide range of subjects that no student can hope to acquire more than a superficial knowledge of any one of them, and the examination becomes a test of memory rather than an intellectual exercise. What is commonly overlooked is that most of the commercial and mercantile subjects provide, in the later years of a university course, an ideal test of the student's real understanding of and ability to apply principles underlying the subjects of his earlier studies. Of these it is probably Agency that covers the widest field. As Dr Stoljar says in the preface to his book: 'It is (so to speak) a mobilisation-area for rules from many other departments; above all, of course, rules from contract; then rules from property, equity and quasi-contract; as well as rules from partnership and company law.'

Although dealt with in at least four current textbooks, that of Dr Stoljar is the first of them to examine the law of agency in the light of its historical development. Agency is too often regarded as a mere branch of the modern law of contract, ignoring the fact that, as common law concepts, both agency and partnership long preceded the growth of assumpsit. Indeed, the action of account between partners and between principal and agent is a contemporary of the actions of 'debt' and of 'covenant'. While including most of the material to be found in the other books on Agency, Dr Stoljar is at pains to describe the sociological factors which have influenced the shaping of many otherwise artificial and incomprehensible rules. In this respect, his rationalisation of the doctrine of the undisclosed principal is a notable contribution to jurisprudential thought, and although he may not find unanimous agreement with his conclusions they at least serve to arouse the reader's interest in his arguments. In justifying the partial application of that doctrine and, if I do not misunderstand him, in advocating its complete extension to partnership, he concludes that the undisclosed partner's liability should be a natural concomitant of his entitlement to share in the partnership profits. In view of the decision in *Cox* v. *Hickman* (in this context somewhat cursorily dismissed in a footnote) and of the express provisions of the Partnership Acts to the effect that the sharing of profits does not of itself make a person liable as a partner, it is felt that this proposition calls for more detailed reasoning. In the absence of further explanation, this reviewer prefers the opinion of Pothier that such liability results from the undisclosed partner having chosen to trust the active partner to the extent of joining him in a fiduciary relationship of unlimited liability. In practice, limited partnership or the provisions of Bovill's

Act are available to persons who wish to invest in a partnership with limited personal liability.

However, throughout this scholarly work the author never fails to stimulate the reader and, even on those occasions when he fails to convince, Dr Stoljar has succeeded in provoking considerable thought. For the aspirant to honours this book is indispensable; for those who teach the subject it suffices to say: *'Lectorem delectando pariterque monendo'.*

P. F. P. Higgins

THE PLACE OF NEGLIGENCE IN THE LAW OF TORTS

By Abraham Harari (Law Book Co. of Australasia Pty. Ltd., 1962). xv and 194 pp. £2/10/-.

Is liability in negligence founded on different principles than liability in trespass or liability under the rule in *Rylands* v. *Fletcher*? Does liability in negligence depend on reasonable foreseeability of harm? Can liability in negligence be based on the foreseeability test? How is the statement that a man has caused harm related to the statement that he has broken a duty of care?

These are some of the questions which this book tries to answer. It offers a new analysis of the notion of negligence in the law of torts. It tries to demonstrate that reasonable foreseeability of harm is not, and cannot logically be, the test of duty, and thus of liability; that the test of reasonable foresight has no place in the law; that negligence in the sense of 'a breach of a duty of care' is an element of causation; and that the principles on which liability is founded are identical in trespass, negligence, and 'strict liability'.

The book is in three parts. Part One deals shortly with the problem of finding or determining the law; in Part Two the concepts of negligence, duty of care, and causation are examined, and the trespass-negligence-'strict liability' division is explained; in Part Three the analysis is elaborated and applied to particular topics, and the foreseeability test is shown to be unworkable.

Since the author is a Senior Lecturer in the University of Tasmania the appraisal of the book is left to others.

BOOKS RECEIVED

W. Friedmann and D. G. Benjafield, *Principles of Australian Administrative Law* (2nd ed.), Law Book Co. of Australasia Pty. Ltd.

O. de R. Foenander, *Trade Unionism in Australia*, 1962, Law Book Co. of Australasia Pty. Ltd.

E. I. Sykes, *Cases on Private International Law*, 1962, Law Book Co. of Australasia Pty. Ltd.