CASE NOTES

REGINA v. PRESTON

Criminal Law—Unlawful Carnal Knowledge—Female Accessory

The ruling by Crawford J. in the Supreme Court of Tasmania that a girl who consents to her own defilement is guilty of the crime of defilement under the Tasmanian Criminal Code should be of interest not only to academics, but also to those charged with the practical administration of the law.[1]

Preston was charged with defilement of a girl under eighteen years of age, contrary to section 124 of the Criminal Code.[2]

The girl gave evidence in chief that she and the accused had had intercourse, but denied in cross-examination that any penetration at all had taken place. In re-examination she was asked, by counsel for the Crown, what she had meant when she said that intercourse had taken place. She failed to answer and counsel for the Crown asked several other questions designed to elicit from her what she had meant. Most of his questions she failed to answer. At this point the trial judge warned her that it was a contempt of Court for a witness to refuse to answer and told her of the Court's power to commit her to prison if she did not. She then answered some of counsel's questions, and in reply to one said that the accused had been lying on top of her on the front seat of a car, but she refused to answer many questions and, beyond that, nothing further was elicited from her as to what had occurred between her and the accused.

His Honour in his written ruling records that it occurred to him about this time that he may have been in error or unfair in reminding the girl of the Court's power to commit for contempt, as it might, under the

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1 *Reg.* v. *Preston*, Supreme Court of Tasmania, 14 June 1962. Serial No. 57/1962, unreported.

For a full examination of the criminal responsibility of 'victims' of crime see the article by Brian Hogan: 'Victims as Parties to Crime' (1962) Crim. L.R. 683.

2 Section 124 (1) provides:

> Any person who has unlawful carnal knowledge of a girl under the age of eighteen years is guilty of a crime.
>
> Charge: Defilement of a girl under eighteen years of age.

Section 1 defines 'carnal knowledge' as the penetration to the least degree of the organ alleged to have been known, by the male organ of generation.

Criminal Code, be said that if she had aided the act of intercourse she, too, had committed a crime under section 3.[3]

The Crown applied to have the girl treated as a hostile witness and Crawford J. resolved to decide the question by hearing evidence on the *voir dire*.

After the taking of evidence on the *voir dire* submissions were heard from counsel as to whether the witness should be declared hostile, during which Crawford J. put to counsel the thought which had occurred to him as to many of the questions requiring self-incriminating answers. Defence counsel submitted that section 3 of the Criminal Code applied to section 124, but counsel for the Crown contended that a distinction could be found in that the crime of defilement could only be committed by a man upon a woman and therefore a woman could never be said to come within section 3 in its application to section 124.[4]

Crawford J. ruled that the girl was a hostile witness and then retired to consider whether she had been required to give self-incriminatory evidence.

On his return his Honour ruled that all that is required to commit the crime of unlawful carnal knowledge is that a man have carnal knowledge of a girl, not his wife, the girl being under the age of eighteen years. Thus if a girl willingly co-operates in an act of intercourse she does an 'act for the purpose of enabling or aiding the accused to commit the crime' of defilement. Similarly, if she counsels, procures or commands a person to have intercourse with her she comes within section 3 (1) (b) [(*sic*) 3 (1) (d)], and again if intercourse takes place she abets the commission of the crime of defilement within section 3 (1) (c). If she incites a male to have intercourse with her she commits a crime under section 298 of the Criminal Code.[5]

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[3] Section 3 provides:

(1) Where a crime is committed, each of the following persons is deemed to be a party to, and be guilty of the crime, and may be charged with actually committing it:

(a) Every person who actually commits the crime;

(b) Every person who does any act or makes any omission for the purpose of aiding or enabling another person to commit the crime;

(c) Every person who abets another person in committing the crime; and

(d) Every person who instigates any other person to commit the crime.

Section 1 defines 'instigate' as 'counsel, procure or command'.

[4] In *R.* v. *Ram*. (1893) 17 Cox C.C. 609 a woman was convicted of rape as a principal in the second degree at common law. The decision appears to lend support to the ruling in *Preston*.

[5] Section 298 provides:

Any person who incites another to commit a crime is guilty of a crime.
Charge: Inciting to commit (specify particular crime).

It would seem in view of this section that a mere incitement itself or a solicitation by a female under the age of eighteen years to have intercourse would justify a conviction for inciting to commit defilement, even though no carnal knowledge in fact takes place (*cf. R.* v. *Higgins* (1801) 2 East. 5). Section 3 only applies 'where a crime is committed' and the effect of subs. 1 (d) is that any person who instigates that crime may be charged with the substantive crime itself. Unless this view of the meaning and operation of s. 298 is correct the section would be surplusage in view of s. 3 (1) (d).

In his ruling Crawford J. referred to the case of *Reg.* v. *Tyrrell*[6] as being 'at first glance, an authority to the contrary.' There a question was reserved for the Court of Crown Cases Reserved 'Whether it is an offence for a girl between the ages of thirteen and sixteen to aid and abet a male person in the commission of the misdemeanour of having unlawful carnal connection with her or to solicit or incite a male person to commit that misdemeanour.'

In that case the girl had been convicted at her trial, but the Court for Crown Cases Reserved quashed the conviction. Lord Coleridge C.J. and Mathew J. both delivered written judgments which were concurred in by Grantham, Lawrence and Collins JJs.

Lord Coleridge held that because the Criminal Law Amendment Act 1885 (Eng.) was passed with the object of protecting females against themselves and because the Act was silent about accessories to crime it could not have been intended that the girls for whose protection the Act was passed should be punishable under it.[7]

Mathew J.'s reasoning was that there was no trace in the Act of any intention to treat the woman as a criminal, and that since it would be impossible to obtain convictions if the contention for the Crown were adopted, such a result could not have been intended by the legislature.[8]

In Crawford J.'s view little of this reasoning is applicable in Tasmania.

> The Criminal Code Act was passed in 1924. It does not deal only with crimes relating to females. Sections 3 and 298 each refer to 'a crime', *i.e.*, the aiding another person to commit *the crime*, the abetting another person in committing *the crime*, etc., and literally and logically, in my view, it would be quite illogical to single out section 124 (1) which creates the crime of defilement from any other crime created by the Criminal Code, so as to say sections 3 and 298 did not apply to the girl aiding, etc., the intercourse with herself.[9]

In disposing of the argument by the Crown, his Honour referred to the case of *R.* v. *Sockett*[10] and to cases of bigamy where the woman knows the man is already married.[11] In *Sockett's* case a woman was convicted of aiding and abetting the use on herself of an instrument with intent to procure a miscarriage, in circumstances in which she could not have been convicted as principal in the first degree, at common law.

His Honour ruled that he should not have informed the witness of his power to commit; although he expressed the view that 'possibly, strictly, as she had not objected to answer,' such a power existed. However, particularly having regard to the tender age of the girl, had it occurred to his Honour that she was likely to incriminate herself a warning would have been given and the witness would not have been told of the Court's power of committal. In all the circumstances it was not safe for the trial to proceed and a retrial was ordered.

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6 [1894] 1 Q.B. 710.
7 [1894] 1 Q.B. 710 at 712.
8 *Ibid.*
9 *Reg.* v. *Preston, supra* n. 1, at p. 3 *per* Crawford J.
10 (1908) 1 C.A.R. 101.
11 *cf.* Glanville Williams: *Criminal Law*, The General Part *ist ed.* at 207.

So far as the practical administration of the law in Tasmania is concerned, it remains to be seen whether the reasoning of Mathew J. in *Reg.* v. *Tyrrell*, although not applicable in Tasmania, will present any difficulty for the administration of justice.

In view of the provisions of sections 87 and 89 of the Evidence Act 1910, which were not availed of in *Preston's Case*, it is obvious that no real difficulties need occur. The two sections provide that where in any proceeding a witness declines to answer on the ground of possible self-incrimination the judge may 'if it appears to him expedient for the ends of justice' that the witness be compelled to answer, inform him that if he answers questions to the judge's satisfaction he will grant him a certificate. Thereupon it is not open to the witness to refuse to answer on the ground of self-incrimination. Provided his evidence is given to the satisfaction of the judge the witness is provided with a certificate which frees him from all criminal and penal actions or other penalties to which he may have been liable for having done anything in respect of the matters touching which he was examined.

However, the writer is of opinion that the ruling in *Reg.* v. *Preston* is to be welcomed. If a dominant principle of punishment is deterrence, then surely the maintenance of law could be strengthened by the possibility of an indictment existing in respect of both sexes. In the present state of society any notion that it is only the one sex which needs protection appears to be a misconception based on an outmoded view of the inequality of the sexes. Prosecution of the female 'victim' of the crime of defilement would, it is submitted, be desirable at least in the case of a girl who repeats the circumstances and also in the case of the amateur prostitute.

T. L. McDermott, LL.B.

GARTNER v. KIDMAN[1]

Nuisance—Surface Water—Drainage

In this case, the parties owned adjacent blocks of land. On Kidman's block there was a large swamp which at times extended across the boundary to cover part of Gartner's land. In 1909 (while Gartner's block was still Crown land), the predecessor in title to Kidman constructed a kind of channel from the swamp to a sandy basin on what later became Gartner's land. This channel was later extended and the result was that most of the swamp was drained into the sandy basin. The channel followed a series of natural depressions in the ground.

In 1959, Gartner, having discerned that a sandpit in the basin could be of commercial value to him, constructed a series of sandbanks in the channel, which prevented the draining of the swamp. Kidman thereupon sued Gartner in the Supreme Court of South Australia (Chamberlain J.) and obtained injunctions to compel Gartner to remove the sandbanks.

[1] (1962) 36 A.L.J.R. 43.

and to restrain him from obstructing the free flow of water along the channel. From this judgment Gartner successfully appealed to the High Court of Australia (Dixon C.J., and McTiernan and Windeyer JJ.).

The learned trial judge had decided the case on the basis that Kidman, as a riparian owner, was entitled to have the flow of water through the channel continue without obstruction. McTiernan J. held that the alterations to the original depressions were so substantial that the channel no longer retained the character of a natural watercourse and that therefore riparian owners could not claim any rights to the flow of water in it that did not exist by virtue of a grant or easement. He concluded that Kidman was limited to such rights as attached naturally to his land in 1909. (It should be observed that no question of prescription arose on the pleadings).

Windeyer J., with whom Dixon C.J. concurred, also concluded that the channel was not a natural watercourse. His Honour then proceeded to analyse the respective rights of the parties on the basis that the water from the swamp was surface water flowing from one piece of land to an adjoining piece of land situated on a lower level.

An examination of the authorities led his Honour to the conclusion that there were two lines of authority on this matter. One favoured the 'common enemy' rule, which states that water is a common enemy against which every man may defend himself as best he can and that therefore, subject perhaps to some qualification, the owner of the higher land may construct drains to carry surface water away from his land, even if this has the result of causing it to flow onto the lower land in greater quantity or in a more concentrated form than would otherwise be the case; on the other hand, the owner of the lower land may take steps to prevent water entering his land and cause it to remain on the higher land.

The other line of authority adopts as part of the common law the rule of civil law that the lower land owes a natural servitude to the higher land in respect of surface water naturally flowing down to it from the higher land and that the owner of the lower land is obliged to receive such water. This theory seemed to receive strong support from a dictum of the Privy Council in *Gibbons* v. *Lenfestey*[2] which, however, was a decision on the law of Guernsey and therefore questionable authority in common law jurisdictions.

These two views were examined by Professor D. P. Derham in a recent article[3] together with a third theory, embodied in a so-called 'reasonable use' rule, which had evolved in two states in the United States. This rule allows each landowner to make a reasonable use of his land, even if this results in an interference with surface waters which causes harm to others. The law would, however, interfere if such harm was caused by an unreasonable use of land.

Professor Derham concluded that the civil law rule tended to cause injustice to the lower landowner, and that, in the absence of binding

2 (1915) 84 L.J.P.C. 158.

3 'Interference with Surface Waters by Lower Landholders'; (1958) 74 L.Q.R. 361.

authority, it should be rejected. He favoured the 'common enemy' rule, provided it was modified so as to give relief in cases where a landowner caused harm to an adjoining owner by unreasonable interference with the flow of surface waters. He claimed that such a rule was preferable to the so-called 'reasonable use' rule, which would be too vague and uncertain in practice.

Finally, Professor Derham claimed that a modified 'common enemy rule' had in fact been formulated by Burbury C.J. in *Bell v. Pitt*.[4] In that case the learned Chief Justice, after examining the existing authorities, rejected the civil law rule and formulated, *inter alia*, the following important rules:

> 3. An owner of a farming property is in accordance with general principles of the common law entitled for the purpose of the better cultivation of his farm to carry out reasonable drainage operations even if the result is to cause an increased concentration of surface water to discharge on to a neighbouring property. That right is an example of the general principle that an owner of land is entitled to the natural and proper user of it even if in the course of such user damage is caused to his neighbour's land.
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> 4. The limits of reasonable drainage operations on a farming property constituting natural user cannot be defined by definition and each case must depend on its own circumstances.[5]

In the instant case, Windeyer J. expressly agreed with the conclusion of Burbury C.J. in *Bell v. Pitt*[6] in rejecting the civil law rule, and held that the rule to be applied was the 'common enemy' rule, qualified by the requirement that the parties act reasonably. His Honour then went on to set out more precisely the consequences which followed from his conclusion. These may be summarised as follows:

(1) The higher proprietor is not liable for the consequence of the natural flow of surface water from his land to lower land. He may be liable if, by the discernible work of man, such water is caused to flow in a more concentrated form than it naturally would. Generally speaking he will not, however, be liable if a more concentrated flow of this nature occurs simply as the result of the natural use of his land. What is a natural use is a question to be determined reasonably having regard to all the circumstances, including the purpose for which the land is being used and the manner in which the flow of water is increased.

(2) Even where the lower landowner has no right of action against the higher proprietor because of the flow of surface water onto his land, he is not bound to receive such water but may pen it back onto the higher land, provided he uses reasonable care and does no more than is reasonably necessary for the protection of his own land.

As Dixon C.J. concurred with Windeyer J., it would seem that the modified 'common enemy' rule advocated by Professor Derham is now established as being the law in Australia. Some subsidiary questions may perhaps be mentioned here.

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4 [1956] Tas. S.R. 161.
5 *Ibid.* at 184.
6 *Ibid.*

In *Bell v. Pitt*,[7] where the higher landowner had constructed a drain which passed on to the lower land not only surface water from his own land but also water which had come onto his land from properties higher than his own, Burbury C.J. said that this went beyond the reasonable use of the higher land, but added:

> I do not wish to be taken as saying that in no circumstances would an owner in the natural use of his property be justified in passing on by means of an artificial drainage system surface water reaching his property from higher land in the same watershed (particularly if it was flowing in its natural state). But it would be for an owner to satisfy the court that such action constituted a natural and reasonable user of his property.[8]

This view receives some support from Windeyer J. in *Gartner* v. *Kidman*,[9] where his Honour said that the right of a lower landowner to protect his land from surface water 'is generally speaking restricted to penning it back on to the higher land from which it would otherwise have naturally come. It does not entitle him to divert it onto the land of a third proprietor to which it would not have naturally gone to the damage of that proprietor'.[10]

In *Warden, Councillors and Electors of Kingborough and Kingborough Municipal Commission* v. *Lucas and Geard*,[11] where a lower landowner had constructed a drain which picked up water from higher land at a point where such water would otherwise have entered his own land and led it directly onto land still lower than his own, Cox J. held that this was not a natural and reasonable use of the lower land. It would appear, therefore, that *prima facie* a landowner is not entitled either to pass on to a lower landowner surface water reaching his own land from a higher property or to divert such water onto lower land before it enters his own property.

It is not yet quite certain what is to be understood by the concept of natural use of land in the present context. Burbury C.J. in *Bell v. Pitt*[12] limited his conclusions to agricultural land. In the recent case of *Bayliss* v. *Lea and Anor*,[13] decided by the Full Court of the Supreme Court of New South Wales, Manning J. preferred to define what is usually called a non-natural use as 'a special use bringing with it increased danger to others . . . or . . . a use which introduces an exceptional danger and not as an incident natural or proper in the use of land in an ordinary manner'.[14]

It is respectfully submitted that the concept of a 'natural' or 'ordinary' use of land should not be permitted to restrict unduly the purposes for which a landholder may use his land without incurring liability for the increased flow of surface water to lower land. Scientific and technological developments will no doubt continue to bring about

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7 *Ibid.*
8 *Ibid.* at 182.
9 (1962) 36 A.L.J.R. 43.
10 *Ibid.* at 58.
11 Tasmania, unreported, 5 November 1962.
12 [1956] Tas. S.R. 161.
13 (1962) 79 W.N. (N.S.W.) 218.
14 *Ibid.* at 232.

a number of new ways in which land may be used and any theory of natural use must be at best of dubious validity.

It may be that the most significant test will be whether the operations which brought about the increased flow of water onto lower land were reasonably necessary for the purpose for which the higher land was in fact being used. This test would make it unnecessary to examine the purpose to see whether it was a 'natural' one; or at any rate such an examination would be confined to seeing whether the purpose was clearly an unnatural one, in the sense that it could not be carried out consistently with a reasonable regard for the rights of neighbouring landowners, and whether all reasonable care was taken to prevent unnecessary damage to the lower land. Possibly Windeyer J. in *Gartner* v. *Kidman*[15] was implying an approach of this kind when he said that, in determining what is a natural use, regard must be had 'to all the circumstances including the purpose for which the land is used and the manner in which the flow of water was increased, as for example whether it is timbered land cleared for grazing, whether it is a mining tenement, or is used for buildings and so forth'.[16]

R. Plehwe

LA ROVERE v. LA ROVERE[1]

Divorce—Habitual Cruelty—Matrimonial Causes Act 1959 *(Cth.) s.* 28 *(d)*

This was an appeal to the Full Court of Tasmania by a petitioner against the decision of Crawford J. dismissing her petition for a decree of dissolution of marriage. The petition was based on the ground of habitual cruelty as the same is contained in section 28 (d) of the Matrimonial Causes Act 1959 (Cth.). The appeal was heard by Burbury C.J., Gibson and Cox JJ., who delivered a joint judgment.

Throughout the period of co-habitation the petitioner was the subject of a number of physical acts of violence on the part of the respondent. It was found that at least four of such acts occurred during the first year of the marriage. Further incidents not involving physical violence were admitted as evidence by the Full Court and were said to 'suggest a calculated course designed to annoy and humiliate his (the respondent's) wife —to deride her and hold her up to ridicule even in public.' Such incidents included the respondent frequently going out at night; his being found in a compromising situation with another woman; and his being seen by his wife in the company of other women in public. There were also at least two occasions when the respondent left the matrimonial home for a number of days.

Several of the acts of physical violence occurred when the petitioner tried to prevent the respondent leaving her and one such act occurred when she endeavoured to get him to return to the matrimonial home.

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15 (1962) 36 A.L.J.R. 43.

16 *Ibid.* at 58.

1 Supreme Court of Tasmania, 10 July 1962 (unreported). The decision will shortly be reported in the Federal Law Reports.

In first instance it was found by Crawford J. that 'almost all the assaults upon the wife had been provoked by her, in the sense that if she had not interfered with her husband he would not have assaulted her'.[2] Crawford J. then went on to say:

> The court will not grant relief to a wife if she could have ensured her own safety by an alteration of her own conduct by being dutiful, restraining her outbursts of temper and exercising self command, but she does not fail because she has made proper remonstrance or even if she has not been entirely patient nor even if she has unreasonably provoked her husband if his conduct is unjustified or out of proportion to the provocation.[3]

The Full Court rejected the view that the wife's conduct amounted to provocation, saying:

> It did not . . . amount to unreasonable provocation. It sprang out of an excess of zeal to preserve her proper rights and status as a wife, and was born of humiliation and the realization of unrequited love. . . . But whatever view may be taken as to all that it is in our view clear that the respondent's reaction was totally out of proportion to any provocation if it can be so called.

It is submitted that this latter view is clearly correct. With respect, it is suggested that it is unreal to suppose that a wife should passively subject herself to humiliation and ridicule born of the husband's malconduct. More, it is unreal to suppose that a husband might, with immunity, strike his wife if she does not give way to such unreasonable conduct.[4]

Cases such as *Vardy* v. *Vardy*[5] appear to have taken a contrary view, but the Full Court in the instant case summed up the objection to such authorities by saying: 'Whatever (if anything) now remains of the old duty of submission on the part of a wife must be limited to what is reasonable according to contemporary notions and social behaviour.'

Having found that there was no provocation such as would provide the respondent with a defence to the petition, their Honours went on to consider whether or not the respondent's behaviour amounted to habitual cruelty.

Their Honours found that the conduct was undoubtedly habitual and that it extended throughout the prescribed period of a year.[6]

The Court had finally to determine what was meant by the legal conception of cruelty, and whether or not it had been established in the instant case. Their Honours pointed out that the Matrimonial Causes Act 1959 (Cth.) does not define cruelty for the purposes of section 28 (d) of that Act. However, it was held that 'cruelty' retained the meaning it had acquired in English and Australian courts. It was stated that:

> . . . the legislature in this section must be taken to be referring to a legal conception of cruelty as a matrimonial offence as developed by the courts in England and in those Australian States where the legislatures had not expressly defined cruelty.

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2 (1961) 3 F.L.R. 10 at 15.

3 *Ibid.*

4 *Cf. Jamieson* v. *Jamieson* [1952] A.C. 525 where a similar view was taken.

5 (1899) 16 W.N. (N.S.W.) 78.

6 Matrimonial Causes Act 1959 (Cth.), s. 28 (d).

In so finding their Honours followed the decision of the House of Lords in *Jamieson* v. *Jamieson*[7] in relation to the Imperial Act of 1937 which likewise does not define cruelty.[8]

The meaning so retained was taken to be properly defined in *McCann* v. *McCann*.[9] There the Court said: '. . . the petitioner has to prove two things: (1) a course of conduct lasting for at least one year;[10] (2) some injury or reasonable apprehension of injury to the petitioner's physical or mental health.'

Speaking of this definition, counsel for the appellant contended that once it is shown that injury is done the second element is satisfied and there is no need to go on to consider the question of apprehension since that element is expressed in the alternative.

Their Honours rejected this contention, and saw fit to dismiss it simply by saying: 'The unsoundness of this argument clearly appears from the passage from Lord Merriman's judgment in *Jamieson* v. *Jamieson*[11] we have cited.'

The relevant part of the passage referred to by their Honours reads as follows:

> . . . when the legal conception of cruelty is described as being conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger, it is vital to bear in mind that it comprises two distinct elements: first, the ill-treatment complained of, and, secondly, the resultant danger or apprehension thereof. Thus it is inaccurate and liable to lead to confusion, if the word 'cruelty' is used as descriptive only of the conduct complained of, apart from its effect on the victim.

Now their Honours' rejection of counsel's contention appears to amount to saying that a petitioner must prove not only that there was injury but also that throughout the prescribed period there was a reasonable apprehension of injury.

With respect, it is submitted that not only is this view not sustainable but also that it can never have been intended by the Full Court. It would appear that their Honours have mistaken counsel's reference to injury as a reference to conduct. Thus their Honours would have understood counsel as saying that once a course of conduct was established it would not be necessary to go on to consider the second element of the accepted definition. That this was their Honours' actual view is lent support by their words in their closing paragraph:

> . . . [This conduct] qualifies as conduct amounting to ill-treatment of a character recognized in the legal conception of cruelty. It is the second element in that conception—the danger to life, limb or bodily or mental health or reasonable apprehension thereof resulting from the ill-treatment—which is the difficulty in this case. No doubt in cases of gross ill-treatment the court will readily infer the second element.

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7 [1952] A.C. 525, particularly *per* Lord Merriman at 544-545.

8 *Jamieson* v. *Jamieson* was heard by way of appeal from Scotland where the relevant Act is the Divorce (Scotland) Act 1938. However, the House of Lords held that so far as cruelty was concerned the Scottish Act did not differ in meaning from the Imperial Act.

9 [1942] S.A.S.R. 108 at 111.

10 The South Australian Matrimonial Causes Act 1929 required proof of habitual cruelty for a period of not less than one year.

11 [1952] A.C. 525.

It will be noted that their Honours not only state the second element in the alternative but also state that a court may readily infer that second element in cases of gross ill-treatment. Their references to the inference to be drawn in cases of gross ill-treatment is in keeping with the suggestion that their Honours understood counsel to say that the court should infer the second element once conduct was established.

Such being their understanding of counsel's argument their Honours quite properly rejected it, relying on Lord Merriman's words in *Jamieson* v. *Jamieson*.[12] However, it is submitted that counsel was really contending that if within the second element of the definition given in *McCann's Case*[13] a petitioner proved injury then she need not go on to prove apprehension thereof.

Their Honours concluded by dismissing the appeal[14] on the basis that there was no evidence establishing the existence of injury or apprehension of injury, 'let alone as persisting for twelve months.' With this finding the writer respectfully agrees, for, as their Honours stated, while there was clear evidence of much ill-treatment, yet there was little or no evidence of any injury resulting therefrom.

R. J. Hand

BAILY v. BAILY[1]

Matrimonial Causes—Separation—Harsh and Oppressive

In this case the petitioner sought dissolution of his marriage on the ground of separation under section 28 (m) of the Matrimonial Causes Act 1959 (Cth.). The case raises the interesting and controversial question of the application of section 37 (1) to that ground. Section 37 (1) provides:

> Where on the hearing of a petition for a decree of dissolution of marriage on the ground specified in paragraph (m) of section twenty-eight of this Act (in this section referred to as the ground of separation), the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the court shall refuse to make the decree sought.

The petitioner left his wife in 1947 because of her persistent eccentric and generally irritable behaviour which had been aggravated by illness. After the separation of three years, the husband filed a petition for dissolution on the ground of desertion under the Matrimonial Causes Act 1860-1947. The High Court, in reversing the decision of Morris C.J. granting a decree, held that although the husband had just cause and excuse for leaving his wife, there was no evidence that the wife had an

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12 *Ibid.*

13 *Supra,* n. 8.

14 It is noted that Burbury C.J. has been wrongly reported as saying that the appeal was allowed, see 36 A.L.J. at 291.

1 (1962) 3 F.L.R. 476.

actual intention to cause her husband to leave, nor did her conduct, in the light of medical evidence, show an intention to sever the matrimonial relationship.[2]

Subsequently another petition, the subject of the present case, was filed seeking dissolution upon the separation ground. The respondent filed an answer claiming under section 37 (1) that it would be harsh and oppressive to her, and contrary to the public interest, to grant a decree to the petitioner.

The matter was heard by Gibson J. who found firstly that the parties had in fact lived separately and apart for the requisite period of five years and that there was no reasonable likelihood of cohabitation being resumed.

At the hearing the matters contained in the answer were no longer pressed, the respondent being apparently resigned to the possibility of a decree being made. His Honour found that it was still necessary to consider whether it would be harsh and oppressive to the respondent or contrary to the public interest, notwithstanding the attitude of the parties. It will be remembered that in *Judd* v. *Judd*[3] Monahan J. expressed the view that the application of the section was not restricted to defended cases, but that the discretion may be exercised on the basis of any evidence which satisfies the court that it would be harsh and oppressive to the respondent, or contrary to the public interest to make the decree sought.

Gibson J. found that in the circumstances no blame was to be attached to the petitioner for leaving his wife, and that no ground other than this had been suggested by the respondent leading to the conclusion that to grant a decree would be harsh and oppressive. It remained therefore to consider whether for any other reason it would be contrary to the public interest to dissolve the marriage.

In this context his Honour referred to the judgment of Nield J. in *Taylor* v. *Taylor* (No. 2).[4] In that case it was held that if the petitioner had caused the separation and the respondent opposed the making of a decree for some *bona fide* reason, it was harsh and oppressive to the respondent to grant a decree. The respondent wife in *Taylor* v. *Taylor* had never wanted a divorce, which was against her religious convictions, and also had never been opposed to reconciliation with her husband. Nield J. observed: '. . . it is unquestionably harsh and oppressive to the respondent to be divorced when the marriage has broken down not by any fault on her part, but entirely by reason of her husband's instability'.[5] He disagreed with the view expressed by Salmond J. in *Lodder* v. *Lodder*,[6] when dealing with New Zealand legislation giving the court an absolute discretion to dissolve a marriage in certain circumstances of separation, to the

2 *Baily* v. *Baily* (1952) 86 C.L.R. 424.
3 [1962] V.R. 112.
4 (1961) 2 F.L.R. 371.
5 *Ibid.* at 373.
6 [1921] N.Z.L.R. 876.

effect that questions of fault or guilt in the main should be irrelevant. Nield J. expressed the opinion in *Taylor* v. *Taylor* that the very fact of the termination of the marriage without any fault whatever on the part of the respondent, and the fact that 'she will be compelled thereafter to describe herself as divorced, not a divorced petitioner, with all the *opprobrium* that involves in the community'[7] would be sufficient to bring section 37 (1) into operation.

Gibson J. distinguished *Taylor* v. *Taylor* somewhat upon the facts and said: '. . . But as the Commonwealth Parliament has provided separation as defined in the Act as a ground for dissolution, I think that no stigma reasonably attaches to a wife respondent divorced on that ground without fault on her part.' His Honour proceeded to find that the conduct of the respondent had in fact caused the separation, even though it was insufficient to enable the previous petition to be granted. It was found therefore that there was nothing in the public interest to prevent the granting of the decree.

His Honour then proceeded to consider the question of the exercise of discretion under section 37 (3) of the Act. The petitioner had filed a discretion statement admitting adultery with a woman with whom he had lived for four years and whom he proposed to marry if the decree was granted. It was found that the adultery was not of such a character as to require the exercise of the court's discretion to refuse the decree.[8]

The present case and *Taylor* v. *Taylor* illustrate the opposing judicial views as to the correct interpretation of section 37 (1) in its application to section 28 (m): the liberal interpretation, which it is submitted was intended by Parliament, and the narrow view which virtually transforms the ground into divorce by consent. It is submitted that the statement of Gibson J. previously quoted, is an eminently reasonable view. The intention of Parliament was to provide a non-fault basis whereby the courts may undo marriages which have irretrievably broken down, and the section is a recognition of the principle that it is in the public interest to dissolve marriages which have in fact broken down.

R. Walpole

HALL v. WELLS[1]

Detinue—Trover—Sale of Caravan by an Infant—Infants' Relief Act 1875 *'Absolutely Void'*

This case dealt primarily with the effect of the words 'absolutely void' in section 1 of the Infants Relief Act 1875. It was an action in detinue, or alternatively trover, before Burbury C.J. in which the plaintiff sought to recover possession from the defendant of a caravan or the sum of £525 alleged to be its value. The case was, as the learned Chief Justice

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7 (1961) 2 F.L.R. 371, at 373.

8 The application of s. 37 (3) was considered in some detail by Mr. Chappell in 'A Petitioner's Adultery and Section 28 (m)' (1961) Tas. Univ. L.R. 590.

1 Supreme Court of Tasmania, 27 April 1962, unreported.

said, 'one of those unfortunate cases in which the court has to make a decision as to which of two innocent parties must suffer as the result of the dishonesty of a third'.[2]

The defendant who had in April 1960 purchased a caravan from one De Jong, an infant, returned it to the seller for some adjustments to be made to it in December 1960. De Jong requested the defendant to hire the caravan to him, to enable him to re-hire it to his customers during the summer months. The defendant would not hire the caravan but offered to resell it to De Jong for £600. De Jong said that he was unable to pay that amount immediately, so the defendant agreed to let De Jong have the caravan and to postpone payment until the end of February. The defendant accepted a cheque from De Jong post-dated to 28 February 1961 and let him have the caravan. He gave De Jong one key to the caravan and retained the other. The defendant did not give to De Jong the registration papers of the caravan. On 20 February 1961 De Jong sold the caravan to the plaintiff who took delivery of it. De Jong's post-dated cheque was duly presented by the defendant and dishonoured by the bank in the ordinary course of its business because there were no funds to meet it.

On 30 May 1961 the defendant, who in the meantime had been informed of the purported sale of the caravan to the plaintiff, took possession of it from a car-yard where the plaintiff had left it for sale. Counsel for the defendant submitted that De Jong had no title to the caravan to pass on to the plaintiff on two grounds:

> 1. That under the sale of the caravan from the defendant to De Jong the parties did not intend that the property in the caravan should pass to De Jong until actual payment.
>
> 2. That if the parties intended that the property should pass at the date of the sale the property nevertheless did not pass because section 1 of the Infants Relief Act 1875 made the transaction absolutely void *ab initio* and destitute of all legal effect.

Burbury C.J. gave judgment for the plaintiff, holding that despite the emphatic terms of section 1 of the Infants Relief Act 1875, that 'all contracts . . . henceforth entered into by infants . . . for goods supplied or to be supplied [other than contracts for necessaries] . . . shall be absolutely void,' nonetheless the property in the caravan did pass to De Jong who in turn was able to pass a good title to the plaintiff. During the course of his judgment the learned Chief Justice discussed the controversial opinion expressed by Lush J. in *Stocks* v. *Wilson*[3] that delivery of goods to an infant under a contract of sale vests the property in him notwithstanding that the contract is declared by the Infants Relief Act 1874 (Eng.) to be absolutely void. Counsel for the defendant

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2 Serial No. 26/1962, at 13.

3 [1913] 2 K.B. 235.

had submitted that this opinion was merely *obiter*, but on this point the learned Chief Justice said:

> I am not persuaded that Lush J.'s statement of the law should be treated as *obiter*. His opinion that the property in the goods passed to the infant by delivery formed part of his reasoning which led him to the conclusion that the unpaid seller had a remedy in equity or none at all.[4]

His Honour referred to the judgment of Crisp J. in *re Henderson*[5] in which that learned judge had said:

> First, I think it is clear that although the infant could not be sued for the price of these goods, yet the property in the goods passed to the infant on delivery; delivery of goods to an infant with intent to pass the property therein operates to vest the property in him notwithstanding the Infants Relief Act 1875.[6]

Burbury C.J. concluded on this point by saying that:

> It is correct to say that even if Lush J.'s opinion is part of the *ratio decidendi* it is not technically binding on this court. But the opinion has been treated by the text-book writers for nearly fifty years as a correct statement of the law and has been adopted by Crisp J. in this court as such, and I think that sitting as a judge of first instance I should follow it.[7]

If this question of the meaning of the words 'absolutely void' in the statute is examined historically, it is submitted that it is extremely difficult to reconcile the present state of the law, as stated by the learned Chief Justice, with the words of the statute itself. As Burbury C.J. says in the course of his judgment: 'The proposition that the property in goods cannot pass under a contract of sale which is declared by statute to be absolutely void would at first sight appear to be uncontestable'.[8]

At common law an infant's contracts were not absolutely void but only voidable in his favour.[9] He might, therefore, avoid it during infancy or within a reasonable time after his majority.[10] Thus prior to the Act of 1875 an infant might ratify and confirm a purchase made during infancy although Lord Tenterden's Act required the ratification to be in writing.

The Infants Relief Act 1875 in section 1 selected three classes of obligations which it declared to be void.. This section has been held to apply to these three classes of obligations only[11] and presumably all obligations which do not come within these three headings are still only voidable at the infant's option. If Parliament had not intended to change the law in relation to the three classes of obligations selected, it is submitted that their selection and enumeration is quite superfluous. The Act has never been regarded as a codification of the common law relating to infants' contracts[12] and section 2 itself certainly amended the common

4 *Hall* v. *Wells*, Serial No. 26/1962, at 8.

5 (1916) 12 Tas. L.R. 40.

6 *Ibid.* at 41. Crisp J. cited *Stocks v. Wilson* [1913] 2 K.B. 235, in support of this statement.

7 *Hall v. Wells*, Serial No. 26/1962, at 9.

8 *Ibid.* at 5.

9 See, *per* Abbott C.J. in *R.* v. *Inhabitants of Chillesford* (1825) 4 B. & C. 94, at 100; *Hunt* v. *Massey* (1834) 5 B. & Ad. 902.

10 Co. Litt. 380b.

11 See *Duncan* v. *Dixon* (1890) 44 Ch. D. 211, at 216, where Kekewich J. held that the section does not apply to a marriage settlement.

12 See Preamble to Imperial Act of 1874 (37 and 38 Vict. C. 62).

law position in relation to ratification of a contract by an infant after full age. Even if we assume that the first section is merely a codification of the common law position, and further assume that Parliament did not intend to alter the common law, one might well ask what meaning could be given to the words 'absolutely void' other than one which would result in infants' contracts being void *ab initio*.

In relation to the problem which confronts the court when it has to decide as to which of two innocent parties must suffer as the result of the dishonesty of a third, particularly in cases on the sale of motor vehicles, it is respectfully submitted that courts in Australia might consider the significance of the registration papers in relation to a motor vehicle. Their significance on the English scene was considered in such cases as *Du Jardin* v. *Beadman Brothers Ltd.*[13] and *Pearson* v. *Rose & Young Ltd.*[14] In the latter case Denning L.J. (as he then was) expressed his opinion as follows: 'It is not a document of title but it is the best evidence of title. Everyone who buys or sells a secondhand car knows that a clean title cannot be given or obtained without the Log Book'.[15] In the same case Vaisey J. said:

> What the relationship between a motor car and its registration book, or log book really is, I find extremely difficult to define . . . what strikes me as decisive in the present case is the fact, already pointed out by my Lords, that a dealer in cars, being a mercantile agent, cannot be said to be 'acting in the ordinary course of' his business as such when selling a car without its log book any more in my judgment than he would be so acting if he sold the car with only three wheels.[16]

Thus his Lordship was prepared to treat the registration book in that case as an integral part of the car itself. It is noted that in Tasmania a purchaser of a motor vehicle is legally obliged within seven days of obtaining possession of the motor vehicle to apply for transfer and forward the certificate of registration with certificate of Third Party Insurance in the purchaser's name and transfer of registration form to the Registrar of Motor Vehicles.

In the present case the defendant did not hand the registration papers to De Jong but retained them himself so they could never have come into the plaintiff's possession.

The learned Chief Justice said on this point:

> I have held that the defendant must be the one to suffer. It may perhaps be said that it is more just that he should be the loser rather than the plaintiff who purchased the caravan in good faith for cash from De Jong. I say this because the defendant by delivering the caravan to De Jong in exchange for a post dated cheque put De Jong in the position of being able dishonestly to sell it to an innocent third party . . . .[17]

It is submitted that the absence of registration papers should have at least aroused the plaintiff's suspicion.

A. E. Bailey, LL.B.

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13 [1952] 2 All E.R. 16.

14 [1950] 2 All E.R. 1027.

15 *Ibid.* at 1033.

16 *Ibid.* at 1034.

17 *Hall* v. *Wells,* Serial No. 26/1962, at 13.

REGINA v. SPRINGER[1]

Criminal Law—Criminal Code—Sections 249 and 250

In this case Crawford J. considered the criminal implications arising from the tender of a cheque as payment for goods where the person tendering the cheque has no account with the bank upon which the cheque purports to be drawn.

The evidence showed that one Saturday one Goninon, after receiving a telephone call, went to see the accused, taking with him a motor car the property of his employer A. G. Webster and Woolgrowers Ltd. A sale was made and the accused offered to pay £250 by cheque and the balance on hire-purchase. He obtained a cheque form on the Australia and New Zealand Bank Ltd. at its Devonport Branch and made out the cheque to the employer, altering 'Devonport' to read 'Deloraine'. He also signed a printed form offering to 'Esanda' Ltd. to hire the car on hire-purchase terms. The following Monday Goninon discovered that the accused had no bank account whereupon the car was repossessed. The offer of hire-purchase was never forwarded to the company by A. G. Webster and Woolgrowers Ltd. who was its agent.

The accused was tried upon an indictment alleging in the second count the 'obtaining goods by a false pretence contrary to section 250 of the Criminal Code' in that he 'with intent to defraud obtained from Barry Charles Goninon a motor car by falsely pretending that a cheque which he . . . then produced and delivered to the said Barry Charles Goninon was a good and valid order for the payment of £250'.[2]

At the close of the Crown's case counsel for the accused submitted that there was no case to answer. As to count two it was argued that as the contract was one of hire-purchase the property did not pass immediately, but that there was a loan pending acceptance by Esanda Ltd. of the offer made by the accused. It was also argued, relying on *R.* v. *Kilham*,[3] that 'obtains' in section 250 means 'obtains the property in' and not merely the possession of the article.

Crawford J. held as to count two that there was a case to answer. The first problem concerned the person from whom the article must be obtained. He pointed out that 'obtain' as defined in section 249, means an obtaining from the *owner* whereas the crime as defined in section 250 is to obtain from *any person*. In the face of this inconsistency he held that the court must do its best to reconcile this difficulty and, although there was no definition of the owner which would assist in this regard, he ruled that 'owner' must include the person from whom the thing was

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1 Supreme Court of Tasmania, 22 June 1962, unreported.

2 The Criminal Code, s. 249: ' "obtains" means an obtaining by the offender from the owner, with an intent on the part of the offender to deprive the owner permanently and entirely of the thing obtained . . .'

Ibid., s. 250: 'Any person who by any false pretence, and with intent to defraud, obtains from any person anything capable of being stolen, or induces any person to deliver anything capable of being stolen, is guilty of a crime.'

3 (1870) 11 Cox C.C. 561.

obtained. He justified this by saying that there was no need to stipulate in the definition of 'obtain' from whom it was to be obtained because the section creating the crime had already said that an obtaining from any person was sufficient.

The writer respectfully suggests that this was a good practical solution. It appears that the same difficulty would have arisen under articles 358 and 360 of Stephen's draft Code upon which the Tasmanian Code was modelled. Again, the English statutes, namely The Larceny Act 1861 (Eng.), section 88, The Larceny Act 1916 (Eng.), section 32, and also the earlier Acts of 1541, 1757, 1812, 1827 and 1851 all use the term: 'Obtain . . . from any (other) person'.

However, the safer course for the Crown would have been to allege that the car was obtained from A. G. Webster and Woolgrowers Ltd. by their agent Goninon. If this had been done proof of an obtaining from Goninon would have sustained the allegation.[4]

Another independent question was whether a mere delivery was a sufficient obtaining under the first part of section 250. The *second* part of the section clearly says 'induces any person to deliver'. *R.* v. *Miller*[5] was relied upon by Crawford J. as showing that a mere handing over of possession was all that was intended by the first part of section 250. Primarily the crime of obtaining goods by false pretences was designed to deal with changes in ownership, while the law of larceny was concerned with interferences with possession against the will of the owner. The difference between larceny by a trick and obtaining goods by false pretences is explained by A. L. Smith J. in *R.* v. *Russett*[6]: 'If possession only is given and the property is not intended to pass that may be larceny by a trick . . . but if possession is given and it is intended by the owner the property shall pass that is not larceny by a trick but may be false pretences . . .' And in *R.* v. *Kilham* it is clearly said by the court: 'The word "obtain" in this section [88 of the Larceny Act 1861 (Eng.)] does not mean the loan of but the property in any chattel . . .' [7]

Section 252 of the Crimes Act 1908 (N.Z.) reads: 'Any person who with intent to defraud by any false pretence obtains any thing capable of being stolen *or* procures anything capable of being stolen to be delivered to any person *other than* himself . . .' is guilty of a crime. In *R.* v. *Cox*[8] Salmond J. said:

> This reference to delivery would seem to show that the section is dealing with possession rather than title. The false pretence . . . may either be with intent to obtain the chattel for himself—*or* with intent to procure delivery to some third person.

This view is still good law in New Zealand,[9] and was followed by Crawford J. in *R.* v. *Springer*.

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4 *R.* v. *Moseley* (1861) Le. & Ca. 92.
5 [1955] N.Z.L.R. 1038.
6 [1892] 2 Q.B. 312, at 316.
7 (1870) II Cox C.C. 561.
8 [1923] N.Z.L.R. 596, at 606.
9 *R.* v. *Miller* [1955] N.Z.L.R. 1042.

But the words 'other than himself' do not appear in section 250 of the Tasmanian Code, nor is there any section in the New Zealand Act similar to our section 249. It is suggested that Salmond J. was not uninfluenced by these differences. However, the real basis of his interpretation is expressed by North J. in *Miller's* case[10]:

> There is little doubt that 'obtain' in its primary meaning can as aptly be applied to possession as to ownership; and, therefore, unless on other and substantial grounds a gloss is required to be put on the word, there is really no justification as a matter of construction for giving the word a limited meaning. In our view no such grounds exist.

It is well established that when dealing with the interpretation of a Criminal Code the starting point is that the common law does not apply, and it is only when the words are ambiguous that resort may be had to authority outside the Code. It is therefore felt that the New Zealand view cannot be readily rejected. But it appears from the same page of the report that the court would more readily have interpreted the section so as to give it (if possible) a wide rather than a narrow operation.

In *R.* v. *Smith and others*[11] a charge was made under the first part of section 32 of the Larceny Act 1916 (Eng.), which is very similar to the first part of section 250 of the Tasmanian Code. On the facts, as found, possession but not the property had passed. The Court[12] said that 'had counts been inserted under the second part for causing or procuring any chattel to be delivered' there would have been no defence open to the accused. This case shows that the English courts still hold the view that 'obtain' in the first part of the section, unlike the second part, requires a passing of the property in, not merely the possession of the article.

Crawford J. also pointed out that 'the real reason, I think, behind *Kilham's* case is that there must be an *intention to deprive the owner wholly of his property*, in other words the question is what is the intention in the *mind of the particular accused*',[13] and his Honour thought that this aspect had been overlooked in the later English cases which followed *R.* v. *Kilham*. This aspect of *Kilham's* case clearly appears from the opinion of the court in that case where it said:

> To constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property, and this intention did not exist in the case before us . . . In this case the prisoner never intended to deprive the prosecutor of the horse, or the property in it, or to appropriate it to himself, but only intended to obtain the use of it for a limited time.[14]

This element of the crime is contained in the definition of 'obtain' in section 249.

However, a difficulty still remained. Because the first part of section 250 contains the word 'obtain', that part had to be interpreted so as to

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10 [1955] N.Z.L.R. 1042, at 1047.
11 (1950) 34 C.A.R. 168.
12 (1950) 34 C.A.R. 168, at 182.
13 Serial No. 65/1962, at 3.
14 (1870) II Cox C.C. 561.

include the definition in section 249, that is, there must be an intention to deprive the owner permanently and entirely of the thing obtained. But the second part of section 250 does *not* contain the word 'obtain' so that his Honour held that in *this* crime no such intention is required. The creation of this crime therefore, on his Honour's view, is certainly a departure from the older law as expounded in *Kilham's* case, and perhaps unique in Australia. However, as his Honour pointed out, 'it is just one of those inconsistencies that appear in statutes and that whichever way it is interpreted there must be some inconsistency'.[15]

S. A. Burbury

DOWDING v. OCKERBY[1]

Defamation—Defamation of a group—Indeterminate class

Section 6 of the Defamation Act 1957 states 'A person who, by words either spoken or intended to be read, or by signs or visible representations, publishes a defamatory imputation concerning another person, defames that person.' Considerable difficulty has centred around the words 'concerning another person'. *Prima facie* these words mean that the plaintiff must show that the words of which he complains were published of and concerning him. It has, however, been established that this does not necessarily mean that the plaintiff has to be named specifically,[2] so that the difficulty arises as to what words constitute reference to the plaintiff. There are two classes of indirect reference to the plaintiff which immediately occur: (1) where a class of which the plaintiff is a member is defamed, and (2) where a specific unnamed person is defamed.

The law applicable to the first class was discussed by the Supreme Court of Western Australia (Hale J.) in the recent decision of *Dowding* v. *Ockerby*.[3] The judgment of Hale J. was subsequently affirmed by the Full Court.[4] The facts of the case were as follows:

The plaintiffs brought an action for libel founded on an advertisement published by the defendant in a daily newspaper. The plaintiffs included a minister of the Presbyterian Church, the Professor of Philosophy at the University of Western Australia, the Federal President of the Australian Labor Party, and a Senator in the Parliament of the Commonwealth. At a public meeting the plaintiffs voiced their opposition to a Bill to amend the Crimes Act 1914 (Cth.) and they were all reported in the press as doing so. The report in the press suggested that the plaintiffs had made rational criticism on which the Federal Attorney-General later based certain amendments to the Bill.

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15 Serial No. 65/1962, at 3.

1 [1962] W.A.R. 110.

2 *Le Fanu* v. *Malcolmson* (1848) I H.L.C. 637, especially *per* Lord Campbell at 668; *David Syme & Co.* v. *Canavan* (1918) 25 C.L.R. 234, at 238.

3 [1962] W.A.R. 110.

4 *Ibid.* at 118.

The advertisement on which the action was founded was published in the press the day after the report was printed. This advertisement was headed 'BY THEIR SQUEAL WILL YOU KNOW THEM (Reds Rally Against Crimes Act)'. The advertisement stated that those opposing the Bill fell within the category of communists, fifth columnists, industrial saboteurs, unbalanced socialists and other despicable people of the same type. The advertisement did not refer to any person by name but the plaintiffs alleged that the defendant intended to refer to the plaintiffs, and they brought forward three witnesses, men of standing in the community, who said in evidence that on reading the advertisement they at once thought of the plaintiffs. Hale J. found that the words were clearly defamatory but that as they referred to a large and indeterminate class, namely, all the people opposing the Crimes Bill, and as the mind of the reader was not directed to any individual or individuals to the exclusion of all others, the plaintiffs could not maintain the action.

The question which Hale J. set out to answer, and this is the question which has caused so much confusion, was whether the advertisement could, as a matter of law, be regarded as capable of referring to the plaintiffs. The answer to this question does not depend upon the fact that a number of witnesses are able to say that they took the statement to refer to the plaintiffs. His Honour proceeded on the basis of *Knupffer* v. *London Express Newspaper Ltd.*[5] and explained the law as it stands after the decision of the House of Lords.

In *Knupffer* v. *London Express Newspaper Ltd.* Lord Simon said that 'if the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words used to refer to him are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to'.[6] Lord Atkin in the same case said:

> The only relevant rule is that in order to be actionable the defamatory words must be understood to be published of and concerning the plaintiff. . . . The reason why a libel published of a large and indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalisations is ingrained in ill-educated and vulgar minds, or the words are occasionally intended to be a facetious exaggeration. Even in such cases words may be used which enable the plaintiff to prove that the words complained of were intended to be published of each member of the group, or, at any rate, of himself . . .[7]

From this his Honour deduced two propositons; firstly that it is not permissible to go beyond the words of the actual allegedly defamatory statement, and secondly that there can not be an actionable defamation of an indeterminate class. Proceeding on this basis his Honour, not going beyond the actual words of the advertisement, found that the class defamed included all persons who opposed the Bill. This class being indeterminate, no member of it could maintain an action for defamation.

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5 [1944] A.C. 116.
6 *Ibid.* at 119.
7 *Ibid.* at 121, 122.

Hale J. perceived a marked divergence of opinion between Viscount Simon and Lord Atkin. The test as laid down by Viscount Simon[8] is, it is submitted, in no way inconsistent with that laid down by Lord Atkin. Viscount Simon speaks of an action only lying for defamation of a 'limited' class—he does not speak of a 'determinate' class. His Honour stated that he could not see any difference between 'limited' as used by Viscount Simon to the effect that a defamatory reference to a limited class may be actionable by every member of that class, and determinate as used by *Gatley on Libel and Slander*.[9] 'Where the defamatory words reflect on each and every member of a determinate body or class of persons . . . each and every member of the body or class can maintain a separate action'. It is submitted that there is a marked diversion between the words 'limited' and 'determinate' in these two contexts. In a determinate class all the members of the class can be determined at any given time. In a limited class it is possible to state at any given time that a very large proportion of the population is obviously not within it, but that the actual number within it cannot be accurately given.

When this meaning is given to the word 'limited' there is no conflict between the speeches of Lord Atkin and Viscount Simon and Hale J.'s problem as to why Lord Thankerton concurred with both the other learned law lords, is resolved. It is submitted with respect, that his Honour was wrong in deciding that the majority opinion in *Knupffer* v. *London Express Newspaper Ltd.* held that for a member of a class to be able to sue for defamation the class must be determinable. It is submitted that Viscount Simon, Lord Atkin and Lord Thankerton held that rather than determinate the class must be limited. The decision of Hale J. would lead to the result that a class can be defamed at will so long as care was taken that the class could not be exactly determined.

A number of lesser observations must be made on the case. The learned judge found that the class referred to all opponents of the Bill, and that[10] it was not a mere pretended description of a class as in *Le Fanu* v. *Malcolmson*.[11] In that case Lord Campbell said:

> Whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury it inflicted, the very same thing is in fact done as would be done if his name and christian name were ten times repeated.[12]

It is submitted that this case cannot be distinguished from the present. Hale J. held that a large indeterminate class, all those who opposed the Bill, were defamed, and this finding is not disputed. However, it is submitted that this reference to a large and indeterminate class is merely illusion; it is ostensibly an attack on such a class, but in reality it points

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8 *Supra*, n. 6.
9 5th edn., 450.
10 [1962] W.A.R. 110, at 117.
11 (1848) 1 H.L.C. 637.
12 *Ibid.* at 668.

to a small number of persons within that group. The description, it is submitted, is such as would direct the attention of the public to a few very vocal and prominent opponents of the Bill. This constitutes sufficient reference to the plaintiffs.[13] 'Whilst it would not be actionable to say that all lawyers are thieves,[14] the circumstances in which the defamatory matter is published may indicate that particular individuals are defamed'.[15]

Relying on *Knupffer* v. *London Express Newspaper Ltd.* and *Braddock* v. *Bevins*,[16] Hale J. held that the words complained of must, in law, be capable of referring to the plaintiff and that evidence by people who, in fact, did identify the plaintiff as one of the persons defamed, was inadmissible. This is not disputed. However, the learned judge then proceeded to deduce as a converse of this that the only things to be taken into consideration were the words of the statement themselves. It is submitted that this deduction is wrong as it does not take into account such factors as existing conditions such as those outlined by Lord Campbell in *Le Fanu* v. *Malcolmson*. It is submitted that Hale J. should have taken into consideration actual conditions at the time of the advertisement, especially with regard to the protest meeting and the people involved, and the resultant timing of the advertisement.

The submission therefore is that Hale J., as affirmed by the Full Court, (1) was wrong in interpreting the majority decision in *Knupffer* v. *London Express Newspaper Ltd.*, (2) was wrong in holding that a member of a class can only sue for defamation if the class defamed is determinate[17] and (3) was wrong in not taking into consideration the surrounding circumstances of the insertion of the advertisement.

W. P. M. Zeeman

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13 See, *per* Isaacs J. in *David Syme & Co.* v. *Canavan* (1918) 25 C.L.R. 234, at 238.

14 *Eastwood* v. *Holmes* (1858) 1 F. & F. 347, 349, *per* Willes J.

15 Fleming, Law of Torts, 2nd edn., 507.

16 [1948] 1 K.B. 580.

17 His Honour did, however, qualify this by adding (at 115, 116): '. . . or that the words themselves show an intention to defame a group within the general class, a group marked out in contradistinction to the general body of members and that he is within that group.' But as his Honour conceded, if that is the case '. . . one is in truth returning to the case of a determinate class.'

BOOK REVIEWS

THE TAIT CASE

By Creighton Burns (Melbourne University Press, 1962). 182 pp. 15/-.

This book tells of the controversy which followed from the Victorian Government's decision to hang a man. The man was Robert Peter Tait who, in August 1961, entered the suburban vicarage of Hawthorn, brutally murdered an old woman and sexually abused her body.

The work is no masterpiece of literary style, but that is understandable in view of the fact that it was compiled and published within a few months of the eventual commutation of the sentence. However, this is more than compensated for by the absorbing and detailed presentation of all the facets of the case.

The central theme is not Tait himself, nor the crime which he committed, for these are of comparatively little importance in the light of the broader issues. It is concerned primarily with capital punishment, an examination of its nature and 'the meaning of the mark that was put upon Cain, the first murderer, "lest any finding him should kill him".'

There are three phases of the controversy: the public outcry, political action and judicial decision. The spontaneous reaction of the protesting groups constituting the first group is revealed: the press, the churches, the Melbourne University students and various other pressure groups began one of the most sustained campaigns to end capital punishment that Victoria has ever experienced, and the reader senses the storm-clouds growing darker over Premier Bolte's head as the struggle goes on with no sign of abatement. It is interesting to read of the fervour of the attacks and the sincerity of the various pressure groups who pursued the struggle even at the risk of jeopardising their own interests. The press *en masse* continued to give full publicity to the case, at the risk of boring their less enthusiastic readers, which might have resulted in loss of newspaper circulation; the Melbourne University Students Anti-Hanging Committee was picketing Parliament only a few weeks before the annual examinations.

From a lawyer's point of view, the description of the legal moves to commute the sentence is helpful and an insight is given into the methods used. The transcript of proceedings before the High Court on 31 October 1962, which resulted in an injunction restraining the Chief Sheriff and his officers from carrying out the execution is printed in full.

The moral question whether there is a place for the death penalty in an enlightened society is raised and conflicting opinions, on theological, moral and utilitarian grounds are expressed. There is no conclusive proof that the death penalty has any significant deterrent value.

In the chapter entitled 'The Significance of the Tait Case', the sufficiency of the M'Naghten Rules as an adequate criterion for the determination of insanity is seriously questioned, and an appeal made for a re-examination of the relationship between insanity and crime.

One of the most interesting aspects of the case was the light thrown on the relationship between the Executive and the Judiciary, arising primarily from the question whether statute law had overridden the Common Law and given the Executive exclusive power with respect to the execution of the death sentence. The point at issue was whether the Common Law power of the Court to stay the execution of an insane man and order an inquiry into his sanity still existed. Thus the legal issues on this point were two-fold: the suppression of the Common Law, and conflict between two branches of government.

The majority of the Victorian Full Court avoided the conflict by rejecting the submission that the Common Law jurisdiction still existed. Smith J. (dissenting) held there was no conflict because statute law gave the Executive the right only to commute a death sentence and not to order that it should be carried out. However, the judgments were not tested by the High Court because the Executive itself finally commuted the sentence to one of life imprisonment 'never to be released'.

Questions such as the need for a Chair of Criminology, conflicting religious views, the efficiency of the parole system, which acknowledged Tait as one of its most tragic failures, and other similar points are raised.

To conclude, the aim of the book is to provoke further thought and action on the issues raised without attempting to answer them, and because the Tait case is still very much a burning issue, though legally concluded, it largely succeeds in its object.

P. M. Biscoe

APPELLATE COURTS IN THE UNITED STATES AND ENGLAND

By D. Karlen (New York University Press, 1963). 1-X and 1-180 pp. $6.

This book is the latest publication in the Judicial Administration series which is published in the United States under the auspices of the National Conference of Judicial Councils and is devoted to the improvement of the American judicial system. The book found its origin in an exchange of visits between American and English lawyers. In 1961 a highly representative American team visited London in order to investigate the English way of handling appeals. The next year a similar English delegation visited the United States in order to inspect American appellate courts. The project had official support as is witnessed by the forewords contributed by Mr. Justice Brennan of the United States Supreme Court and Lord Evershed, the former Master of the Rolls. The purpose of the interchange was not only that each national team should gain a greater insight into the working of the appellate system of the other side, but also that from a comparison of methods and in the light

of mutual criticism improvements to the national system of each might follow. This indeed has been the case to a slight degree in England, but as appears from the author's guarded words in the introduction to his book, to hardly any degree in the United States.

Professor Karlen was a member of the United States team and has rendered great service in reducing the results of both investigations in the form of a book. The book is divided into three parts; an investigation of selected American appellate courts, both State and Federal, and culminating with the Supreme Court; an investigation of the English appellate courts; and a concluding part which seeks to compare the two systems. Though, as he admits, the book is the result of the thoughts and observations of all who participated in the project, it is the author who bears responsibility for all statements made. In a way this is a pity, for it might have been better if an Englishman had been responsible for the description of the American system. The book is obviously written for Americans in the first place. The American part tends to be a factual statement of American appellate procedure, largely divorced from the general United States legal tradition. On the other hand, the part dealing with the description of the English system has been handled in a much more imaginative manner. The author there adopts a more critical tone in his description and he also attempts to explain the peculiarities of English procedure by reference to English legal and political traditions in general. As a result one gets the impression that the American system is that of a cold but efficient bureaucracy, where the major function of the lawyer is to present the facts in writing to the court. So far as the law is concerned, the court does its own research and oral argument in such courts where it is still customary appears as a barely tolerated atavism. On the other hand the English system, though often makeshift and time-wasting, appears as essentially humane. This criticism is, of course, at the same time a compliment to Professor Karlen's objectivity and his deep understanding of the English system. Perhaps an English observer could have done the same for the American system.

This basic difference between the two systems appears as the most prominent conclusion from the project. For that reason there can be little borrowing except in minor incidentals. The American system may indeed have greater relevance in Australia where, although our system is fundamentally that of England, we do share some of the features existing in America. Thus the bar in Australia is not as specialised and certainly not as selective in the causes of action it allows to proceed, as its English counterpart. As a result some State courts, especially in New South Wales, are faced with the same litigious flood as the appellate courts of the State of New York described by Professor Karlen. Like the Supreme Court, the High Court may in the near future find it necessary to limit the nature and the number of the appeals which now reach that tribunal. To some extent this is already recognised and the limitation of appeals in Federal matrimonial causes bears witness to this trend. This book therefore can be strongly recommended to Australian lawyers.

From Professor Karlen's introduction it appears that the present project was intended as part of a wider comparative study of the Anglo-American judicial system. This book may therefore be the first of a series. This certainly is to be encouraged.

Perhaps a similar project could be initiated as between Australia and the United States. It would do us no harm if an understanding but critical visitor such as Professor Karlen had a close look at our method of administering the law.

P. E. Nygh

AN INTRODUCTION TO THE CIVIL LAW

By K. W. Ryan (The Law Book Co. of Australasia Pty. Ltd., 1962). xiii and 286 pp. £2/18/-.

The author accurately and succinctly states the object and compass of this book, in his preface, with the words 'it attempts to do for the modern civil law of France and Germany what many manuals have done for the older civil law of Imperial Rome, namely to set out as simply and concisely as possible the main institutions of their systems of private law.' Side by side with this exposition the author also supplies comparisons of the civil law so found with equivalent provisions of the common law.

In this book new ground has been broken inasmuch as this is a modern book in which is brought together for the first time the law of France, Germany and England for the purposes not so much of detailed criticism, comparison and evaluation as to provide a general description of the fields as a whole without attempting any specialisation in specific categories of law.

In a masterly first chapter entitled 'The Development of the Civil Law' the reader is provided with a lucid and helpful review of the historical framework which surrounds the modern law of the three systems under examination and which provides a basis and starting point for the ensuing seven chapters. These seven chapters deal with specific phases of the law namely contracts, general, particular and quasi-contract, torts, property, succession, trusts and family law. After the encouraging and interesting start of the first chapter the reader is then given an introductory outline of the topics mentioned which consists in the main of broad coverage and consequentially categorical statements. However, the necessarily unconnected and dogmatic nature of an expository listing of rules is to some extent, at least in comparison with works dealing solely with Roman law, offset by the continuing change of scene from one's own legal system to two foreign and different civil law systems. This exercise in many places emphasises the essential nature of law, irrespective of whether it is contained in common law decisions or civil law codes, by highlighting similarities both of rules and of judicial approach in adapting the fixed legal rule to specific sets of facts. An example of such a similarity which the author highlights is to be

found at page 42 in his statement that a contract results from an accord of wills, either actually entertained as broadly is the case at Civil Law or imputed on an objctive basis by the common law. In both the common law and the civil law such an accord requires the exchange of declarations of will, express or implied, directed towards the same object. Since the decision in *The Wagon Mound Case* [1961] A.C. 388, although differing terminology is used, another such similarity is revealed by the author in the three systems on the approach to the difficult question of causation and remoteness of damage. Many such examples are readily available. And perhaps this is only to be expected from the author who (at page 12) lauds the idea of a philosophy of law which seeks to expose the general principles of the law and to erect a comprehensive theory of law. However, despite the general similarities in principle and the specific similarities in detail between the three systems the author has no hesitation in stating that his survey helps to correct 'the widespread but erroneous notion that the civil law constitutes a unitary system in which local variations in different countries relate only to minor matters'.

The various chapters in the book are well planned with clear headings, although perhaps some further subdivision of material would have led to easier comprehensibility of the longer chapters. One minor point of value was the fact that quotations in foreign languages were kept to an absolute minimum thus obviating any need for improvised translations based on schoolboy French, German or Latin.

The author's style is clear, his treatment is thorough, and this Introduction to the Civil Law fulfils its purpose as such by laying open the full territory of what is to most common law students in Australia an unknown land. It is of course no substitute for the more specialised texts on specific branches of the general field, but might well be regarded as essential prerequisite reading. The size of the print is adequate and clear. Apart from a blemish in the printing in the second and third lines of page 1 no other errors or defects were detected.

It is thought that this book is a useful and valuable contribution to Australian legal literature and amply repays reading by all students, regardless of their particular interests, for the manner in which it throws the common law into perspective as merely one field of study among other and equally sophisticated systems.

A. G. Ogilvie

AN INQUIRY INTO CRIMINAL GUILT

By P. Brett (The Law Book Co. of Australasia Pty. Ltd., 1963). IX and 213 pp.

The purpose of this book is to examine the concept of criminal guilt. The author maintains that the concept is incapable of complete and adequate analysis although it can be illustrated and described. Dr. Brett emphasises the need for the reform of the criminal law which he considers to be based upon seventeenth century philosophy and eighteenth century psychology.

As may be expected, the opening chapter deals with the complex problem of defining a crime, and the author's own conclusion is that a criminal conviction imports condemnation for moral fault. At once, he is on controversial soil, for, having taken this stand, he is obliged to take the view that strict liability has no place in the criminal law, regardless of the possible consequences to the public.

Dr. Brett then turns his attention to different doctrines which have left their marks on the criminal law. These include a discussion of the relationship between mind and body, the development of the theories of punishment, and finally a topic which has recently reared its head afresh, the effort to divorce law from morality. It would hardly be surprising to find the author in agreement with the views of Dr. L. Fuller on this subject, but in fact, he goes further and expresses his opinion that the criminal law is actually an embodiment of the ethical values of the community.

This bold stand, however, is later qualified when Dr. Brett admits that the requirements of the criminal law and the community ethic do not always 'exactly coincide'. This seems to the reviewer to be something of an understatement, particularly in view of the many moral offences which are surely considered generally to be evil and yet they are not criminal offences.

Dr. Brett concludes his discussion of *mens rea* by considering the relative merits of the objective and subjective tests in establishing criminal responsibility. Since the decision of the House of Lords in *Director of Public Prosecutions* v. *Smith* [1961] A.C. 290, the subject has been much debated. Dr. Brett does not agree with the argument adopted by many advocates of the objective test, that it is impossible to assess the mental processes of the accused. He adopts the view that members of the jury are enabled by their quality of 'indwelling understanding' to put themselves into the place of the accused and make confident assertions as to the state of his mind. The sense of indwelling understanding is apparently acquired merely from living in the community.

Finally, the author considers the defences which are available on a criminal charge. It is interesting to note that Dr. Brett considers mistake of law would be a valid excuse where the crime is not forbidden by the community ethic and the individual has made such inquiries regarding the provisions of the law as the community ethic requires him to make.

The author discusses the defence of insanity and the McNaghten rules in the light of the different psychiatric schools of thought. He also deals with the defences where the accused pleads he was acting 'out of character' due to some temporary condition, such as intoxication, hypnotism or automatism.

The final conclusion which the author draws from his research is that owing to the extreme complexity of human behaviour, the field covered by criminal law is not susceptible of precise and exact definitions and room must be left for play at the joints. While it is most unlikely

the reader will agree with Dr. Brett on all the suggestions he puts forward, the work will at least cause him to reconsider some of his cherished ideas of criminal responsibility. This in fact is the aim of the author, as mentioned in the preface.

Generally the book is both refreshing and stimulating, and it is to be hoped that the inadequacies of the criminal law will receive the reconsideration deserved by the author.

M. W. Daunton-Fear

TRADE UNIONISM IN AUSTRALIA — SOME ASPECTS

By Orwell De R. Foenander (The Law Book Co. of Australasia Pty. Ltd., 1962). 215 pp. £3/3/-.

In this book Dr. Foenander, who is the author of several previous works on various aspects of industrial relations, ranges over a wide variety of topics connected with Australian trade unionism. The greater part of the work is devoted to the law relating to trade unions, and goes some way towards filling a gap in Australian legal literature, for so far no single work has been produced devoted exclusively to this subject. Dr. Foenander also gives an account of the historical development of trade unionism in this country, and an estimate of the policies and attitudes of the trade union leaders. He devotes a final chapter to a variety of interesting and topical matters — communist influence, the position of female workers in industry, native and migrant problems, and the attitude of the unions towards international affairs and the nationalisation of industry. A merit of the book is that the subject is treated comparatively throughout, and instructive comparisons are drawn with trade unionism in Great Britain, the United States, Sweden, France and other countries.

The most distinctive feature, perhaps, of the Australian trade unions is the combination of their almost complete autonomy, with the public, semi-official role which they enact in the life of the community. The combination has been unusually successful, but the author is right to point out that the attitude of the unions has not always been entirely consonant with their responsible position. 'There is still, too,' he says (page 26), 'no admitted clearcut, or final, recognition, by union leaders, of the logical irreconcilability, or incompatibility, of authoritative regulation of employer-employee relations with the strike, and other expressions of organised direct action, or self-help, in the enforcement of industrial claims, although the great majority of them accept the doctrine of compulsory arbitration in the settlement of industrial disputes.'

It would be unjust to expect, in a work of this length, an exhaustive analysis of the many problems considered. At the same time one feels that there is sometimes a lack of proportion in the amount of space given to the various topics. Rather less than two pages, for example, is given to the question of the political levy, which arose in *Hursey's Case* (1959) A.L.R. 1383, with its important legal, political and constitutional

implications. Rather more than two pages, on the other hand, are devoted to an enumeration of the industries in connection with which the Australian Workers' Union is registered. No doubt it is interesting to learn that workers in the dehydration of fruit industry, employed in Tasmania, are not eligible for membership if they are already eligible to be members of the Federated Engine Drivers and Firemen's Association of Australia, but that it is otherwise with workers similarly employed in the Murrumbidgee Irrigation Area; but more burning issues can be imagined.

In all, however, Dr. Foenander's book is to be recommended as a most readable and interesting introduction not only to the legal but to the social and political aspects of Australian trade unionism.

M. Scott

AN ANALYTICAL GUIDE TO CONTRACT AND SALE OF GOODS

(including Hire-Purchase Agreements and Bills of Exchange)

By R. A. Samek (The Law Book Co. of Australasia Pty. Ltd., 1963). XIV and 198 pp. £3.

The student who opens Mr. Samek's book with a hope of embarking upon some sort of 'Cook's Tour' Guide to Commercial Law, in which the law is presented in an uncomplicated fashion, will be a very sadly disappointed person indeed. He should have been forewarned, perhaps, by the use of the phrase 'An Analytical Guide' which, in some mysterious way, conveys the idea that we are going to be made to think.

This is precisely what Mr. Samek succeeds in doing. From the very beginning to the very last page, the author is prodding us into thinking by asking questions and posing problems. No student would, perhaps, be equal to an uninterrupted flow of questions and problems. Mr. Samek avoids this difficulty by an attractive interposition of case materials throughout the book which is divided into four parts. Part I (one half of the text) is devoted to Contract; the remaining parts to Sale of Goods, Hire-Purchase Agreements and Bills of Exchange respectively, where the relevant statutory materials are set forth.

The declared purpose of the book is, in the first place, to provide a body of materials suitable for an introductory course in Commercial Law; secondly, to encourage a critical examination of the materials and to train the student in the use of these to new fact situations. In the reviewer's opinion, the author succeeds admirably in these objects.

Mr. Samek has refrained, in any obvious fashion, from imposing his own views on any particular subject, except when dealing with Mistake. Here, the author has been tempted into expounding his own opinion as to the 'logical basis' of mistaken identity. The general treatment of Mistake is attractive and should serve as a salutary antidote to the bemusing expositions which are to be found in some of the student's textbooks.

One would have thought that some detailed attention should have been paid to the question of the Breach of a Fundamental Term which is, perhaps, one of the more significant developments in the law of Contract during this century. This would have enabled Mr. Samek to ask such thought-provoking questions as 'When is a car not a car?'

There can be no hesitation in recommending this book which, if used as a supplement to the student's wider reading, should help in a very appreciable way in producing a real understanding of the basic principles of Commercial Law.

M. Howard

THE LAW OF PARTNERSHIP IN AUSTRALIA AND NEW ZEALAND

By P. F. P. Higgins (The Law Book Co. of Australasia Pty. Ltd., 1963). 362 pp. £3/16/-.

The principal purpose of this book is to present the law of partnership in the context of Australian and New Zealand cases. However, although the Australasian Partnership Acts are substantially transcripts of the English Partnership Act, many other branches of the law, varying from State to State, impinge on the law of partnership.

The various aspects of partnership law are dealt with as indicated in the Table of Contents and separate chapters are devoted to those aspects of partnership such as Bankruptcy, Income Tax, procedure in Partnership Actions and Registration of Business Names, which are not dealt with in the Partnership Acts.

The author's industry and capacity for research will be apparent from a quick glance at the text of this book.