BOOK REVIEWS

STUDIES IN CRIMINAL LAW

By Norval Morris, Ph.D., and Colin Howard, Ph.D. (London: Oxford University Press, 1964), xxxiv and 261 and (bibliography and index) 9 pp. 72/- net.

Those already familiar with some of the articles collected in this work when previously published in various learned journals will welcome the appearance of the collection. Those who are not will find in it admirable discussions of six of the liveliest topics in the developing criminal law of the present day, plus a long chapter on penal sanctions and human rights. The collection is divisible into three parts: one, the chapter last mentioned; two, five studies of what the authors rightly claim to be 'original and valuable contributions to the criminal law by the courts of Australia', on insanity and automatism, provocation, manslaughter, strict responsibility and res judicata; three, a study of the definition of murder. The professed aim of the work is to reach an English audience as well as an Australian, and part of the long introduction by Sir John Barry of the Victorian Supreme Court is no doubt for this reason devoted to an account of the court system of this country. Sir John's introduction is a very comprehensive one, and forms an integral and valuable part of the work as a whole, providing as it does a general philosophical background of discussion of the purposes and essential features of the criminal law. The outstanding characteristic of this discussion, and of the authors' work on penal sanctions and human rights which is appurtenant to it, is balance—a sound shrinking from the extremes of legal positivism and the sociological pursuit of reform unlimited in the treatment of criminals, whilst retaining readiness to make full use of the insights of psychiatrists, sociologists and others. 'Retribution' long ago became a word with emotional content among many writers on the subject of the place of punishment in the criminal law, but work-a-day lawyers will be delighted to see this combination of judicial and academic recognition of the core of truth in C. S. Lewis' concept of just deserts as the connecting link between punishment and justice. The authors' treatment of the dangers of excessive reform as a guiding principle of punishment is excellent, and their work on penal sanctions generally will evoke nothing but praise from those who share their viewpoint. It may be noted in relation to their disapproval of statutes empowering detention and treatment of sexual offenders, that the Sexual Offences Act, 1951, of this State has been repealed by the Mental Health Act, 1963. However, the extent to which effect will be given to the wide provisions of that Act, and the wisdom of their operation in practice, have yet to be revealed.

Whatever be the result of the attempt to reach an English audience, the value of this work to Australian lawyers so far as the discussions of specific aspects of the criminal law are concerned is undoubted. This applies equally, one would think, to non-code as well as to code States, particularly at the present time when the possibility of a uniform code for the whole of Australia is a subject of preliminary discussion, and draft sections of a code for the A.C.T. and federal territories is under consideration in several States. Much of the various codes relating to the more fundamental parts of the criminal law, including those dealt with in this work, are based upon or endeavour to restate the common law as it stood at their inception, and consequently the examination in these studies of the fundamental principles and social purposes involved should be most helpful in both types of State.

So far as Tasmania is concerned, it is regrettable that at the time the section on provocation was being written (which is presumably when the original article was written, well before publication of the book) the Tasmanian State Reports were available only up to 1956. By dint of herculean labour by the present editor they are now, fortunately, almost up to date. The Criminal Code has undergone a far more intensive interpretation by the Court of Criminal Appeal (and in the case of *Vallance*, by the High Court) since 1956 than in the whole of the period from its enactment up to that time. Students and practitioners in Tasmania who use the work will therefore need to have regard to the two *Hitchens* cases, [1959] Tas. S.R. 209 and [1962] Tas. S.R. 35, in which virtually the whole ambit of insanity under our code, including the 'irresistible impulse' provision, is reviewed, to *Masnec*, [1962] Tas S.R. 254, which deals with manslaughter under the code generally, and rules against the applicability of the principle upon which *Howe's Case* (1958) 100 C.L.R. 448 was decided; *Murray* [1962] Tas. S.R. 170—manslaughter by an abettor to a principal convicted of murder; *Vallance* [1960] Tas. S.R. 51 and 108 C.L.R. 56—unlawful wounding, criminal responsibility; *Snow*, [1962] Tas. S.R. 271—rape; *Martin*, [1963] Tas. S.R. 103—bigamy, defence of mistake; and *Haas*, No. 10/64, as yet unreported—attempt to murder.

In all of these cases the question of the extent to which common law rules should be imported in interpreting the code was important, and perhaps the dissent of Crawford J. in *Murray*, and his partial dissent in *Snow*, indicate there may be problems in that area still to be solved. Incidentally, in *Masnec*, Burbury C.J. and Cox J., and in the first *Hitchens* case, Crisp J., paid respectful attention to the articles now reprinted in this work as chapters IV and II respectively. The series of cases just mentioned illustrates excellently the extremes of technicality which interpretation of a criminal code often necessarily involves—*Vallance* being perhaps the outstanding example. It also indicates that the Tasmanian code is in need of amendment, because although we may now be tolerantly sure what the law is in those areas, we must be left far from satisfied that it represents a desirable state

of the law. Such amendments would call for some basic re-examination of principle of the kind being attempted by the committees drafting the new code for the federal territories. In such a re-examination, these studies would be most helpful because close analysis of the existing law is combined therein with full consideration of defects.

It is not to be thought of course that the authors' views and proposals will meet with agreement in every case and they clearly do not expect it; but they are penetrating, stimulating, progressive and fully documented, and inevitably will attract much support in any discussion of amendment of criminal law. Certainly the book will be a most desirable acquisition for any lawyer interested in the operation of that law in this country.

The Hon. Mr Justice F. M. Neasey

ANSON'S PRINCIPLES OF THE ENGLISH LAW OF CONTRACT

Twenty-second Edition by A. G. Guest, M.A. Oxon. (London: Oxford University Press, 1964), xliv and 635 pp.

The first edition of Anson's *Law of Contract* appeared in 1879 and for several decades it was the leading text-book in its field for the law student. It expounded clearly and concisely the principles of the English law of contract. It may have stated these principles so dogmatically as to make them appear more simple in concept and in their application than in fact they are, but the late Victorians and the Edwardians were untroubled by the problems which have arisen in this age of 'affluent consumption'. The twentieth edition was published in or about 1945 and it seemed that it would be the last, but the publishers thought otherwise. In Mr. Guest they found an able and enterprising editor and in 1959 there appeared the twenty-first edition. A book review may be an admirable idea, in practice many reviews are less than satisfactory. Sometimes the reviewer is odiously sycophantic, other times he takes the opportunity to tell the reader how he (the reviewer) would have written a superior work; even if the reviewer is both honest and modest his impressions are his own, there is no wholly objective standard. Thus, of the twenty-first edition one reviewer said 'The result is praiseworthy and workmanlike . . . a production which can be recommended to the student as a sound presentation of the general principles of English law, which will hold his interest, and perhaps, arouse his enthusiasm' (1960 L.Q.R., p. 450), another declaimed 'this work, . . . contains too many errors, omissions and unbalanced statements to be a satisfactory guide for students' (1960 M.L.R., p. 210). Which was the more accurate? If the proof of the pudding is in the eating, that is, in the copies sold, then the former appears to have been nearer the truth, for the first sentence of Mr. Guest's preface to this edition is 'The very kind reception given to the twenty-first edition would seem to have justified the extensive revision of the text then undertaken and the presentation of Sir William Anson's classic work in a new and more modern form.'

Mr. Guest is not so much an editor as a ghost writer: come another edition and there will be little left of Anson. In this edition he has carried on the work of innovation with which he commenced his editorship. He has re-arranged the chapters on Terms of the Contract, Incapacity, Misrepresentation, Illegality, Privity of Contract, Discharge by Agreement, and Discharge by Frustration, has ventured to comment more freely on the existing state of the law and to indicate where, in his opinion, the law may be in need of reform. Before commenting on some matters of detail it can be said that the work is both attractively produced and attractively written. The student who reads it should acquire more than a fair understanding of how the rules of the law of contract work; the practitioner who consults it will more often than not find helpful commentary not only on cases old and new but upon matters of policy.

As to detail—in his appraisal of the doctrine of consideration Mr. Guest states that 'foreign systems seem to exist quite happily without the need for consideration' and points out that 'Desire to enforce promises has led the Courts on occasion to find a derisory consideration and to construct a bargain where none in fact was present' (p. 112). This is reasonably fair comment but, notwithstanding its many faults, the doctrine of consideration has allowed the common law to give *as a matter of practice* a much greater freedom to the enforcing of promises than had the rule been, as in many foreign systems, that parole proof is restricted to commercial matters. 'Actionable cause' in French law is no less elusive than consideration. The more grievous handicap of consideration may be its exclusion of the right of a third party to sue on a contract.

Mr. Guest makes a valiant attempt to explain the difference between a 'warranty' and a 'condition' and a 'condition' and a 'fundamental term'. It is doubtful whether his attempt is wholly successful, but it is doubtful whether any attempt can be successful. In the opinion of this reviewer no such attempt should be made in this context without proper emphasis being given to the influence of the law of sale of goods, for the general law has been much bedevilled by that law, in particular by the rules so rigidly created in sections 12-15 of the Sale of Goods Act, 1893. He ventures the suggestion that that law as enshrined in the 1893 Act was intended for transactions between merchants deemed to be wary of each other and not for the modern retailing of complex merchandise to brain-washed consumers. An exemption clause even if valid as against a merchant should never have become applicable to consumers, but it did, hence the *deus ex machina*, the fundamental term.

Upon 'mistake' who cannot be in error? The suggestion, for what it is worth, is that the chapter on 'mistake at common law' precede that on 'misrepresentation', and that the connection between 'mistake in equity', 'fraudulent misrepresentation', and 'innocent misrepresentation' be more clearly established.

To conclude, if there is to be a twenty-third edition, and there is every reason to expect there will be, it should be the first edition of Guest on Contract.

J. J. Gow

BRITISH DIGEST OF INTERNATIONAL LAW

Edited by Clive Parry (Stevens & Sons, 1965). Vol. 5, The Individual in International Law—Nationality and Protection (xxx and 641 pp.). £9. Vol. 6, Aliens and Extradition: Rendition of Fugitive Offenders (xxxvii and 852 pp.). 10 guineas. Vol. 8, Organs of States—Consular Officers and Functions of Diplomatic Envoys and Consular Officers in relation to Foreign Marriages (xxvi and 699 pp.). £9/13/6.

Whether or not one agrees with G.B.S. that an Englishman thinks he is moral when he is only uncomfortable, it is perhaps more than coincidence which gave rise to the bursts of activity in the field of public international law after the two World Wars. 'In things within the scope of international law, conscience, if it works less impulsively, can at least work more freely than in home affairs.' Thus spake William Edward Hall in 1889. He went on: 'At any rate it is a matter of experience that times in which international law has been seriously disregarded have been followed by periods in which the European conscience has done penance by putting itself under straiter obligations than those which it before acknowledged.' In the juristic aftermath of the First World War were born the British Year Book of International Law, The Annual Digest and Reports of Public International Law Cases, the Grotius Society and its Transactions and the like.

Dr. Clive Parry and his team of collaborators have now begun to do for international law, as understood by the British, what Moore and Hackworth have long since accomplished for the United States. It is interesting to recall the Act of Congress of February 20, 1897 which provided for the 'revising, reindexing and otherwise completing and perfecting by the aid of such documents as may be useful, the second edition of the Digest of International Law of the United States.' The work referred to was the Digest edited by Francis Wharton which was published in three volumes in 1886.

The onerous task of preliminary examination of the Foreign Office archives—indentation, as the editor gratefully acknowledges, with the collective help of many willing hands—was made possible only by generous financial support from various quarters, in particular the International Law Fund established in 1955 for the promotion and development of international law. It is certainly a case of 'hats off gentlemen' to all those taking part in this most valuable and enduring project.

The plan adopted, and its order and arrangement, follow closely that of John Bassett Moore in his great pioneering Digest of International Law of 1906, comprehending the entire subject. As Moore pointed out, this solution of the problem, although the most onerous, was believed to be the only one that was compatible with scientific principles. In the execution of this design Moore had emphasized two

points of cardinal importance. One was that 'mere extracts from state papers or judicial decisions can not be safely relied on as guides to the law. They may indeed be positively misleading. Especially is this true of state papers, in which arguments are often contentiously put forth which by no means represent the eventual view of the government in whose behalf they are employed. Instead, therefore, of merely quoting extracts from particular documents, it has been my aim to give the history of the cases in which they were issued, and, by showing what was finally done, to disclose the opinion that in the end prevailed. The other point to which I have endeavoured specially to attend is, in dealing with manuscript records, to avoid giving brief glosses which convey no intimation of the question under consideration, but to follow and, wherever practicable, quote the text, and to give, besides, enough of the facts to render the application apparent. This I conceive to be of the essence of a digest, especially of unpublished papers which the reader can not himself consult.'

The learned editor of the British Digest has obviously taken this admonition to heart so that, while the work bears the name and character of a digest, it also contains much that is of an expository nature, in a form suitable to a treatise. A large part of the material has not seen the light before. It has been sought to reproduce every document selected for printing in its context. They have not in general been in any way curtailed except for purely formal parts and for references to persons the identity of whom is immaterial. Nevertheless, the editor has tried to let the documents, statutes and decisions speak for themselves and to refrain from any expression of opinion as to their accurate reflection of international law.

It is anticipated that when completed the work will consist of fifteen volumes. It is based upon a comprehensive examination of Foreign Office papers, particularly reports of the Law Officers of the Crown, and is divided into two Phases. In principle, Phase 1 embraces the period between 1860—approximately the year of the flowering of the Foreign Office 'Confidential Print'—and the outbreak of the First World War.

The three volumes under review are the first of the series to appear. volumes 5 and 6 are concerned with the position of the individual in international law. The former treats of the different ways by which British nationality may be acquired and lost, and the protection of British subjects generally. Volume 6 deals with the admission, expulsion and treatment of aliens in British territory, of British subjects in foreign States, and the domestic law and procedure of extradition. Volume 8, entitled Organs of States, is devoted to Consular Officers and the functions of diplomatic envoys and consular officers in relation to foreign marriages. The appendices of all three volumes set out the text of the relevant Statutes, Reports of Royal Commissions and Select Committees, lists of Colonial Laws and other useful references.

The first volume of the British Year Book of International Law in 1920 opened with the following words: 'The War has left in the minds of many people the belief that international law is a thing of the past, and therefore it behoves all those who believe that it is still a living force to work for that firm establishment of the understandings of international law as the actual rule of conduct among governments. If, however, it is true today that international law is a living force, it is equally true that the experiences of the last few years have shown that much that was regarded as definitely established must be re-examined in the light of modern developments.'

The wealth of practical wisdom—and, it may be said, the entertaining reading into the bargain—which is to be found between the covers of this impressive work is yet a further manifestation of the will to make of international law a dynamic influence for good in the world.

N. C. H. Dunbar

STRICT RESPONSIBILITY

By Colin Howard, Ph.D. (Sweet & Maxwell Ltd., 1963), xx and 220 pp.

This is a critical study of the doctrine under which a defendant is exposed to punishment for conduct which is devoid of 'fault'—the ill-defined area of 'regulatory offences'. The author's conclusion is stated at p. 28 as follows:

'The conclusion is that strict responsibility is prima facie objectionable because it envisages the punishment of innocent people; is not justified by any of the arguments which have been put forward in its favour; and is supported by none of the available evidence.'

The validity of this conclusion seems to depend on three assumptions which do not seem themselves to be self-evident or necessarily valid. First, it is asumed that regulatory offences are properly regarded as on all fours with offences such as robbery with violence, housebreaking, sodomy, and all the other miscellany of the rules commonly accepted as constituting the 'criminal law.' Secondly, it is assumed that that criminal law is founded on 'morality;' and the third assumption is that as no empirical study has produced evidence which supports the doctrine, therefore it is unsupportable.

To look quickly at the first of these assumptions, it seems that whether or not regulatory offences are regarded as 'criminal' is simply a matter of definition. This reviewer is not aware of any single criterion which serves as an exclusive characteristic of the commonly so-called 'criminal law' rules; in the presence of such heterogeneity, to describe the man convicted (without 'fault') of selling adulterated tobacco as a 'criminal' seems to require a sort of semantic act of faith. The stigma which attaches to such a conviction in a business community which accepts price fixing agreements and 'fiddles' on income-tax seems to have little in common with that attached to a conviction of, say, rape. It is a question of which is to be master, that's all, as Humpty Dumpty said.

The equation of criminal law with morality is an oversimplification. A good deal of law is 'moral' in Dr. Howard's sense—the sense of fair treatment under the palm tree—but it has many other constituents too: commercial convenience and the protection of designated interests among others, and these attributes are common to 'criminal' rules as well as to others. There is no doubt a constant interaction between the criminal law and the mores of a community, and the two phenomena may well be mutually reflective to a large extent, but sentences are not always and exclusively imposed as retribution for a moral fault. In this connection one wonders whether (in spite of Dr. Howard's assertion at page 5) people do more readily obey 'just' laws, or whether people obey only those which they cannot reasonably hope to violate with impunity.

The objection based on lack of evidence is two-edged—so far as is known, no study has demonstrated the ineffectiveness of strict liability. And the amount of judicial support for it may be considered not entirely devoid of weight. Indeed, the rationalisation of the doctrine propounded by the Privy Council in *Lim Chin Aik* v. *R.* [1963] I All E.R. 223 at p. 228H might be persuasive to many minds.

But granted the author's assumptions, his discussion is careful, closely reasoned, and impressive. He suggests instead of the existing doctrine a theory of liability for negligence (which seems to mean 'moral culpability'), coupled with the provision of defences to be established by the defendant. Incidentally the author's discussion of the burden of proof seems to this reviewer to be less satisfactory than other parts of the book, bedevilled as it is by a couple of misprints on p. 44. However, the book is generally provocative, and it is interesting to speculate on the inflation of the author's theme into a general principle of criminal liability. Such speculation points up one of the major problems in the criminal law—whether the trend is to be towards stricter social control by objective standards of external conduct.

E. M. Bingham

SOME PRINCIPLES AND SOURCES OF AUSTRALIAN CONSTITUTIONAL LAW

By P. H. Lane (Law Book Co. of Australasia Pty Ltd., 1964), xxii and 303 pp.

There has long been a need for a student's textbook on Australian Constitutional Law. Existing texts are either devoted to particular aspects of constitutional law only or partake more of the nature of encyclopedic reference books than of any readily serviceable guide to students. Dr. Lane's book was undoubtedly designed to fill that gap.

Yet one may query whether Dr. Lane has really satisfied this demand. True Dr. Lane has avoided prolixity by concentrating on a number of aspects of constitutional law most commonly taught at Australian Law Schools and by omitting such fascinating, but usually ignored, topics as the immigration power. This reviewer, if he had been asked to make the choice, would have preferred a discussion of the

external affairs power to a discussion of the meaning of 'residents of different States', but this is clearly a matter for argument. Dr. Lane has also acted rightly in avoiding an excessive recitation of the facts and reasoning in decisions when Professor Sawer's casebook is available. The author refers the reader constantly to the relevant pages of that casebook. Dr. Lane was also right in refusing to pre-digest for student use other published material readily available to the student.

However, Dr. Lane through most of his book seems to assume not merely an availability of this material, but a sound grasp and understanding thereof. There are some exceptions: in the chapter on the arbitration power the author appears much kinder to the 'absolute beginner', than say, in the chapters on the commerce power or the meaning of 'the judicial power of the Commonwealth'. In most of his book, however, he seems to address himself to the initiate rather than the pupil.

For the student who possesses these qualifications, this book should be an excellent guide. Dr. Lane's attempts to expound the factors motivating the High Court in its decision which lie behind the often meaningless 'formulae' and 'labels' used by that august tribunal, make for stimulating reading. Sometimes, despite his promise in the preface not to do so, the author leaves the reader in mid-air. With the discussion of the scope of the defence power this is unavoidable, but in his discussion of what amounts to a 'judicial function', the author strikes one as being somewhat mischievous in querying the usefulness of almost every description put forward.

At other times the understandable desire of the author to keep the book concise makes him appear to commit the opposite sin of being unduly dogmatic. Thus this reviewer would be hesitant to accept the use which Dr. Lane makes of the *Rola Case* on page 104, and would most certainly take issue with his views concerning the subordination of the Commonwealth to State laws in certain circumstances as set out in pages 254-257. No one would dispute that Dr. Lane's interpretations in these matters are both reasonable and tenable, but he does not make it clear that there are other interpretations. For instance, it would seem that the late Mr. Justice Fullagar had more in mind in *Bogle's Case* (1953) 89 C.L.R. 229 than barring State legislation concerning the use made by the Commonwealth of its own property, and that far from representing the views of 'one Justice', they had the approval of the then Chief Justice.

Whilst this reviewer has some doubts whether this is **the** textbook we have been waiting for, it is undoubtedly a work of high calibre. Indeed the high level aimed at by the author is part of the objection to it as a student's textbook. It can of course be argued that only by casting pearls before swine, can we teach swine the excellence thereof.

One final request: Would Dr. Lane in future editions, as there will and should be, please exorcise the word 'States—rightsism' itself?

P. E. Nygh

CASEBOOK ON COMPANY LAW

By R. S. Sim (Butterworths, London, 1965), xxxi and 349 pp. £1/19/-.

This book comprises extracts from reported cases on company law collected under five main headings: 'The Company as a separate legal entity', 'Formation', 'Management', 'Winding Up, Reconstruction and Amalgamation' and 'Miscellaneous'—the latter including such disparate subjects as 'Lifting the Veil of Incorporation', 'Minority Protection' and 'Exempt Private Company'. Each extract is headed by a brief statement (usually no more than one sentence) of the principle gleaned by the author from the case, but there is virtually nothing in the way of criticism or discussion by the author except for an occasional rather laconic cross-reference to another decision (see e.g. p. 71). The author is Senior Lecturer in charge of Degree Courses and Legal Studies at Wigan and District Mining and Technical College.

The book is, of course, written by an English author for the English market and it is therefore not a matter of criticism that it does not refer to the Australian Uniform Companies Acts. Nevertheless this fact does affect the book's usefulness in Australia for not only is there the inconvenience of translating the references to the U.K. Act of 1948 to their Australian equivalents (which are in some cases materially different, e.g. Section 186 of the Uniform Acts and Section 210 of the U.K. Act—the 'oppression' section) but there is the more serious drawback that some important provisions in the Uniform Acts do not have an English equivalent. Examples which spring to mind are Sections 19 and 20 which affect the *ultra vires* rule, and the provisions relating to Official Management.

On a more general level, the approach of the author has been dictated by its professed purpose (as stated in the Preface) which is for 'professional students who study Company Law for their final examinations; notably, Company Secretaries, Accountants and Students preparing for the final examinations of The Law Society and for the Bar', although the hope is expressed that it will be 'of great use to a University student studying the subject'.

The inevitable result of his aim (again not a defect, because one cannot criticise a book for not achieving an object it does not seek) is that the book becomes a comprehensive manual on the practical details of the subject rather than a discussion of points of principle in a deeper and more academic manner.

This is illustrated in many ways. On a point of such basic importance as the legal nature of a share, the classic definition of Farwell J. in *Borland's Trustee* v. *Steel Brothers* [1901] 1 Ch. 279 is only mentioned in passing in a rather off-hand fashion (see page 188) and the interesting discussion of the question in *Short* v. *Treasury Commissioners* [1948] 1 K.B. 116 is not mentioned at all. Similarly on the topic of 'lifting the corporate veil' *Daimler Co.* v. *Continental Tyre Co.* [1916] 2 A.C. 307 is not mentioned even though Lord Halsbury's comments make a

fascinating contrast with his earlier remarks in *Salomon's Case* [1897] A.C. 22, which are contained in the book. Parenthetically it might be noted that it would seem more appropriate to include 'corporate veil' cases such as *Smith, Stone & Knight Ltd.* v. *Birmingham Corporation* (1939) 4 All E.R. 116 in the section dealing with the company as a corporate entity rather than placing them at opposite ends of the book. Again there seems to be very little reference to the views of writers such as Professor Gower or to periodical literature, or to the thought-provoking decisions in such American cases as *Dodge* v. *Ford Motor Co.* (1919) 204 Mich. 459 and *Perlman* v. *Feldmann* (1955) 219 F. 2d 173 (or indeed to Australian High Court decisions such as *Peters American Delicacy Co.* v. *Heath* (1939) 61 C.L.R. 457 or *Mills* v. *Mills* (1938) 60 C.L.R. 150, both of which are referred to several times in Professor Gower's '*Modern Company Law*'). However, there are admittedly references to the report of the Jenkins Committee on Company Law Reform.

As far as this reviewer is aware, the great majority of Australian law students would study Company Law at a University rather than in professional examinations and therefore need a more academic approach. Accountancy students, of course, would be in a different position but in their case there would be no need for the quantity of case law contained in the book.

Turning to the contents of the book, rather than its omissions, the reader's confidence in the accuracy of the author is somewhat weakened by the reference in the summary of the facts in *Steen* v. *Law* [1963] 3 W.L.R. 802 to 'the Australian Companies Act'. Even if this had been a reference to the Uniform Companies Acts—Acts in substantially identical terms which were enacted in the Australian States and Territories in 1961 and 1962—it would not be correct because even now there is no such animal as an 'Australian Companies Act', only a Victorian Companies Act, a Tasmanian Companies Act, etc. However, in this particular case the comment is *a fortiori* because the reference is to the New South Wales Act of 1936 (see Table of Statutes p. XV) which in no way can be considered identical to Acts in other States existing at the time *Steen* v. *Law* was decided.

A more serious criticism, however, can be made of the author's summary of the decision in *Freeman and Lockyer* v. *Buckhurst Park Properties (Mangal) Ltd.* [1964] 1 All E.R. 630. The summary is as follows (p. 96):

> A person dealing with the company is entitled to rely on the authority conferred by the public documents even though he has not inspected them.

It is submitted that this gives a misleading impression of the true effect of that decision. The basis of the *Freeman & Lockyer* case was that a director, who had been held out by the company as managing director although not appointed as such by the board under a power contained in the Articles, made the company liable on contracts entered

into by him which came *within the ordinary scope of a managing director's powers.* The case is therefore distinguishable from cases such as *J. C. Houghton & Co.* v. *Nothard, Lowe & Wills Ltd.* [1927] 1 K.B. 246, *Kreditbank Cassel, G.m.b.H.* v. *Schenkers Ltd.* [1927] I K.B. 826 and *Rama Corporation Ltd.* v. *Proved Tin & General Investments Ltd.* [1952] 2 Q.B. 147 where there were unusual transactions which would not be within what would ordinarily be expected to be the scope of the authority of the officer purporting to act on behalf of the company (see Willmer L.J., [1964] 1 All E.R. at p. 638). The plaintiffs in the *Freeman & Lockyer* case succeeded not because they were entitled to rely on the company's public documents but because they were entitled to rely on the ostensible authority of the director who had been held out by the company as a managing director and who was exercising functions within the usual authority of such an officer ((1964) 1 All E.R. at p. 640).

P. C. Heerey

THE LAW OF CONTRACT

By G. C. Cheshire, D.C.L., F.B.A., and C. H. S. Fifoot, M.A., F.B.A., 6th ed. (London: Butterworth & Co. Ltd., 1964), lxxii and 575 and index 37 pp.

There can be no question that Cheshire and Fifoot's *Law of Contract* has proved to be of marked success. This is due in no small measure to the manner in which the authors' ideas, although not universally regarded as being sound, are presented in a fashion which is both attractive and stimulating.

One imagines that, with such an established textbook, there is a natural disinclination to engage in any fundamental re-formulation of ideas, involving as this would a considerable amount of re-writing. Assuming this to be the case, the authors are to be congratulated on their new approach to the difficult question of Illegality. There are four new chapters dealing with those contracts which are void and those which are illegal by statute and at Common Law respectively. Perhaps the most useful of the new chapters is that concerned with the express and implied prohibition of a contract. This is always a difficult problem and the distinction between a contract which is illegal as formed and one which is illegal as performed, and the consequences of such a distinction, are discussed in an attractive manner.

The authors persist with their view that the court in *Couturier* v. *Hastie,* after construing the contract, held it to be void. However, there is much to be said for the opinion expressed in *McRae's Case* that the vendor was suing for the price of the goods which he was unable to deliver and that the case turned upon the failure of consideration and that the question whether or not the contract was void did not arise in *Couturier's Case. McRae's Case* has now been elevated into the text. Although it is once again acknowledged that this decision has been welcomed in numerous quarters, there is no discussion of any ideas which support the High Court decision and oppose the

opinion of the authors. Their view is that, as there was a contract for the sale of a particular ship and no ship existed, then the contract must be regarded as void for want of subject matter. Using section 6 of the *English Sale of Goods Act*, they come to the conclusion (at p. 193) that 'it would be ludicrous to suggest that a contract for sale is void if goods have ceased to exist and yet valid if they have never existed' and yet there does not seem to be anything intrinsically ridiculous about A being made liable on his promise to B that something exists, which in fact does not, there are circumstances under which the seller ought to have known that it did not exist. It is suggested by the authors that the way of avoiding the injustice of their view lies either in an application of the *Hedley Byrne* principle or by the use of the collateral contract.

The authors' discussion of the collateral contract continues to be split. There seems to be no good reason why part of the material should come under the heading of 'Constructing a Contract' when the whole can be dealt with in the chapter on 'Terms and Representations', as an answer to the difficulties of forecasting whether the court will hold that what was said by X was, or was not, intended to form an express term of the contract. Although, in theory, there is much to be said for Cheshire and Fifoot's view that the best solution to this problem is to avoid it altogether by the use of the collateral contract, it would seem that B is faced with the problem of satisfying the court that, on the evidence, what was said by A could reasonably be regarded by B as a contractual promise.

It is gratifying to note that the authors have at last accepted the view that the rule that consideration must move from the promisee is no different from the principle of privity of contract and that X does not become a party to the contract merely because he is named as such but only if he furnishes consideration. There has been a shortening of the discussion on the theoretical basis of the doctrine of frustration and again it is pleasing to see that the just and reasonable solution theory has finally been abandoned and the views expressed in the *Davis Case* now accepted. The 'Suez Canal' cases have been used to illustrate the operation of frustration.

The important decisions since the last edition have been attractively incorporated into the text. *Singh* v. *Ali* [1960] A.C. and *Singh* v. *Kulubya* [1963] 3 All E.R. are used to illustrate the rule that the illegal nature of the contract is no bar if the plaintiff can found his cause of action without disclosing the illegality and are much better examples than the *Bowmakers' Case. Archbolds (Freightage) Ltd.* v. *Spanglett Ltd.* [1961] 1 Q.B. is an important decision, but one wonders whether it can usefully be compared with *Cope* v. *Rowlands*. Cheshire and Fifoot have difficulty in reconciling *Phillips v. Brooks* with *Ingram* v. *Little* [1961] 1 Q.B. Indeed, there is much to be said in favour of the view expressed by Devlin L.J. in his dissenting judgment in that case, that any attempt to solve the *inter praesentes* problem, as a

question of fact, is doomed to failure. Pursuant to a discussion of the condition and the warranty as contractual terms, *Hong Kong Fir Shipping v. Kawasaki Kisen Kaisha* [1962] 2 Q.B. has been used to place emphasis upon the idea that not all contractual terms can be classified initially as either conditions or warranties and that a breach of an express term does not entitle you to repudiate your obligations under the contract merely by your describing that term as a condition. However, the authors still adhere to the view that the condition-warranty dichotomy is a useful one. Disfavour is expressed in respect of *White & Carter* v. *McGregor* [1962] A.C. and the view is taken that, in the case of an anticipatory breach of contract, the party not in breach, whilst under no obligation to mitigate, is not entitled to aggravate, his damage.

No textbook is perfect and there is much of Cheshire and Fifoot that one would not agree with both from the point of view of selection and treatment of material but, compared with other treatises on the subject, there can be little dispute as to its pre-eminence, which will be continued by this new edition.

M. Howard

LAW LIBERTY AND MORALITY

By H. L. A. Hart, M.A. Oxon. (Oxford University Press, London 1963), 88 pp. £1/5/-.

This book contains the text of three lectures delivered by Professor Hart at Stanford University in 1962. It concerns the legal enforcement of morality, a subject of particular interest since the passing by the House of Lords in May 1965 of a bill to give effect to the Wolfenden Committee's recommendation as to homosexuality.

It is Professor Hart's contention that the use of the criminal law to enforce morality is without justification.

In defence of this view, he examines arguments put forward by those who maintain that society has the right to use the criminal law to enforce morality; particular attention being given to the arguments put by Lord Devlin in his essay *The Enforcement of Morals* and by the great Victorian judge, James Fitzjames Stephen in his book *Liberty, Equality, Fraternity*. These are subjected to a detailed and penetrating analysis.

In part I the problem is posed in the question 'Ought immorality as such to be a crime?' (p. 4). Professor Hart invites us to consider the answer which John Stuart Mill gave to such a question in his famous essay *On Liberty*. He said, 'The only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others to do so would be wise or even right' (p. 4). To this declaration

Professor Hart enters a *caveat*, 'I do not propose to defend all that Mill said; for I myself think there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others. But on the narrower issue relevant to the enforcement of morality Mill seems to me to be right' (p. 5).

A century after Mill wrote *On Liberty*, the Wolfenden Committee put forward its recommendations. The principles by which these were supported were, as Professor Hart says, 'strikingly similar to those expounded by Mill in his essay'. Lord Devlin, on the publication of the Wolfenden Committee's report, 'took as his target the Report's contention "that there must be a realm of morality and immorality which is not the law's business" and argued in opposition to it that "the suppression of vice is as much the law's business as the suppression of subversive activities".' (p. 16).

From here on, the present book takes the form of Professor Hart's answer to Lord Devlin in what is largely a Hart-Devlin debate on the morality of the legal enforcement of moral rules. Highly persuasive arguments have been put up on both sides, and to choose which is the more convincing would be an unenviable task. Two examples will suffice to indicate the type of question which Professor Hart tackles.

In Part II of his book Professor Hart considers Lord Devlin's explanation of the rule of criminal law that, subject to certain exceptions such as rape, the consent of a victim is no defence. Lord Devlin put this as an example of a law enforcing morality: 'the reason why a man may not consent to the commission of an offence against himself or forgive it afterwards is because it is an offence against society'. (p. 8). In the case of this rule Lord Devlin claims that the 'function' of the criminal law is 'to enforce a moral principle and nothing else'. (p. 9).

As Professor Hart points out, many people would wish to retain such a rule yet object to the punishment of offences against morality which harm no one, for example, homosexual practices between consenting adults in private. But if we agree with Lord Devlin's classification of the rule under discussion then such an attitude would be inconsistent. Professor Hart's answer is that the rule is not necessarily an example of the enforcement of morality but can be explained as 'a piece of paternalism, designed to protect individuals against themselves' (p. 30). He argues that paternalism 'is a perfectly coherent policy' (pp. 31-32) and 'instances of paternalism now abound in our law, criminal and civil' (p. 32). If this justification of the rule is available, it follows that Lord Devlin's contention that the rule's function must be 'to enforce a moral principle and nothing else', cannot be right.

The second example concerns a point raised by Dean Rostow in his essay 'The Enforcement of Morals', 174 Cambridge L.J. (1960), an essay written in defence of Lord Devlin's viewpoint. Rostow cites the punishment of polygamy as an example of the legal enforcement of

morality. In reply Professor Hart argues that the law in the case of bigamy does not punish 'the substantial immorality of sexual cohabitation' (p. 40) but rather 'the law is . . . concerned with the offensiveness to others . . . of public conduct, not with the immorality of . . . private conduct, which, in most countries, it leaves altogether unpunished' (p. 41). He thus makes a distinction between the immorality of conduct as such and its additional aspect as an offensive act or nuisance when practised in public. To this Lord Devlin replies in *The Enforcement of Morals*, 'I do not think that one can talk sensibly of a public and private morality any more than one can of a public or private highway' (p. 17).

These matters are but two of a considerable number which Professor Hart considers when calling in question the moral basis for the legal enforcement of morality, all of which receive penetrating analysis and criticism. To choose between the views of Professor Hart and Lord Devlin might be an unenviable task, but it is hoped that the examples discussed in this review will serve to whet the appetite of the reader and cause him to add this immensely readable and thought-provoking book to his bookshelves.

I. S. Taylor