Causation in the Law. By H. L. A. HART and A. M. HONORE. (Oxford, at the Clarendon Press. 1959. xxxii and 454 pp. including index. £A4. 9. 3).

"For, if some limitation must be imposed upon the consequences for which the negligent actor is to be held responsible—and all are agreed that some limitation there must be—why should that test (reasonable foreseeability) be rejected which, since he is judged by what the reasonable man ought to foresee, corresponds with the common conscience of mankind, and a test (the "direct" consequence) be substituted which leads to nowhere but the never-ending and insoluble problems of causation. 'The lawyer', said Sir Frederick Pollock, 'cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause.' Yet this is just what he has most unfortunately done and must continue to do if the rule in *Polemis* is to prevail. A conspicuous example occurs when the actor seeks to escape liability on the ground that the "chain of causation" is broken by a 'nova causa' or 'novus actus interveniens.' " These words of Viscount Simonds, speaking for the Judicial Committee of the Privy Council in the *Wagon Mound,*[1] suggest most powerfully that the learned Viscount, when he wrote them, had not read HART & HONORE'S CAUSATION IN THE LAW. For the two objectives of the book are, first, to indicate that the problems of causation, though they may be difficult, and at times beclouded with such expressions as that used by His Lordship, "the chain of causation", are not insoluble, and do not involve logical and metaphysical controversies so much as the application of the plain common sense of the ordinary man, and second, to argue powerfully that causation is not, as clearly Viscount Simonds himself would assert, "a ghost to be exorcised", and that to substitute foreseeability (or "risk") as a substitute for the causal tests by which responsibility is limited would be a retrograde step.

It must be said that the book under review is more successful in achieving the first object than the second. Professor Hart, who is a distinguished philosopher as well as a lawyer, and his fellow-author have used the analytical methods of what is known as "ordinary language" philosophy to show that "the images and metaphors, the fluid and indeterminate language, upon which both courts and textbook writers . . . still fall back when deciding issues in causal termin-

[1] [1961] A.C. 388, at 423.

ology . . . have their roots in certain features of a variety of concepts which permeate the daily non-legal discourse of ordinary men." The first part of the book is wholly devoted to an analysis of these concepts. Of particular relevance to the reference in Viscount Simonds' speech to breaks in the "chain of causation" (which he would appear to regard as giving rise at the very least to logical and metaphysical controversies, if not to insoluble problems) is the section numbered II in Chapter III, under the heading "Tracing Consequences", in which there are ten pages of lucid analysis of the kinds of situations in which in ordinary discourse intervening acts or events are regarded as limiting the consequences which would otherwise be attributed to a particular act or omission. Supplementing this in the second part of the book, which is devoted to the problems of causation as they have arisen in and been solved by the common law, is Chapter VI, which presents an equally lucid analysis of the occasions when the presence of a third factor has been thought to negative causal connection between a wrongful act and harmful consequences. But this is only one example of the content of the book. There is hardly a causal problem, whether practical dilemma or academic puzzle, which is not subjected to a double analysis, first from the point of view of ordinary discourse or "common sense", and then from the viewpoint of the common law; and the first two parts of the book are a rich mine of suggestive ideas and analyses which in many instances throw fresh light on familiar cases and problems, and which cannot fail to be of interest and profit to the book's reader, whether he be a philosopher, an academic lawyer or a practising lawyer.

When the authors turn to criticism of those theories which would substitute for causation some other test to limit responsibility for the consequences of wrongful acts, they deal in turn with the tests of foreseeability and "consequences within the risk" (Chapter IX) and with the more subjective tests of the sense of justice (of which the chief spokesman is Professor Leon Green) and moral blame (Chapter X). The assertion, relative to the principle that in the law of negligence no recovery should be allowed for unforeseeable harm, that "it is difficult to affirm with confidence that any aspect of the principle . . . represents existing law . . ."[2] can no longer be maintained since the decision in the *Wagon Mound*,[3] but it remains true that "some generally accepted rules of law are inconsistent with it, *e.g.*, the rule that a negligent defendant is responsible for harm which

2 At 247.

3 [1961] A.C. 388.

is the effect of his act in combination with an abnormal susceptibility of the plaintiff." *Smith v. Leech, Brain & Co. Ltd.*[4] is now (and so long as it is not overruled) clear authority for this. The difficulty which this reviewer feels with the criticisms of the "foreseeability" test is that they do not meet the situation created by the *Wagon Mound.* They amount largely to criticisms of the logical absurdity of the test when it is applied (or strained) to make a defendant liable for harm which (as they say) became possible and foreseeable for the first time after the defendant's negligence had caused the initial harm.[5] In *Re Guardian Casualty Co.*[6] (a New York decision) the defendant (presumably by negligent driving) forced a taxi-cab off the road, so that it struck and came to rest against the stone porch of a house. Twenty minutes after the collision, when third parties were trying to remove the taxi-cab, a stone, which had been loosened by its impact, fell on the pavement and struck the deceased, who was standing about twenty feet away. The court held that the defendant[7] must be taken to have foreseen not only that the other vehicle would or might mount the sidewalk but that it might strike a building with such force as to loosen part of the structure, that it would then be necessary to remove the vehicle from the place where it came to rest, and that a part of the structure dislodged by the original impact might then fall onto the highway. It is true that so precise a calculation of consequences is unlikely to have passed through any defendant's head as he faced from moment to moment the problems of driving in what was presumably a busy city street. But given the possibility that, as the result of a collision with another vehicle, or the taking of evasive action forced on that vehicle by the defendant's negligence, it might mount the pavement and collide with a building, a possibility which would appear to be clearly foreseeable before impact, one would think that the subsequent possibilities were equally foreseeable at the same time, and not (as the authors suggest) only after the collision with the building had occurred. Of more relevance are the facts in *Mauney v. Gulf Refining Co.*,[8] but the risk that courts may take the foreseeabililty doctrine too seriously, and require such detailed prevision that recovery from ulterior harm (*i.e.*, harm which was not so likely to result from defendant's act that it would be a

4 [1961] 2 Weekly L.R. 148.

5 An instance of this is given at 241.

6 (1938) 253 App. Div. 360, 2 N.Y.S. 2d. 232.

7 Or, as HART & HONORE say at 242, the defendants, though on 241 there is only one.

8 (1942) 193 Miss. 421, 9 So. 2d. 780, referred to at 242.

reason for calling it negligent) would hardly ever be allowed, amounts to no more than a risk of perverse factual findings which could attach to almost any test; for example, the tests discussed by the authors concerning the "voluntariness" of intervening human action.[9]

A further difficulty with the fact situation in the *Wagon Mound*[10] is that it does not really raise a causal problem of the type with which HART & HONORE are dealing; but the case which it is now taken as overruling, *In re Polemis*,[11] does raise such a problem, *viz.*, the effect on causation of an abnormal condition existing at the time of a human intervention.[12] Indeed, so far as the type-situation of *In re Polemis* is concerned, it would appear that if it were to be reproduced at this moment the decision would be governed by *Smith v. Leech Brain & Co. Ltd.*[13] and not by the *Wagon Mound*.[14] Again, as HART & HONORE make abundantly clear, the situation in which there is a *novus actus* (or *nova causa*) *interveniens* (to revert to Viscount Simonds' language), is susceptible of being stated as a causal problem, although it can also be stated as a problem of foreseeability. To some extent the discussion in Chapter IX does anticipate the *Wagon Mound,* for there is a reference[15] to a foreseen effect of the foreseeability doctrine; the authors say that if it were admitted physical harm would be subdivided into various types and "[t]he rule would be that, for each of these types of harm, plaintiff must show that defendant acted in a manner foreseeably likely to cause that type of harm." They add that this proposal "would limit responsibility in a more rational way than the present techniques of 'duty of care' and 'unforeseeable plaintiff'." But it is not clear that the suggested rule is in fact anything other than a variation of the "duty of care" rule.

The truth is that no single test will yield satisfactory results in every situation. To some it may seem "illogical" and unfair that an antecedent abnormal circumstance will be regarded, from the point of view of a causal test, as merely part of the circumstances on which the wrongful act operates, while a subsequent abnormal circumstance will "break the chain" of causation. It seems equally illogical and unfair to say that the unforeseeability of the antecedent abnormal circumstances is irrelevant to the limitation of damages flowing from a wrongful act, while the unforeseeability of subsequent abnormal cir-

9 At 129 *et seq.*
10 [1961] A.C. 388.
11 [1921] 3 K.B. 560.
12 See 75.
13 [1961] 2 Weekly L.R. 148.
14 [1961] A.C. 388.
15 At 244.

cumstances is relevant thereto. But to say this is to introduce into the discussion considerations of justice (for "illogical" in this context is a critical expression moved by the sense of injustice) and policy, considerations which the authors themselves will not accept as total substitutes for causal concepts in solving problems of this kind. Yet they cannot be wholly excluded; for the lawyer's use of causal concepts owes much to causal notions latent in ordinary thought, and these, as the authors point out,[16] have in decisions outside the central area of simple cases "been powerfully *and properly* influenced by judicial conceptions of policy or justice."[17]

Five chapters of Part II are devoted to the causal problems arising in the law of tort; there follows a chapter on causation and contract (in the course of which it is pointed out,[18] that the first branch of the rule in *Hadley v. Baxendale*[19] involved the problem of loss of profit, not of recovery for physical harm or incidental expense, and that the rule in this case is not really comparable with that in *In re Polemis*[20]—another anticipatory criticism of the *Wagon Mound*[21]). Chapters XII, XIII, and XIV are devoted to the criminal law, the last containing an examination of the relation between causation and the principles of punishment. The final chapter of Part II contains some useful observations on the question of evidence on causal issues and the procedural effect of evidence adduced. The whole of this Part of the book contains a valuable collection and discussion of authorities, from a number of common law jurisdictions, on questions and problems of causation, and for this alone the book would be a worth-while addition to a practitioner's library.

The last sixty pages of the book are devoted to an examination of some continental theories of causation; these are of more general interest, but they serve to round off a most remarkable and comprehensive piece of scholarship on the part of the two authors.

The book is lucidly written throughout, although the closeness of the argument and (especially in some chapters in Part II, the amount of detail) make it not an easy book to read. Indeed, there are times when the reader, becoming immersed in detail, completely loses sight of the wood for the trees, and occasionally, as a result of the repetition which the authors' care has forced upon them, has the

16 At 5.
17 Italics added by reviewer.
18 At 287.
19 (1854) 9 Ex. 341; 156 E.R. 145.
20 [1921] 3 K.B. 560.
21 [1961] A.C. 388.

momentary sensation that he is going in circles. But these are petty criticisms of what is an extremely good book. The production, as is usual with the Clarendon Press, is excellent, and there are remarkably few misprints; the reviewer noted "volunary" for "voluntary"[22] "unforseeable" for "unforeseeable",[23] "wrondgoer" for "wrongdoer".[24] In the statement of fact in *Shrewsbury v. Blount*,[25] "scrip-certificates" has become "script certificates"; in note 4 on page 230 a lower-case "j" has slipped in as the first letter in Jordan. Finally, in one place the misprint "casual" for "causal" has slipped through; that this should have occurred only once in a book in which the word "causal" is constantly used is itself a high tribute to the standards of proof-reading.

E.K.B.

An Introduction to the Civil Law. By K. W. RYAN, B.A., LL.B. (Queensland), Ph.D. (Cantab.). 1962. xiv and 294 pp. (including index). (Law Book Co. of Australasia Pty. Ltd.; Sydney, Melbourne, and Brisbane. £A2. 18s.).

Dr. Ryan's object in writing this book is described as being "to set out as simply and concisely as possible the main institutions of [the] systems of private law" of France and Germany. In this he has succeeded admirably, and has produced a book which will be of value to all teachers and students of Comparative Law. A particular feature of the book (which Dr. Ryan himself rather modestly claims merely as a novelty) is that, after an introductory chapter tracing the development of the Civil Law from Justinian's codification to the modern French and German codes (with a brief excursus on the influence of Roman Law on the Common Law), it gives parallel accounts of the solutions adopted by French and German law of the main problems of private law. Thus the student is continuously invited not only to compare each of these two great systems of law with the Common Law, in respect to its approach to fundamental problems of law and its solutions of those problems, but also to compare each with the other. In most instances the threefold comparison is expressly made in the book itself, although at times the reference to the Common Law is little more than a pointer, as, for example, in the sections on strict liability and on abuse of right in the chapter on the Law of

22 At 70.
23 At 100.
24 At 171.
25 At 177.

Torts. This is all to the good in a book intended principally for students, as it will force them to draw on their own resources for the more detailed comparisons which many teachers of the subject will inevitably demand.

The reviewer would hazard the guess that the book will quickly become a necessary tool to most teachers of an undergraduate course in Comparative Law. Whether it will be a sufficient tool is another question. Dr. Ryan himself admits that an examination of selected topics in depth is "an essential part of a worth-while course in Comparative Law", and that the book can do no more than sketch a general background. But the background which it sketches is confined to the "institutions" in the civilian sense, that is, the principal branches of the substantive law and their main concepts. It hardly deals at all with "institutions" in the American realist sense, which is broad enough to include the sources and methods of law. There is a brief account[26] of the roles of the praetors and jurisconsults in the development of Roman Law, as part of an account of what is described in a sub-heading as "Justinian's Codification", but more perceptively in the text as a "restatement" of the law, and there are good brief accounts of the formation and characteristics of the Code Civil and the Burgerliches Gesetzbuch; but there is no separate discussion of the techniques and methods of interpretation, the nature of the judicial process and the attitude to precedent, or even the unfamiliar features of Civil Law procedure. Thus there is frequent reference to the decisions of the Cour de Cassation without any indication of their status in French law; and on page 103, in particular, after a reference to *Patureau-Miran c. Boudier*[27] and an extract from the *motifs,* there is a statement cited from the judgment that "the cassation sought must be denied"; a statement which, in the absence of research in other books,[28] will mystify the student who comes on it for the first time. It is not intended to suggest that Dr. Ryan should have written another book, of a different sort, in place of the present book, but merely that in the opinion of this reviewer the present book would have been improved had it been possible to add a further chapter treating in more detail the sources and methods of the systems in question. May we hope, however, that before long we may have from Dr. Ryan's pen a companion volume on sources and methods of the Civil Law?

[26] At 3.

[27] [1892] Dalloz Jurisprudence I. 596.

[28] *E.g.*, LAWSON, NEGLIGENCE IN THE CIVIL LAW, 231 *et seq.*

The book is well produced, lucidly written throughout, and easy to read. Although it is, as indicated above, primarily a student's book, it would be worth-while reading for any practitioner (and one hopes there are many) with an interest in the law beyond the daily bread-and-butter grind, and a lively curiosity in the way in which fundamental problems of the law are met and solved in other systems. Such a one could not fail to find much in the book to interest him.

E.K.B.

Parliament at Work. By A. H. HANSON and H. V. WISEMAN. 1962. xi and 341 and (index) 16 pp. £A2. 9. 6. (London: Stevens & Sons Limited. Our copy from Law Book Co. of Australasia Pty. Ltd.).

Two members of the staff of the University of Leeds have collaborated in the production of a *nova species* in English legal literature, a casebook of Parliamentary procedure. They make no bones about using the word "parliamentary" to describe their work, although practically all the illustrations are taken from the activities of the House of Commons; as they note in their preface, "[they] have brought in the Lords only where the context required [them] to do so." Is this an indication of the increasing insignificance of the House of Lords as part of Parliament, particulary since the Parliament Act of 1949 left it with little more than nuisance value? The authors may well think so, for their expressed object is to subject the procedures of the House of Commons to careful scrutiny, partly to make them better known, partly with the laudable object of creating a well informed body of opinion better able to criticise constructively such of the procedural techniques as may have outlived their purpose.

The illustrations contained in the work are all taken from the post-World War II period; while it would not be possible within the confines of a short volume to give examples of every major procedural rule, the selection is comprehensive and well balanced. It is not a mere list of condensed quotations from *Hansard;* the authors have adopted the plan of setting out their examples in a continuous and therefore more intelligible and interesting narrative, and they have not hesitated to make a few shrewd thrusts where the situation seems to call for comment as well as description. Nearly a quarter of the whole book is devoted to the passage of Bills through the House, with pride of place given to the Attlee administration's Iron and Steel Bill of 1949, a highly controversial measure which gave experienced politicians on both sides of the House an opportunity to use—or per-

haps even to exploit—the rules for or against the Bill. An even more substantial allocation is given to "Financial Procedure", and provides the authors with an opportunity to criticise much of the obscurity which surrounds the complex subject of public financing. The whole compilation is a most useful adjunct to teaching material on government and constitutional law, particularly where ready access to *Hansard* is not possible.

Even if it is too much to hope that the intelligent layman will buy this book, it ought to command the attention of legislators, present and prospective, as well as of teachers of government and the law and customs of Parliament.

The British Cabinet. By JOHN P. MACKINTOSH. 1962. xi and 533 and (index) 12 pp. (London: Stevens & Sons Limited. £A3. 10s. Our copy from Law Book Co. of Australasia Pty. Ltd.).

The author explains in his preface that five years ago he was invited to collaborate with Professor J. D. B. Mitchell of Edinburgh University in preparing a third edition of *Keith's British Cabinet System,* and that after some months he and his collaborator, and their publishers, agreed that adequate revision of Keith would make that work almost unrecognizable. It is, in this reviewer's opinion, indeed fortunate that Dr. Mackintosh was then able, with the blessing of all concerned, to start writing an entirely new work on the Cabinet system as it originated in England and later developed in the United Kingdom. Fortunate—because Dr. Mackintosh's book, though much longer, is far easier to read than Keith's, since it is free from the aridity of style and the overweening dogmatism of so much of Keith's work in the constitutional field. Readers—whether teachers or students—of Mackintosh will find few literary mannerisms to irritate and deter them; for myself I must confess that "implement" and "homologate" have become two of my pet aversions since Keith did them to death in his later works. Nor will they find any trace of that ineffable superiority which was one of Keith's less endearing characteristics; those who ventured to disagree with him were brusquely dismissed as unworthy of serious consideration or refutation. Dr. Mackintosh often disagrees with other writers; but at least he does so cogently, clearly, and above all courteously.

A short introductory part refers to the general nature of cabinet today, with some reference to precedents and conventions to suggest how, in the author's opinion, it actually works. Then he really settles down to his task with an admirable historical account of the almost accidental birth and growth of the system, from its virtual genesis

shortly after the Restoration in 1660. This, in a condensed form which does not appear to have left out any factor or event of significance, takes the story down to 1832 and is followed by a much more exhaustive and detailed account of development from the first Reform Act to 1914; and 1832 to 1914 is, after all, the really formative period of the contemporary cabinet system. Peel's plaintive question, during the debates on the Reform Bill, "How thereafter could the King change his government?", was even more penetrating than he probably realised; for, *pace* Dr. Mackintosh—and others—that very mild measure of House of Commons reform (unnecessary and revolutionary as it seemed to the Duke of Wellington and his friends) began a movement which in barely a century was to deprive the monarch of all governmental power and to transfer it to the elected representatives of the people acting through cabinet.

Dr. Mackintosh does not seek to burke the fact that in modern conditions (a description of which constitutes the final and largest part of his book) cabinet may seem to have acquired a degree of autocratic power greater than that enjoyed by any monarch in the past; or that it is arguable that there is a marked tendency for that power, or at least a great deal of it, to be concentrated in the hands of the Prime Minister. (To be able to survive the effect of the Profumo-Keeler disclosures, with the aid of genuine—or merely histrionic—tears; and then to be able to talk of leading his party into the next election, is surely an indication of the strong position held by the present occupant of the office). The author goes on to discuss the extent to which that power can be kept in check by an active and vigilant Opposition, by dissentient groups within the ranks of the government's supporters, and by extraneous factors such as the press and public opinion. One may not agree with all his conclusions, but at least they are sufficiently well founded and argued to require protagonists of different conclusions to re-think and re-state their own premises and deductions.

To this brief summary of a book which this reviewer has found interesting and stimulating, and to which he will be constantly referring, it remains to add that it strengthens his long held view that the English system of cabinet government is the product not merely of the political forms obtaining there but of a massive complex of economic, social, and other factors as well; and that it is absurd, and may even be dangerous, to imagine that it can be transferred holus bolus to communities which do not share and have never shared the habits of speech and of life of the place of its origin.

F.R.B.