BOOK REVIEWS.

Professional Negligence. By J. P. EDDY, Q.C. (Stevens & Sons Limited: London. 1955. xii and 140 and (index) 6 pp. 19s. 6d.)

This little book comprises the Travers Memorial Lectures given by the author at the City of London College in January-February, 1955. For the most part the author recounts the facts of leading cases with details which add to their entertainment value if not always to their legal significance, and reports some of the judgments with often lengthy quotations. Clearly he did not intend to be "scholarly." There is no minute examination of cases in point of their logical consistency and in this no doubt the author's approach has much virtue. But one might have expected that he would have given rather more thought to an assessment of the law in terms of the purposes it is serving. There is some attempt to explain the substantial increase in actions brought against doctors and hospitals (pp. 78ff), but more often the author tends to mystify rather than enlighten his readers as to the meaning of the law. The magic of the Latin maxims *qui facit per alium facit per se* and *respondeat superior* may keep the reader in awe but they tell him nothing. The misprint in *imperitia culpae annumeratur* is unlikely to impair anyone's understanding.

The reviewer found the most provocative thought in the book in the foreword by Lord Justice Denning. Liability insurance carried by a professional man does not destroy the element of punishment in a judgment against him for negligence. Liability insurance cannot protect him against damage to his professional reputation. The law in this context is still a means of control of behaviour, and this explains the importance of moral fault in our idea of professional negligence. It is true that the purpose of compensation of the victim is defeated to the extent to which moral fault must be shown, but this is the price we pay for what is probably the most appropriate means of control of professional behaviour. The reason why negligence in the employer and the motor vehicle operator comes more and more to be an amoral idea is very simply that in these contexts control of behaviour is rather to be achieved by detailed provisions in statute and regulations, and the law of negligence may safely emphasise the purpose of compensating the victim.

ROSS PARSONS.

"Full Aid" Insurance for the Traffic Victim. By ALBERT A. EHRENZWEIG. (University of California Press: Berkeley and Los Angeles. 1954. Our copy from the publishers.)

Professor Ehrenzweig has a forthright and colourful style which runs at a fine old pace. Yet it carries a heavy burden of valuable and stimulating matter. His *Negligence Without Fault* will be well known to those who are concerned to appraise the function of the traditional rules of tort liability in the mid-20th century. The present little book is devoted to such an appraisal in the special context of litigation in respect of personal injuries arising from motor vehicle accidents. The reviewer's own interest in the subject will be apparent from the article *Death and Injury on the Roads* published in the present number of this *Review*. In that article will be found a profession of a debt to Professor Ehrenzweig.

The hazards of motor vehicle accident litigation are much the same in America as in Western Australia, but there are some differences. Jury trial in America, it would seem, brings some popular prejudice in favour of victims into the operation of the law—a prejudice which our judges more or less successfully escape. The author's statement that "a pedestrian will almost always prevail" (p. 4) certainly would not be true of our experience. On the other hand the passenger victim in this State is in a much stronger position than he is in those American States where common law or statute require that he show gross negligence if he seeks to recover from his driver. Our Court list is not cluttered with cases awaiting trial. But then our victims are more powerfully deterred by the penalty of the cost of an unsuccessful action. American victims have the advantage of the contingent fee system and are not required, if they lose, to pay for the defendant's attorney. Our confidence that the right side always wins contrasts with the argument which, according to Professor Ehrenzweig, is frequently advanced in America, that "judges and juries are often wrong, that it is bad enough to see somebody held liable who in justice should have prevailed; and that in such a case to make him pay his opponent's attorney in addition would add injustice to injustice and make honest litigants unwilling to risk the gamble of a law suit" (p. 6).

The victim who has passed the hazards of litigation will still go uncompensated unless the defendant is "financially responsible." Massachusetts has had a compulsory third-party insurance Act since 1925 and pressure to take out liability insurance is exercised in a number of other States by "financial responsibility" laws. But liability insurance is far from universal. The author estimates that 15,000,000

out of 48,000,000 vehicles in America are not insured (p. 7). Western Australia has the advantage here—we have probably the most efficient compulsory third-party insurance scheme to be found anywhere in the world.

The hazards of litigation and the still substantial area of financial irresponsibility combine in America to produce a very real social problem of the uncompensated victim. The solution Professor Ehrenzweig offers seeks to remove both causes. In place of liability insurance he proposes "full aid" insurance—accident insurance in statutory minimum amounts—taken out by the owner and operator of a motor vehicle and covering all injuries inflicted by the operation of the vehicle. Thus compensation may be recovered by the victim irrespective of whether he can pass the hazards of litigation in a common law action in tort. To ensure that there is always a financially responsible defendant he proposes first that the owner and operator shall be offered a bribe; if "full aid" insurance is carried owner and operator will, by statutory provision, be relieved of common law liability for ordinary negligence. Secondly he proposes that in cases where the bribe fails and no "full aid" insurance is carried the victim who is otherwise unable to recover compensation will be able to recover the amount which "full aid" insurance would have provided from an uncompensated-injury fund administered by the motor vehicle insurers. Professor Ehrenzweig writes in a climate of opinion which, led by the insurance lobbies, and perhaps by some deep philosophical truth, is opposed to compulsory insurance. He has no doubt secured for himself a more tolerant hearing by insisting that taking out "full aid" insurance must be "voluntary." And we would be so much nearer paradise if we could persuade every man to provide for his neighbour, even though we need to stimulate his goodwill with a little bribe. But it appears to the reviewer that the chances that Professor Ehrenzweig's scheme would work if "full aid" insurance were in truth "voluntary" are indeed remote. Will those who have to be compelled to take out liability insurance, whether by the Massachusetts direct sanction or the oblique sanction of financial responsibility laws, voluntarily take out "full aid" insurance? In fact the author pays only lip service to the cause of voluntary insurance. The reader is wooed in the preface with the promise that the author's scheme will "depend upon private insurance and upon voluntary acceptance by the public" (vii) but towards the end of the book the author tells us that "nonconformists would remain subject to the continued pressure of financial-responsibility laws" (p. 38). Can one say that where a man elects to be shot rather than hanged, his submission to shooting is "voluntary"?

The scheme will in fact require increasing pressure of financial-responsibility laws. It is a tortuous way of going about things, or so it seems to us. Why not simply compel owners and operators to take out "full aid" insurance? But we are forgetful of the climate of opinion within which the author must work.

The author's anticipation that owners and operators will elect to take out "full aid" insurance proceeds on the assumption that "full aid" insurance will be cheaper than tort liability insurance. There may be grounds for that assumption in the American scene, but if "full aid" insurance is to be high enough to "make the proceeds of accident insurance correspond roughly to the popular estimate of an adequate minimum award" (p. 27) the assumption would not be sound in Western Australia. There is undoubtedly a need, as the author suggests, for down-to-earth investigation and calculation of the kind which preceded the Columbia Report. In the article referred to the reviewer has set up a suggested scale of tariffs to form the basis of a calculation of cost. Calculation is a formidable task, but such progress as the reviewer has made to date is enough to warrant a conclusion that the cost of insurance to finance what is a very modest scale of tariffs will be substantially greater than the present cost of tort liability insurance. If "full aid" insurance is more expensive than tort liability insurance, there will be no bribe and the author's scheme will fail.

It is true that the author proposes an uncompensated injury fund to ensure compensation in cases where there is no "full aid" insurance, and the victim is otherwise unable to obtain compensation. But the fund will not be able to meet the demands that will be made upon it, unless "full aid" insurance covers almost all vehicles. The author proposes that the fund will be financed from "tort fines" collected by the fund from injurers or accident victims whose criminal negligence has contributed to the accident, and contributions from tax sources. The fund will be administered by motor vehicle insurers. Income from "tort fines" is limited. There is no theoretical limit, save that imposed by the financial resources of the State, to the amount of contribution from tax sources, but any substantial contribution will transform Professor Ehrenzweig's scheme into a State social service, curiously enough administered by a group of insurers.

The idea of "tort fines" is some advance on the Scandinavian device where the insurer is in certain cases required to recover from his own insured. But the idea is open to the criticisms that the fund is hardly an appropriate body to determine when a fine should be 'collected', and the punishment is contingent upon injury having been caused.

Pending enactment of legislation which will abolish tort liability in cases where "full aid" insurance is carried, Professor Ehrenzweig proposes an "intermediate solution": Insurers can insert a "full aid" clause in their policies giving the victim the power to elect to take a tariff payment in exchange for a waiver of any tort claim. He anticipates that "the attractiveness of immediate payment unencumbered by the expense and delay of negligence litigation would induce the majority of accident victims" to elect to take tariff payments. Without doubt insurers can write this kind of insurance, but will there be any market for it? Again there is need for down-to-earth investigation and calculation, but it seems a fair assumption that liability insurance with the "full aid" clause will be more expensive than straight liability insurance. Where the victim is confident that he can pass the hazards of litigation he will prefer to pursue the bigger prize. Speculative actions will be less common and this will mean that the confident plaintiff will be so much the less deterred by the prospect of delay in securing judgment.

Whether because we are a more easily regimented community, or because our insurance lobbies are less powerful, much of Professor Ehrenzweig's book is, so far as we are concerned, arguing a cause that has already been won. We do not question that motor vehicle owners should be compelled to carry insurance in the interests of potential victims. But there is still a cause to be won in this country as to the form of insurance that should be carried. Professor Ehrenzweig's book is an important contribution to the presentation of the case for accident insurance, and as such it has very real value for us. The reviewer cherishes the hope that Western Australia may soon be induced to take the lead in this corner of the world by establishing a soundly made compensation scheme founded on accident insurance.

ROSS PARSONS.

Readings and Moots at the Inns of Court in the Fifteenth Century. Vol. 1. Ed. by S. E. THORNE. Publications of the Selden Society, Vol. 71. (Bernard Quaritch: London. 1954. cxlvi and 273 pp. £3. 13. 6 stg. Our copy from the Selden Society).

The latest volume of the Selden Society publications contains an impressive quantity of fifteenth century readings in the Inns of Court. Professor Thorne has edited the manuscripts and provided a translation. He has also written an introduction in which he discusses the rotation of readers, and further gives a short biography of those

lawyers whose readings are printed in the volume. The evidence is usually scanty and at times conflicting, and the task of identification is in consequence not always a simple matter. Professor Thorne's researches here have been notably thorough and are exceedingly helpful. It is perhaps, however, a matter for some regret that his involved style and presentation of material make his argument at times a little difficult to follow, so that one becomes rather confused by the exuberance of detail. The beginning of the Introduction itself on p. ix is a fair sample of the author's convoluted style.

This however is a small matter in the end, and our gratitude must be offered to Professor Thorne for making the readings available in modern form. This work is only the first volume; the second is to contain a discussion of mediaeval education in law, lists of readers and readings, and the text of moots argued at two of the Inns. Its publication will be awaited with considerable interest.

L.J.D.

Depreciation of Fixed Assets in Accountancy and Economics. By G. T. WEBB. (Law Book Co. of Australasia Pty. Ltd.: Sydney, Melbourne and Brisbane. 1954. xii and 319 pp. £A2. 10. 0. Our copy from the publishers).

The subject here dealt with is one which has been exercising the minds of accountants considerably in recent years. It is of obvious importance in business affairs because it is concerned with the incidence of wear and tear of assets, obsolescence, repairs, replacement, the charging of amounts against the current year's income, and so on. Mr. Webb has given us full measure in his survey, examining both theory and the practical application of theory. He is concerned initially to stress the different approaches of the accountant and the economist. To the accountant, depreciation is a method of writing off against revenue the original value of a fixed asset over a fixed period related more or less to the estimated life and productivity of the asset; this is a theory of amortization. To the economist, depreciation represents the using up of fixed assets, and he is concerned primarily with their replacement in the interests of production. Mr. Webb suggests that whatever theories different groups may wish to canvass, depending on their academic or professional point of view, it may be more satisfactory to accept at the one time the two outlined above. "The two points of view should be regarded, not as conflicting concepts, but as correlatives, viewing the question of depreciation from two different sides. The original cost of fixed assets should be amortised

and charged into costs and, unless the business is to be wound up after a limited period, the fixed assets eventually should be replaced. Depreciation charges, therefore, should both write off the original cost of the assets, and assist the replacement of the assets when the time arrives" (pp. 16-17). No doubt accounting theory is still in a fluid state in this matter but while controversy flourishes it is valuable to have the results of Mr. Webb's comprehensive examination.

A number of other matters related to the subject of depreciation are also dealt with. The interested reader will find chapters discussing full employment, various aspects of public and private investment, and the nature of expenditure on maintenance and repairs. The results are given of a survey of the policy of manufacturing companies concerning depreciation and replacement of fixed assets. In this respect some criticism is voiced of the failure in both Australia and Great Britain to make adequate renewal of machinery which has become obsolete and inefficient, and the importance of replacement in the interests of defence as well as of full employment is stressed.

The language in which the book is written is simple and reasonably free from accountants' jargon. But not entirely free. It is, for instance, difficult to understand why, on p. 47, "notivating factors" are referred to, when nothing more than "motives" is meant. Perhaps the main criticism should be directed at the general flatness and dullness of expression. It is plain, wholesome fare which is offered, and while it is far from indigestible, the palate undoubtedly yearns for a restaurant of higher class. One cannot help recalling rather wistfully the view of Professor W. T. Baxter in *Studies in Accounting*[1] that accountancy can be exciting stuff and that literary style is something that accountants would be well advised to aim at. One could however find worse writing than Mr. Webb's; it is poor but honest.

A few legal cases are cited. Unfortunately no indication is given of where they are to be found in the law reports. And one case, *Re Crabtree, Thomas v. Crabtree,*[2] is referred to in four different ways. On p. 66 it is given correctly, but on four occasions (pp. 67 and 68) it appears as *Crabtree v. Crabtree,* on p. 71 it has become *Thomas v. Crabtree,* while in the index on p. xi we are offered *Crabtree, Re Thomas v. Crabtree.*

L.J.D.

1 Reviewed in 2 U. WESTERN AUST. ANN. L. REV. 190.
2 (1911) 106 L. Times R. 49.

Australian Secretarial Practice. By R. KEITH YORSTON and EDWARD E. FORTESCUE. (Law Book Co. of Australasia Pty. Ltd.: Sydney, Melbourne and Brisbane. 3rd edition, 1953. xx and 629 pages. £A3. 10. 0. Our copy from the publishers).

A new edition of this classic of company law was long overdue, and as a comprehensive guide to the legal provisions of all Australian states and territories it is an exceedingly valuable publication. In its thirty chapters all matters of company administration and law which a competent and informed secretary will need to know are covered in detail in the light of the relevant statutes and professional practice. The duties of the secretary, the memorandum and articles, share capital in all its aspects, dividends, directors, types of companies, meetings, debentures are all considered and the law relating to them set out and expounded.

This work is essentially a practice manual and a book of reference, and it is no derogation from its worth to describe it as such. Its detailed exposition and orderly arrangement make it indispensable. It does not at all events claim to be a critical examination of the working of company law in the different states. One would not therefore go to *Australian Secretarial Practice* for a full-scale criticism and suggestions as to what the law ought for preference to be. This aspect of things is not of course entirely overlooked, and a number of ideas and recommendations—some originating from bodies like The Institute of Chartered Accountants in Australia—are from time to time put forward. There is room however for a wider examination of the operation of company law and for the putting forward of new ideas for improvement, and it would be most agreeable to have from the authors something aiming to be considerably more than, in essence, a guidebook and factual presentation of the law. Perhaps one day they may be prepared to do this.

One or two minor points call for comment. It may be true enough, as suggested on p. 392, that the words "assets" and "liabilities" are unnecessary in a balance sheet. But the argument that "those uninitiated in accounting knowledge are always confused by the inclusion in a balance sheet, under the heading of 'assets,' of a loss being carried forward in an appropriation account and likewise have difficulty in understanding why a profit appears on the liabilities side" is scarcely a valid one. These things are after all a matter of accounting principle, and within the system of book-keeping the situation is quite consistent and explicable. Remove these offending headings, and you are still left with the problem of explaining to the uninitiated why a

loss carried forward appears on the same side of the balance sheet as Land and Buildings and Cash in Bank. You may also be called upon to explain why cash receipts are *debited* in the cash book, and a hundred and one other accounting matters of that kind.

An improvement which would be very acceptable would be the addition of an index to the sections of the several statutes which are referred to.

The binding of the volume, in colour and texture, is thoroughly vulgar and repulsive. Perhaps the fourth edition may receive more handsome treatment.

L.J.D.

An Introduction to the Law of Nations. By OSCAR SVARLIEN. (McGraw-Hill Book Company, Inc., New York. 1955. xv and 478 pp. Our copy from the publishers. $6.00).

The field of international law is so vast that an introductory book on the subject can serve a very useful purpose. Professor Svarlien has written a comprehensive and attractive work which is of convenient and manageable length. One result of course of the compression of the book is that there has been no opportunity for detailed examination of the highly controversial matters which are thick in international law. It is, on the whole, informative rather than critical, and is further evidently very dependent on the arguments and views of previous writers. It remains nevertheless a production of some worth in a province where an introductory text-book is very welcome.

In discussing the question of recognition, Professor Svarlien points out the difference between a state and its government, but in asserting the difference between *recognition* of a state and of a government, he fails to make it clear what significant legal consequence will follow in international law if there is recognition of a state only, and not of its government. The United States admits the existence of China as a State but does not recognise the Communist government, preferring the Formosa nationalists. But its recent dealings over the conference table with Chinese Communist representatives (though the United States has been careful to point out that the meetings do not constitute a formal recognition of the Communist regime) do not depend for their raison d'être simply on the acknowledgment that China is a State, but must involve at least the *ad hoc* recognition of the Communist *government,* for the strictly limited purposes of the conferences.

The distinction between *de facto* and *de jure* recognition appears in recent years to have lost in practice much of its importance. Professor Svarlien's description of the distinction between the two is not altogether satisfying. He says (p. 104) that *de jure* recognition is "complete." This however can scarcely be true in cases where a new government recognised *de facto* is in control of the territory in question. In respect of property within the territorial limits, as the cases show, the government still recognised *de jure* will not be able to assert any claims. On the other hand, the government recognised *de facto* will not be able to lay claim to property outside the territorial limits, unless of course it is actually under its control.

There are one or two curiosities. It seems hardly necessary to point out, on p. 230, that monarchs are entitled to be addressed as "Your Majesty"; and the United Kingdom legislation giving effect to the agreement made in 1942 with the United States on the subject of jurisdiction over American troops in Great Britain is said to be "also frequently referred to as the 'United States of America (Visiting Forces) Act of 1942'." This is no exciting piece of information since it is simply the short title of the statute under discussion. It is unfortunate that in dealing with this subject the difference beween civil and criminal jurisdiction has not been sufficiently brought out and discussed, and that the Australian cases of *Chow Hung Ching v. The King,* (1949) 77 Commonwealth L.R. 449, and *Wright v. Cantrell,* (1944) 44 State R. (N.S.W.) 45, have received no mention.

On p. 427 Professor Svarlien states that "if an American woman marries an Englishman she would, according to British law, acquire British nationality." This would have been the case before the 1948 legislation, which Professor Svarlien has overlooked. Since the 1st January, 1949, as a result of the British Nationality Act, 1948 (11 & 12 Geo. 6, c. 56), a woman does not automatically acquire on marriage her husband's British nationality (or United Kingdom citizenship), though she may be granted this on simple application to the Secretary of State. The Nationality and Citizenship Act (No. 83 of 1948) (Australia) operates in a similar way.

It would be better if, in conformity with practice, the All England Reports were cited as All E.R. and not All Eng. (see, for example, the footnotes on p. 107).

L.J.D.

Hire-Purchase Law. By R. ELSE-MITCHELL, LL.B. (Second edition. Law Book Co. of Australasia Pty. Ltd.: Sydney, Melbourne, and Brisbane. 1955. xvi and 146 and (index) 12 pp. £A2. 10. 0.).

Some part of current economic difficulties, in Australia as well as in other countries, is said to be due to the extraordinary increase in hire-purchase transactions. No one, whether lawyer or layman, can have failed to notice the extraordinary change in our economy during the post-war decade, from a sellers' to a buyers' market; and it appears to be axiomatic that once the latter is established, the selling of a wide range of consumers' goods cannot be effected for cash. Hence if production is not to be slowed down—or perhaps temporarily suspended—the excess goods can only be cleared by financing the spread of payment over an extended period. There are obvious dangers in the expansion of hire-purchase, which among other things panders to the gambling instinct said to an Australian characteristic (the purchaser and the seller are both gambling on the former's ability to retain his job and to keep up with his payments); but it is not a form of gambling to which the Gaming Acts have any application. Nevertheless it has created its own problems, and most communities in which the standard of living has risen much beyond subsistence level have found it necessary to provide legislative protection and guidance for both parties to hire-purchase agreements—and particularly for purchasers, whose principal characteristic seems to be an unbounded optimism as to the permanence and elasticity of their resources.

All the Australian States have passed legislation on the subject without doing anything at all unusual about it; Mr. Else-Mitchell would be the last person to suggest that there is anything very novel in our Acts. Basing his work primarily on the New South Wales Act, he supplies a very useful table of the comparable provisions in the acts of the United Kingdom, New Zealand, and the other Australian States. Hence, given reasonable library resources, lawyers in States other than New South Wales ought to have little difficulty in determining to what extent, if at all, Mr. Mitchell's work requires modification in their own State. Since a review which contains no criticism is sometimes suspect, I hasten to add that even though printing and publishing costs are still very high, it is most unfortunate that this slender volume should cost as much as £A2. 10. 0. But within the limits of the 146 pages allowed to him Mr. Else-Mitchell has produced a masterpiece of compression.

F.R.B.

Lewis' Australian Bankruptcy Law. Fourth Edition, by J. F. PATRICK, LL.M. (Law Book Co. of Australasia Pty. Ltd.: Sydney, Melbourne, and Brisbane. 1955. xxx and 291 and (index) 15 pp. £A1. 17. 6.).

The new edition of Lewis' Australian Bankruptcy Law merits more—as indeed did its predecessors—than recognition of the modest claim made for the work on its first publication in 1928, viz., "(it) is intended merely as a simple textbook on the subject of Bankruptcy Law for students reading Law in Australian Universities and a general statement which may be useful for solicitors in general practice and for accountants, trustees and others who may be brought into active contact with the subject." Compact with essential information and distinguished by clarity of analysis and expression, it has never been a students' "cram book" but rather a text-book in miniature.

The second and third editions had been revised by the author himself; the preparation of the fourth was entrusted to the capable hands of Mr. J. F. Patrick of the Victorian Bar, whose task—as the Preface shows—had been virtually completed when the High Court of Australia handed down its judgment in *The Queen v. Davison*[1] denying to Registrars and Deputy Registrars in Bankruptcy the power (which they had exercised unchallenged for some twenty-five years) of making a sequestration order on a debtor's petition.[2] With commendable restraint Mr. Patrick arranged for printing to be postponed until he could include in the new edition a summary not only of *Davison* but also of the Act which Parliament promptly passed in order to offset the consequences of the High Court decision[3] (see pp. 28-29). Mr. Patrick was also able to refer to *McQuarrie v. Jacques,*[4] an important decision on sec. 92 of the Act which was also virtually simultaneous with the preparation of the new edition.

In *McQuarrie* the learned Chief Justice said that in determining the matters in issue it was "necessary to enter one of the darker recesses of the bankruptcy law." It may be said of Lewis and his

1 (1953-1954) 90 Commonwealth L.R. 353; see *supra* at 376.

2 The logic of the High Court's attitude towards the exercise of the federal judicial power compelled this result. If the constitution means (though it does not say) that the judicial power can only be exercised federally by persons holding office during good behaviour; and if the making of a sequestration order on a debtor's petition is not an administrative but a judicial act—as the High Court has just classified it—it is clearly constitutionally improper to entrust such power to a mere civil servant.

3 The decision was one of those rare constitutional cases, the effect of which can be avoided without constitutional amendment.

4 Now reported in [1955] Argus L.R. 49.

editor that they have not been afraid to enter some of these recesses and that they have frequently succeeded in providing temporary illumination—temporary because the capacity for permanent revelation is to be found only in the High Court.

F.R.B.