BOOK REVIEWS

CASES AND MATERIALS ON AUSTRALIAN FAMILY LAW, *by David Hambly* and *J. Neville Turner.* The Law Book Company Ltd., 1971, pp. i-xxiii, 1-656 (including index). $13.50 (hard), $10.50 (paper).

This excellent book provides a stimulating and scholarly selection and arrangement of the relevant legislation and the leading judicial decisions in its field. When it appeared it offered the first major attempt at anything approximating to a comprehensive coverage of Australian family law, and, as a teacher of the subject, the reviewer would be churlish if he did not acknowledge his debt to it.

The editors succeed admirably in placing family law in its social and historical context, by an eclectic quarrying of stimulating non-legal materials. Such an inter-disciplinary approach to the subject is to be welcomed. Without it family law may strike the student as little more than an arid jumble of legalistic rules and remedies.

Prominence is also given to the theme of law reform, and, in particular, reference is made to recent developments in England, such as the Divorce Reform Act 1969, and in New Zealand, for example, the Domestic Proceedings Act 1968. This exercise in comparative law is particularly valuable in encouraging students to reflect on the aims and objectives of the law and to adopt a critical attitude to the solutions of their own jurisdiction.

Clearly exigencies of space have meant that some important topics have had to be omitted. The editors themselves refer with regret to the lack of materials on the increasing encroachment of the State—most of it beneficial—upon the parent-child relationship. Of much lesser significance, the editors, in dealing with financial provisions for spouses in Ch. 10, omit to mention the wife's presumed powers as *praeposit a rebus domesticis,* or those arising from her agency of necessity. (The latter, which are arguably anachronistic, have, of course, been abolished in England by section 41 of the Matrimonial Proceedings and Property Act 1970, while the former, somewhat surprisingly, have had no place in South Australia since the Married Women's Property Act of 1884. See now Law of Property Act 1936-1972, s.104).

Although perhaps equally peripheral, the brief section (on p.354) dealing with the question of inter-spousal immunity from tort actions is so condensed it is misleading. It should have been noted that in South Australia the legal effects of the extract from the Law of Property Act 1936-69, s.101 (1) were substantially modified by the Motor Vehicles Act 1969, s.118, and the Wrongs Act 1936-59, s.25 (d). (A subsequent edition will need, of course, to have regard to ss.9 and 13 of the South Australian Act No. 19 of 1972).

While the book is to be warmly recommended and will prove of great value to teachers and students of family law both in Australia and beyond, there are a few points, most, no doubt, of the *de minimis* variety, to which attention might be drawn.

First, a Table of Statutes should be provided in subsequent editions, and citations included in the Table of Cases. Indeed, given that there must be times

in most University Law Libraries when the demand for a particular volume of reports exceeds the supply, it would be helpful if, instead of giving a reference to a single report of a case only, the usual text-book practice of multiple citations were to be adopted.

Secondly, some of the sting has been removed from the criticisms (at pp. 305-307) pointing out the ineffectiveness of s.71 of the Matrimonial Causes Act 1959-1966, as a means of protecting the interests of any children of a marriage, by Rule 115A of the Matrimonial Causes Rules, inserted therein on 1st October, 1967.

Thirdly, the editors permit two extremely minor solecisms. There is, of course, no such body as the English Law Commission. There is the *Scottish* Law Commission and the Law Commission tout court. And the correct citation of *MacLennan* v. *MacLennan* is not [1958] S.C. 105, but 1958 S.C. 105, Scots lawyers preferring to dispense with the unnecessary adornment of brackets.

Finally, the editors (at p. 253) question the decision of Skerman, J. in *Ruff* v. *Ruff* (1964) 7 F.L.R. 133, that constructive desertion can be condoned during the statutory period. Reference might have been made, however, to the decision of the Court of Appeal in *France* v. *France* [1969] P. 46; [1969] 2 All E.R. 870 which supports that of Skerman J.

Brian Davis*

THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800, *by F. L. Wiswall, Jr.* Cambridge University Press, 1970, pp. i-xxviii, 1-223. £4 (U.K.).

Legal History has always been an esoteric study in England and, until recently, the not unnatural preoccupation of legal historians with the common law has led to a neglect of the country's civil law heritage. Today, happily, the balance of interest is altering; several useful historical studies of civil law courts have been published in recent years and the High Court of Admiralty, as the most important of them, is quite rightly receiving the most attention. The pioneering work of Marsden, over seventy years ago, is in the process of being supplemented by a more detailed study now under preparation at Cambridge; Dr. Wiswall's book is the latest contribution to progress in this field, and it is all the more welcome because it examines an aspect of Admiralty history not previously investigated in depth; the development of Admiralty jurisdiction and practice since 1800.

The author's approach is both original and useful. In an era when much marine law (prize law especially) was still in a formative stage and owed a great debt to the work done by the giants of the nineteenth century civil law, he rightly emphasises personalities. In effect, he begins his study with the appointment of Stowell to the Admiralty bench in 1798 and after describing the

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pitifully limited jurisdiction enjoyed by the court at that time, he discusses its expansion in what he calls "the era of Stowell" (a term which embraces Stowell's judgeship and that of his immediate successors, Robinson and Nicholl, in whose work Stowell's influence can be clearly discerned). Due recognition is given to various factors which contributed to the development of Admiralty jurisdiction over this period (in particular, the expansion of mercantile commerce resulting from the cessation of naval hostilities and the invention of the steamship). Pride of place, however, is rightly assigned to the work of Stowell himself. Part of this work was done out of court; thus, Stowell and those of his civilian colleagues who were members of Parliament, were responsible for the passage of several statutes which tilted the jurisdictional balance, however slightly, in favour of the Admiralty against the common law courts. But more important was Stowell's contribution as a judge; in almost thirty years on the bench, he was responsible for a long series of decisions which won practically universal respect from the public and the legal profession and many of which significantly increased the jurisdiction of the court.

Dr. Wiswall thoroughly examines the relevant case law and two conclusions emerge from his analysis. One is the inertia of the common law in the face of this renewed competiton, an inertia which he rightly attributes to various factors; the dying down of old animosities, the recognition that with some causes of action once claimed by the common law, the Admiralty offered a better remedy and, above all, the tact of Stowell himself; he was always careful to avoid entertaining causes of action where a prohibition was at all likely (and in fact, he was never once prohibited in the whole of his judicial career) and he even displayed a willingness to apply common law rules, when they were at all appropriate, in Admiralty causes. The picture the author paints of the common law lion lying down with the Admiralty lamb is an affecting one; one wonders what Sir Leoline Jenkins would have made of it.

The other point which emerges from this analysis of the Admiralty under Stowell is the very close working relationship between the English and American jurisdictions. The latter was in its infancy at the time, and Dr. Wiswall provides a fascinating picture of its early growth, relying heavily on the work of the great American judges, especially Story and Ware. A fact which emerges clearly from this picture is that the development of the American jurisdiction closely paralleled that of the English Admiralty much earlier; there was the same attempt to expand jurisdiction and the same hostile reaction from competing courts. On the whole, however, the American Admiralty courts fared better than their English counterpart and, no doubt, Dr. Lushington's explanation for this is substantially correct. In England, the Admiralty had been closely connected with the ecclesiastical and conciliar courts and this had aroused the hostility of the common lawyers in the seventeenth century, when the court's claim to a wide jurisdiction was finally destroyed; in America, however, no such connection had ever tainted the Admiralty in the eyes of the common lawyers and its jurisdiction, in Lushington's words, "remained on its ancient footing". The intimate link between the English and American courts is further emphasized by the extent to which each was willing to follow the other's decisons. Dr. Wiswall's examination of the cases shows how much credit is due to the sound work done by the great American judges, for he reaches the conclusion

that "the balance seems . . . to have gone to the use of American authority in England".

Stowell's era spanned one of the great formative periods of Admiralty (and especially prize) jurisprudence and the author achieves a fair estimate of his work; by a judicious choice of cases, he illustrates Stowell's contribution to both substantive and procedural law and also some of his human traits (for example, his dislike of women working in ships and his apparent indifference to slavery). Too much cannot be expected in a book of this size and scope, but there is another aspect of Stowell's work as a judge which might well have been glanced at; the literary quality of his judgments. This is something which attracted much admiration at the time and Stowell himself is known to have attached great importance to it, spending much labour in revising the prose of his judgments before they were delivered; indeed, some of his judicial *bon mots* (for example "the elegant simplicity of the three per cents") passed into current usage during this period. For this reason (if for no other) an appendix containing judgments, or passages from them) would have been welcome.

Stowell and his immediate successors (Robinson and Nicholls) were followed by Lushington and to his tenure of office as judge, Dr. Wiswall has chosen to attach the epithet "resurgent". The use of the word, on the evidence provided, seems justified; the period may not have been as excitingly creative as that of Stowell, but a great deal was achieved. A variety of statutes, catalogued by the author, affected the jurisdiction of the court, almost always expanding it, and this, together with other factors (such as the growth of maritime trade), resulted in a vast increase in the amount of instance business passing through the court. Another important development lay in the field of procedure and here again, Dr. Wiswall is able to show that England followed where America led; the first American rules were promulgated in 1845, but in the United Kingdom another decade was to elapse before any significant step was taken in the same direction and even then, it seems only because of the appointment as Registrar of the energetic H. C. Rothery.

Of Lushington's performance as a judge, more than one opinion may be held. Some of his decisions were clearly inconsistent, some of his statements on historical matters were manifestly incorrect and in some of the causes which came before him, he threw away the chance of expanding the court's jurisdiction. Moreover, Lushington's interest in improving the court's procedure is a matter about which Dr. Wiswall himself seems to have had second thoughts; on p. 73, he says that Lushington "strove consistently for the modernization of the Admiralty Law", whereas on p. 54, he expresses the opinion that Rothery, the Admiralty Registrar, was the *primum mobile* of this endeavour (Lushington ,as the author observes, had possessed the power to reform procedure since 1840, but nothing was done until Rothery became Registrar in 1853). It must, however, be born in mind that Lushington acted over a very long period, when the volume and difficulty of the causes which came before him would have taxed any judge. Dr. Wiswall's ultimate judgment on Lushington seems a fair one (and it is all the more valuable because Holdsworth died before he was able to give his own definitive opinion); "as to his ranking amongst Admiralty Judges, Dr. Stephen Lushington can be con-

sidered second only to Lord Stowell—and in addition it must be granted that Lushington was Judge throughout the most difficult and challenging period in the history of the instance jurisdiction".

Lushington's career as judge of the Admiralty lasted until 1867, and it was in the latter part of this period that the "great transition", as Dr. Wiswall calls it, took place; the transfer of Admiralty business from the civilians to the common lawyers. The transfer was accompanied by that most melancholy event in the history of English civil law—the dissolution of Doctors' Commons. Here we have what is, for the general historian, the most interesting and valuable part of the book; the author has provided the fullest modern account of the matter and he has succeeded in correcting, in several important respects, factual mistakes and misconceptions of earlier writers on the subject.

The College of Advocates was founded in 1511 and by 1800 (and for many years before) membership of the College was a condition precedent to practice in the Court of Admiralty, as well as the principal courts of the Established Church. Members were for a long period housed in Mountjoy House; this was destroyed in the Great Fire, but later replaced by a splendid set of buildings designed by Wren. These not only housed the advocates, but also provided accommodation for the Court of Admiralty and for many of the more important ecclesiastical courts. By the mid-nineteenth century, the atmosphere was one of quaint tranquility and Dr. Wiswall quotes several well-known passages from Dickens (who, as a law reporter, knew Doctors' Commons well) which capture the special flavour of the life led by advocates and proctors at that time.

By 1850, however, this tranquillity was to be short-lived. As early as 1833, the Parliamentary Committee on the Admiralty Court had recommended drastic changes both in that body and in the principal church courts and in 1857 the axe fell. By two statutes passed in that year, the Court of Probate and the Court for Matrimonial Causes were established and in the following year the College of Advocates was formally dissolved. The author's examination of the concomitant circumstances is of particular importance, as his careful study of the evidence has corrected mistakes which have been current for too long.

The received opinion has been that the Probate Act of 1857 abolished the civilians' monopoly of Admiralty practice and also did away with Doctors' Commons, but the author has demonstrated the falsehood of both these assumptons: common lawyers were not able to practise in the Court of Admiralty until the passing of the High Court of Admiralty Act of 1859, while the Probate Act did no more than make it possible for the members of Doctors' Commons to wind up that society themselves. In the mordant words of Dr. Wiswall: "[the common lawyers] condemned the civilians and then handed them a razor with which to cut their own throats".

The other matter about which the author advances convincing arguments which run counter to those commonly accepted, relates to the possible continuance of Doctors' Commons after the mid-nineteenth century reforms permitted common lawyers to practice in the Court of Admiralty and in the newly established courts of Probate and Divorce. Here far less certainty is possible,

but at least Dr Wiswall has shown that Holdsworth's summary rejection of the arguments advanced by Dr. Lee (the principal opponent of dissolution) was unjustified. At a time when the teaching of civil law by Oxford and Cambridge was still disgracefully inadequate, Doctors' Commons might have begun a new career as a teaching body (a function for which its superb library made it well suited); its membership could have been increased by admitting Doctors of Law of other universities and the Society, as a body of practitioners and teachers, might well have continued to flourish in a modest way. Dr. Wiswall's comparative approach is particularly useful here, as he is able to show that the absence of an equivalent organization in America has never been a valid argument against the continuance of Doctors' Commons in England; the wholly different way in which the civil law side of the American legal system developed made the creation of such a body impossible there and American civilians (at least partly as a result of this) were less expert in civil law than their English counterparts.

The dissolution of Doctors' Commons and the destruction of the civilians' monopoly of practice in the Court of Admiralty was no more than a prelude to the destruction of the court itself, for in 1875 it was incorporated into the newly created High Court. The author's analysis of the relevant statutes and of the newly promulgated Rules of the Supreme Court shows that this change-over was a great deal smoother than might have been expected (and than many feared); jurisdiction was hardly affected, procedure remained very much the same and the amount of Admiralty business passing through the Probate, Divorce and Admiralty Division showed no decline. In other respects, however, the break with the past was decisive and complete; in particular, Dr. Phillimore (who succeeded Lushington as judge in 1867 and dealt with Admiralty suits in the first few years of the Probate, Divorce and Admiralty Division) was the last judge of that Division to have received the old civil law training. Upon his retirement in 1883, the court passed entirely into the hands of the common lawyers and "emerged out of the past and into the present".

In that present, it has continued to function, although the clothing it wears has now come, in some respects, increasingly to be cut according to the common law pattern. Dr. Wiswall has skilfully shown how, in both procedure and practice, the common lawyers tried to force the Admiralty into their own mould; the singular incompetence with which this was sometimes done is shown by the fact that the 1883 Rules of Procedure, as applied to some Admiralty actions, were drafted by lawyers who could not grasp the difference between actions *in rem* and actions *in personam*. The comments of (say) Lord Stowell on this elementary blunder would have been both austere and instructive. It also seems fair to say that the qualities of originality and forcefulness which characterized so many of the older civilian judgments in Admiralty now began to show signs of waning. All the judges were now recruited from the ranks of those with a purely common law training, and it is not surprising that few of those who dealt with Admiralty business in the three or four decades after Phillimore's retirement, and whose careers have been examined by Dr. Wiswall, have been held by him to have made significant contributions to Admiralty law.

All this may seem to paint a sorry picture of a system of jurisprudence in its ultimate decline. In recent years, however, the picture has ceased to be

so black; the judges appointed to handle Admiralty business have been experts with an informed interest in the subject and the jurisdiction has been drastically increased by statute (in particular by the Administration of Justice Act of 1956, which made "such great restoration of jurisdiction to Admiralty that it may properly be termed 'a Coke's nightmare' "). The author has certain reservations about the absorption of Admiralty business by the Queen's Bench Division of the High Court, but, on balance, his view of the future is sanguine. Admiralty law displays a flexibility and capacity for development which should enable it to handle the new problems posed by modern technology (for example, litigation involving hovercrafts and aeroplanes). Moreover, many of the modern common lawyers concerned with Admiralty business have shown a gratifying interest in preserving the great traditions transmitted by their civilian predecessors. This optimism is, however, tempered by a timely word of warning. The great danger to these traditions is a potential lack of interest in them, which will be the inevitable concomitant of a lack of knowledge. The short-sightedness of the nineteenth century advocates prevented Doctors' Commons from surviving to fulfil an educational function and there is not now a single English university which teaches Admiralty law. Is it too much to hope that Oxford and Cambridge at least, with their long tradition of civil law instruction, will rectify this omission?

At this point, the author passes from the court to the law which it administers, and in his final chapter he devotes himself to that most characteristic of Admiralty procedures—the action *in rem* (an action brought directly against the ship). Dr. Wiswall begins with the essential jurisprudence of the action and he takes the text of his argument from the two limbs of Sir Francis Jeune's judgment in *The Dictator* [1892] P. 64, 304, which he describes (and without exaggeration) as "perhaps . . . the most important single case within the period covered by this work". The first limb is concerned with the two conflicting views as to the nature of the action which have been current since the last century; one maintains that proceedings *in rem* are directed against a ship *simpliciter* and the other, that the action is essentially a procedural device, the sole purpose of which is "to gain personal jurisdiction over the owners". By a review of the decisions and the older works of practice, the author demonstrates conclusively that the former theory (formally endorsed by the Privy Council in *The Bold Buccleugh* (1850) 3 W.Rob.220) is the correct one in principle. Moreover, by an ingenious piece of detective work, he has been able to show that the procedural theory, advanced by Jeune in his judgment in *The Dictator* as the true basis of the action *in rem*, almost certainly derives from Jeune's misunderstanding of Admiralty attachment *in personam* (a genuinely procedural device, intended to secure the appearance of the defendant, and which does bear some superficial resemblance to procedings *in rem*).

The second limb of the judgment in *The Dictator* (which also stems from Jeune's procedural theory) purports to establish that "liability in an action *in rem* might exceed the value of the vessel against which the action is brought" (the excess being a personal liability, enforceable against the owner). Here again, the argument is effectively demolished by Dr. Wiswall. It runs clearly counter to a respectable line of earlier judgments, the unanimous views of text book writers, considerations of public policy (which aimed at

encouraging maritime trade by limiting the owner's liability) and, above all, to the fact that proceedings against foreign owners could never lay hold upon their private assets: "the *res* being all of the owner which could be had, his liability became personified therein and the actual value became also the constructive limit".

The arguments against the procedural theory are clearly based on a formidable combination of history, logic and case-law. But Jeune (like some latter-day Gallio) "cared for none of those things" and he has had the dubious distinction of establishing, by a single judgment, the procedural theory of the action *in rem* which has since been almost universally accepted by English courts.

How is one to explain this apparent obtuseness on the part of a lawyer who although (in Heuston's opinion) "not in the very first rank of English Judges" had, on the whole, a successful judicial career. One reason stems from (and admirably illustrates the unfortunate results of) the decline of Doctors' Commons; Jeune was a common lawyer with little training in Admiralty law and the procedural theory would naturally occur to a man with such a background. At common law, proceedings are always *in personam* and if the defendant's property is taken, the purpose is purely coercive; to such a man, the idea that seizing the defendant's property is simply a means of enforcing his appearance is the most natural explanation of the action *in rem*. Moreover, confusion was worse confounded by the Judicature Acts and the 1883 Rules based upon them, as no attempt was made to distinguish (in point of nomenclature) between common law judgments *in rem* and Admiralty actions *in rem*; even so distinguished an historian as Sir William Holdsworth later fell into the trap of confusing the two concepts.

From the theoretical basis of the action *in rem*, the author turns to its most characteristic feature; the arrest of the vessel subject to such proceedings. Having adverted to the antiquity and uniqueness of the process, he develops another theme (again making a significant contribution to a little explored field)—the fact that the court may assume jurisdiction *in rem* without arrest. The earliest method of achieving this result was apparently the *caveat*—a formal prohibition of arrest, entered in the court's records and given in consideration of a promise by the defendant to appear and defend the action; the history of the procedure is obscure, but it is plausibly traced to informal practice in the Admiralty Registry of the early seventeenth century. The procedure is still available in respect of English Admiralty proceedings, but it has been largely superceded by private undertakings between the parties' solicitors; the ultimate result, in English Admiralty practice, is that formal arrest is now surprisingly rare.

That arrest, upon proceedings *in rem*, is unnecessary when the defendant has given an undertaking, is one thing; that arrest in such proceedings is generally unnecessary is quite another. This is a further modern heresy which Dr. Wiswall examines and demolishes. It stems from the judgment of Sir Gainsford Bruce in *The Nautik* [1895] P. 121 and, as the author shows, it results from Bruce's misunderstanding of two earlier decisions which turned upon general principles of comity and not upon any rule of English Admiralty law; moreover, it runs counter to the logic of the English civilians' practice up

to that time (a practice still followed in America) that proceedings *in rem* are not possible unless the *res* is within the jurisdiction. Unfortunately, *The Nautik* (like *The Dictator*) has been uncritically followed by later judges and the extraordinary position has now apparently been reached that English Admiralty proceedings *in rem* may run their full course without the vessel concerned ever having been within the jurisdiction of the court.

The present state of the English action *in rem* presents a melancholy picture of confusion, misunderstanding and a fine disregard, both by judges and textbook writers, for modern decisions which run counter to the received view of *The Dictator*. As Dr. Wiswall observes, the term "action *in rem*" can no longer be applied with any propriety to the modern action commonly given that title in English courts where there has been no arrest of the vessel, as it now bears all the hallmarks of an action *in personam:* "there is personal service . . . of a writ of summons directed to the person, a personal undertaking is given, and there is either a personal appearance or a default judgment against the person, with a personal liability enforceable against the person—all the attributes of an action *'in personam'* " (and, it might be added, few (if any) of those properly attributable to an action *in rem*). He therefore suggests (conveniently if inelegantly) that the term *para-in-rem* should be applied to such actions in future. The proposal has much to commend it, as it would help to prevent the blurring in the meaning of the phrases "action *in rem*" and "action in personam" which the existing practice encourages.

The final point taken by Dr. Wiswall in his summary of the current law is that Jeune's procedural theory has not won the universal approval which has been widely assumed. It has never, it is true, been formally overruled, but it does run counter to the earlier decision of the Privy Council in *The Bold Buccleugh*, which was, arguably, binding upon Jeune. Moreover, *dicta* exist in two other cases which directly contradict Jeune's thesis; in *The Longford* (1889) 14 P.D.34 (decided three years before *The Dictator*) and in *The Burns* [1907] P. 137 (decided fifteen years after it) the Court of Appeal used language wholly incompatible with the procedural theory.

How are these conflicting views as to the essential nature of the action *in rem* to be reconciled? The matter is of more than purely academic interest, as difficulties have already arisen when attempts have been made to enforce English *para-in-rem* judgments in those jurisdictions where the procedural basis of the action *in rem* is not accepted. American courts, for example, have long been willing, as a matter of comity, to enforce foreign Admiralty judgments, but in the case of *The Harrogate*, 112 F. 1019 (2d Cir.1901), where proceedings in the Probate, Divorce and Admiralty Division were of the *para-in-rem* variety, the American courts refused to enforce the judgment *in rem*, on the ground that the English proceedings were not themselves genuinely *in rem*.

Dr. Wiswall's answer to this problem is essentially pessimistic. One possibility is judicial action (in particular, a definitive judgment by the House of Lords, when an appropriate case comes before it); the other is an international convention, arrived at as the result of diplomatic activity. The former course, the author believes, will meet with considerable judicial resistance, while as to the latter, he truly says: "this . . . would be much more difficult of accomplishment—the writer well knows that Americans, for example, are

notoriously talkative, but inactive in this regard". But, whatever is the ultimate future of the action *in rem,* Dr. Wiswall has no doubts as to where blame for its present difficulties lies—the change in the responsibility for the action from the civilians to the common lawyers: 'the action *para-in-rem* is a civilian legacy, but the procedural theory (and its ramifications) was and is essentially a creature of the common law".

This book is a useful and original contribution to a period of Admiralty history which has hitherto been largely neglected. The nineteenth century court inevitably lacks the glamour of its more splendid past and Dr. Wiswall is particularly to be congratulated upon the skill with which he has tempered the dry minutiae of statute and rule with an examination of personalities. As he himself says: "men, as types and individuals, have been responsible for the Law during every second of every day; it is the change in the philosophy of men—sometimes slow and sometimes abrupt—which gives substance to raw and otherwise uninspiring data".

It is to be hoped that Dr. Wiswall is planning other historical studies (the history of the Admiralty jurisdiction in America is a subject crying out for further investigation); this is a field which his present book has shown him well able to till and his modest disclaimer of historical expertise in the Introduction should not dissuade him. It is also to be hoped that this and similar studies of the Admiralty will reach a wider circle in future than that of the lawyer. The material surviving in the archives of the English court (as this reviewer can testify) is astonishingly wide in its scope and the records are a mine in which economic historians and maritime historians (to name only two groups) may usefully quarry.

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PROPERTY LAW CASES AND MATERIALS, *by R. Sackville* and *M. A. Neave.* Butterworths (Aust.) Ltd., 1971, pp. 1-22, 1-19, 33-1187. $25 (hard), $18 (paper).

Students of Property Law need not balk at Sackville and Neave's 1,200 page tome, Property Law Cases and Materials, an excellent book equally suitable for practitioners.

It has always been difficult for Australian Students of Property Law to find out how much of the old law of property is still in force, and with what variations, in each of the different States of Australia. The authors have made a magnificent attempt to explain lucidly, in full historical context, the origins and evolutions of the law of property and reveal its present day application and modification in the legislation of the States and the Commonwealth. Lucidity is exemplified in the discussion of the Rule in Shelley's case, with five pages of notes showing by way of a comparative table the application of the Rule to a fee simple estate, a fee tail estate and a life estate, considering in each case testamentary dispositions and dispositions inter vives.

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The authors begin with an introduction to the subject that immediately confronts the student with the problems of definition and policy whilst informing him of the traditional classification and terminology of the subject after which fundamental principals of possession, reisin and title are discussed. Reference to such things as proprietary rights in marital communications, in documents and photographs obtained in confidence and also in copy for publication through the mass media is most appropriate though not normally dealt with in previous text books on the subject.

The chapter headings adopted by the authors are most comprehensive and include such topics as Planning the Use of Land by Private Agreement, Proprietary Interests in Land owned by Another Person and Some Problems of Planning and Conservation of Resources. Under each heading and sub-heading there is always a very clear introduction, which will be readily followed by the student, and passages from leading cases and from statutes as required. After each case the authors have appended a series of notes directing the attention of the student to the modern application of the old cases and the impact of modern legislation. The notes contain numerous cross references inviting the student to compare and distinguish other cases, ancient and modern, and also provide him with a means of self-examination as he goes along.

The notes make excellent material for tutorial discussion as the authors have taken pains to deal with all the tests that must be considered, or which perhaps ought to be considered, for the application of a particular rule of law, the reason for the rule and its history. They also pose social questions such as, in relation to *Tulk* v. *Moxhay*, "Is it desirable that the user of land should be restricted by private agreement? Should the planning of land use be solely a government function rather than a power which can be exercised by private individuals?" No doubt many readers would appreciate suggested answers to some of the legal questions asked. The absence of some answers to the questions asked in the notes detracts from the utility of the book for a student's individual use.

If the discussion on the Torrens Title System or benefits and burdens of covenants running with the land is heavy going for students, it is invaluable for practitioners. However, there are some deficiences in the book that practitioners will regret; for example, the absence of a table of Statutes or any discussion of the rule against perpetuities and the brevity of the discussion of Compulsory Acquisition in Chapter 3, especially now that this process is so active in practice.

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ARRANGEMENTS FOR THE AVOIDANCE OF TAXATION, *by Dr. I. C. F. Spry* (Law Book Company Ltd., Australia, 1972, pp. x, 131).

This book is a short monograph on probably the most controversial and difficult provision in the Australian *Income Tax Assessment Act*, s.260, which purports , in a few words, to invalidate all forms of tax avoidance. The pro-

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vision over the last fifteen years has precipitated a veritable torrent of litigation, and it, and its New Zealand counterpart (s.108, *Land and Income Tax Act*), have been to the Privy Council a half dozen times during that period.

Dr. Spry traces the history of the section, and then proceeds to examine in detail the case-law on the two key questions raised by s.260: (1) when does an arrangement fall within its ambit, (2) when it does, what is the the effect of the section on that arrangement? Dr. Spry's analysis of the first question is, on the whole, meticulous, lucid, and convincing. He very clearly identifies, although, of course, fails to resolve, the central contradiction in s.260—if an arrangement of the fairest, largest, and most liberal interpretation of other provisions in the Act, fails to fall within them, how is one ever able to say, pursuant to s.260, that a liability to tax has been avoided which the legislature *intended* to impose?

Unfortunately, the author's analysis of the equally important and difficult second question, is much less compelling. He appears to take at face value the long-asserted proposition that the section has only an annihilating effect and cannot be used to construct hypothetical factual bases on which to ground liability, and then finds the cases baffling when the actual determinations on the facts in particular cases do not square with this proposition. The reviewer has elsewhere attempted to point out ((1964) 38 A.L.J. 237, and (1966) 40 A.L.J. 244) that the result of annihilating an arrangement under the section will almost never lead to the exposure of a taxation situation. When a taxpayer enters into an arrangement to avoid a future liability to tax (the only kind that can be avoided), he necessarily avoids that liability by avoiding creating the situation that would attract it. Simply by destroying the arrangement that he has entered into will not leave exposed the arrangement that he did not, designedly, enter into. The observations of Lord Donovan in *Mangin's* case ([1971] 2 W.L.R. 39 at 45) are well placed, and despite the difficulties that Spry points out arise when one is required to hypothesize about which course a taxpayer might have followed had he not entered into an arrangement of tax avoidance, s.260 can have no meaningful operation unless it is given such an interpretation.

Other more minor criticisms of the book are:

(1) The author fails to deal with any of the considerable number of Board of Review decisions on the section. While these may be of marginal authority, they are very useful illustrations of the operation of the section, particularly for tax practitioners. As a result, sections in the book which deal with categories of transactions that have received scant judicial attention tend to suffer The author's thin treatment of the effect of s.260 on partnership arrangements is the best example of this. In fact, there are a number of Board of Review decisions dealing with precisely this category of situation. In a specialised monograph of this kind, one is entitled to expect comprehensiveness.

(2) The three pages that the author devotes to sham transactions are quite inadequate. There is a great deal of complex and confusing case-law on this subject. The author should have felt compelled to deal with it in the present context.

(3) The case-law on ss.137 and 138 of the Canadian *Income Tax Act, 1952*, which are closely comparable to s.260, should have been examined.

(4) The constitutionality of s.260, which has occasionally been questioned, although not a live practical issue, warrants a page or two in a work of this kind.

These criticisms aside, the book is a highly competent analysis of a very difficult body of law. It is also fluently and clearly written (apart from a mysterious and irritating addiction to the adverb "ordinarily"), which is perhaps more than one has come to feel entitled to expect of any text on tax. The author rightly points out that the only fate the future should hold for s.260 is its repeal. The present Chief Justice of the High Court, who appeared for the taxpayer in *Newton's* case (1956) 96 C.L.R. 577(P.C.), once mentioned to the reviewer that as Attorney-General he had asked the revenue authorities to consider redrafting the section. Even this modest request was declined. While, of course, from the tax authorities' point of view, the great strength of the section lies in its weakness, namely its hopeless uncertainty, surely no one, whatever his political views of the social legitimacy of tax avoidance, can regard this as an acceptable legal expedient for dealing with the problem. The section as it stands makes logical nonsense and this is reflected in the gobbledegook that most of the cases can be reduced to. In the meantime, as the confusion in the case-law grows, Dr. Spry can confidently look forward to bringing out new editions of his book at regular intervals.

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