

of reasoning there explained is used occasionally in later commentaries,<sup>3</sup> this reviewer at least was left with the feeling of disappointment that there was not more; and that there were not perhaps some examples of lawyers working with definitions, and some discussion of their methods in the light of the analytical methods proposed.

The criticism referred to relates to the rather odd placing of Chapters 4 and 9 in relation to each other. These chapters deal with the Austinian Theory of Law and with Kelsen's Pure Theory of Law respectively. The texts quoted in these chapters would seem to hang together and the value of separating them by the chapters between is difficult to see. But the oddness does not stop there. The author's commentaries seem to reveal some basic misconceptions about the relations between the two theories. He quotes passages from the South African *Dönges* cases<sup>4</sup> and of the Australian cases, *McCawley v. The King*<sup>5</sup> and *Attorney-General for N.S.W. v. Trethowan*,<sup>6</sup> as involving problems of Austinian sovereignty whereas, properly understood, it is submitted, they involve problems relating to Kelsen's 'basic norm'.<sup>7</sup>

Similarly Professor Lloyd's discussion of Kelsen's 'basic norm' reveals certain confusions. He satisfies himself in his chapter on Austin that Austin's sovereign is divisible. He applies the same kind of reasoning to assert that Kelsen's 'basic norm' may be not one but many. The difficulties which he encounters on pages 302 to 304, where he is discussing Kelsen's notion of a 'basic norm', are sufficient to indicate a degree of confusion in the mind of the writer, particularly when read against the passages from Kelsen which are quoted in the following pages. After all Kelsen's very recognition of a legal order presupposes one 'basic norm' and denies the possibility of a multiplicity of such norms. It is one thing to reject Kelsen's theory, it is another to accept his notion of a 'basic norm' and then to take the inadmissible step of multiplying it.

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*Criminal Law*, by J. P. BOURKE, M.A., LL.B., one of Her Majesty's Counsel, with D. S. SONENBERG and D. J. M. BLOMME, LL.B. (Butterworth & Co. (Australia) Ltd, 1959), pp. i-lxix, 1-509. Price £6 2s. 6d.

In recent years Butterworth & Co. have published a number of annotated Acts of Victoria. Although *Criminal Law* is the latest in this series it is by no means the least important of these publications. This comprehensive book comprises an annotation of the Crimes Act of Victoria 1958, and the Commonwealth Crimes Act 1914-1955.

His Honour Mr Justice Monahan of the Supreme Court of Victoria pointed out in the Foreword to this book that 'lawyers who have practised regularly in the criminal courts in Victoria have long lamented the absence of a book of general reference on the subject' (of criminal law).

This book is undoubtedly proving to be a most valuable acquisition to

<sup>3</sup> Particularly when discussing the Scandinavian Realists at pp. 241-242.

<sup>4</sup> *Harris v. Minister of the Interior* (1952) 2 S.A. 428 (A.D.) *sub nom. Harris v. Dönges* [1952] 1 T.L.R. 1245; and *Minister of the Interior v. Harris* (1952) 4 S.A. 769 (A.D.). <sup>5</sup> [1920] A.C. 691. <sup>6</sup> (1931) 44 C.L.R. 394.

<sup>7</sup> It is perhaps revealing that in selecting passages from *Trethowan's* case the author chooses to quote from Rich J. and Starke J. and to avoid the subtleties of the judgment of Dixon J. which are really much more instructive.

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those lawyers who practise in the criminal law. Indeed, not only does the practitioner welcome a book such as this, but the student of criminal law must also find this book of very great value. A considerable proportion of the syllabus of Criminal Law and Procedure at the Melbourne University studied by the law student is covered by The Crimes Act of Victoria 1958. The annotations of this Act will enable the student to 'devil' the leading authorities interpreting the particular section of the Act he is studying with a minimum of time wasted, and at the same time there is prepared for him a brief and cogent note of the facts of the case and the *ratio decidendi*.

A work of this kind is of inestimable value to the busy practitioner who under modern conditions moves from court to court and from case to case with astonishing mobility. Today, more so than ever before, with the vast output of reported decisions he finds it hard to keep abreast of the developments in the law. This work enables him to quickly find the important decisions and relieves him of having to carry to court many bulky volumes of law reports.

A word of caution is needed, however. This book, I am sure, was not intended by its learned authors to be regarded by the practitioner as a textbook on criminal law, and it certainly cannot be safely used as such. This book can only be used with safety as a textbook if it is used in conjunction with *Archbold's Criminal Pleading Evidence and Practice*. As in *Archbold*, a most useful table of 'Offences, Penalties and Alternative Verdicts' is to be found at an early stage in the book. However, this table, unlike *Archbold*, does not include the common law alternatives to a number of offences and is therefore incomplete. For instance, the common law offence of common assault is an alternative to the crime of assault occasioning actual bodily harm under section 37 of the Crimes Act 1958.

Unfortunately, as with almost any first edition, there are minor blemishes in the text and omissions of some reported Victorian decisions which can be used as a guide to interpreting some sections of the Crimes Act. For example, the recent decision of *R. v. Murphy*<sup>1</sup> could perhaps be noted to section 81 of the Crimes Act. Likewise, the authors in dealing with section 417 of the Act did not record the decision of the Court of Criminal Appeal in *R. v. Abbott*.<sup>2</sup> This decision conflicts with *R. v. Jones*,<sup>3</sup> a decision of a single judge in Victoria, and affects a Victorian rule of procedure in criminal trials. It is also regrettable that the scope of this book did not enable the learned authors to incorporate into this work somewhere the subject of confessional evidence in relation to a criminal trial. In recent years there has been considerable development in the criminal law on the subject of the admissibility of confessional evidence and the exercise of a judge's discretion in rejecting 'non-voluntary' confessions and admissions. In particular, the High Court decision in *R. v. Lee and Others*<sup>4</sup> would surely be worthy of mention. I would go further and suggest that it would not be outside the scope of this work to include a reference to the 'Judge's Rules' which are to be found reproduced in Victoria in the *Standing Orders of the Chief Commissioner of Police*.

In view of recent developments in the law of insanity in criminal trials, it would undoubtedly be of considerable value to the profession and to the student if additional emphasis were to be placed on this topic in a

<sup>1</sup> [1957] V.R. 545.    <sup>2</sup> [1955] 2 Q.B. 497.    <sup>3</sup> [1956] V.L.R. 98.

<sup>4</sup> (1950) 82 C.L.R. 133.

later edition. The decision of the Privy Council in *Attorney-General for South Australia v. Brown*<sup>5</sup> and the decision of the High Court in *Thomas v. The Queen*<sup>6</sup> have only recently been reported, but one finds that there is no reference at all to the equally important and far-reaching decision of the High Court of Australia in the case of *Stapleton v. The Queen*.<sup>7</sup> Undoubtedly in a subsequent edition the learned authors will be obliged to expand considerably the case notes appended to the crime of murder, and to include references to these important authorities.

In conclusion, I congratulate the learned authors who have accomplished a tremendous undertaking in publishing this book. It is a credit to their zeal and industriousness and it is to be hoped that in a subsequent edition of this book the scope of this work will be enlarged so that some day soon it may take its place on our shelves as a Victorian textbook on the criminal law.

NORMAN M. O'BRYAN\*

*The Life of Chief Justice Way*, by A. J. HANNAN, C.M.G., Q.C. (Angus & Robertson Pty Ltd, Australia, 1960), pp. i-ix, 1-253. Price £2 2s.

Unlike the situation in the United States, legal scholars and political scientists in Australia have almost completely neglected the field of judicial biography.

As far as the High Court is concerned only two of its members, Sir Edmund Barton and Henry Bournes Higgins, have been the subjects of published studies. Both of these works, however, do not even pretend serious evaluation of the judges' work on the High Court bench. John Reynolds' study of Sir Edmund Barton is more concerned with his work in New South Wales politics and in the movement for Federation than with his legal career.<sup>1</sup> This is not surprising as Reynolds is not a lawyer but a historian. The 'memoir' of Henry Bournes Higgins written by one of his nieces, Nettie Palmer, is an affectionate literary remembrance rather than a biographical study.<sup>2</sup> Sir Samuel Griffith has been the subject of a series of lectures<sup>3</sup> and an unpublished thesis<sup>4</sup>, but both works are unsatisfactory. The first is little more than a series of disjointed headings like, 'Griffith as a friend to the working man', 'Griffith as a Conversationalist', 'His loyalty to the Crown', and so on. The second is merely a three hundred page calendar of most of the things Griffith said and did during his lifetime.

These are the only studies that have as yet appeared of judges of the High Court. There has not been one serious attempt to evaluate the contribution of any of the judges to Australian law, apart from the mortuary estimates that appear when one of them dies. Obituaries are hardly the place for critical estimates. This is more than surprising when the important creative function of the High Court in its interpretation of the Australian Constitution is taken into account.

<sup>5</sup> [1960] 2 W.L.R. 588; [1960] 1 All E.R. 734.

<sup>6</sup> (1960) 33 A.L.J.R. 413. <sup>7</sup> (1952) 86 C.L.R. 358.

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<sup>1</sup> Reynolds, *Edmund Barton* (1948).

<sup>2</sup> Palmer, *Henry Bournes Higgins: A Memoir* (1931).

<sup>3</sup> A. D. Graham, *Sir Samuel Griffith*, Queensland University's Macrossan Lectures 1938.

<sup>4</sup> J. C. Vockler, *Sir Samuel Walker Griffith* (1952). Unpublished thesis presented to the University of Queensland for the B.A. (Hons.) degree.