

BOOK REVIEWS

Cases and Materials in Constitutional and Administrative Law, by PETER BRETT, LL.B. (Lond.), LL.M. (W. Aust.), S.J.D. (Harv.). (Butterworth & Co. (Australia) Ltd, Sydney, 1962), pp. i-ix, 1-517. Price £5 2s. 6d.

In his capacity as a progenitor of case-books Dr Brett has not only contrived to father twins but has produced a substantial guide-book to Australian administrative law into the bargain. This is an occasion for congratulations and sober rejoicing, in which students overseas will wish to join. Some may indeed quibble at the words 'Constitutional and . . .' which appear in the title, for only a few constitutional principles are discussed (and at a fairly high level of generality; surely the implications of *Victorian Stevedoring and General Contracting Co. v. Dignan*¹ are worthy of a fuller investigation than they receive?), but the balance of content may be less surprising to Australians than to outsiders. The Melbourne students for whom it has primarily been designed are as well equipped as anybody to assess its merits as an aid to study. My own impression is that they will be singularly hard to please if they find it unsuitable for their purposes. It is unquestionably a valuable contribution to the comparative study of the part played by the courts in administrative law. For it is the first casebook of its kind to have been published in any Commonwealth country, and the scheme has been imaginatively conceived and skilfully executed.

So intimately are the principles of Australian administrative law interwoven with those of England that any list of dissimilarities must be short. Australia makes more use of prohibition and less of *certiorari*, the declaratory judgment and the Attorney-General's action for an injunction in aid of public rights. Australian courts are rather less ready than the English to defer to a Minister's *ipse dixit*, and less reticent in reviewing the validity of subordinate legislation. The Australians have exhibited a higher degree of subtlety and sophistication in circumventing the effect of privative clauses. And Australian judgments are typically characterized by a wealth of citation of authority and a depth of juridical analysis which are too rarely evident in modern English decisions. The English administrative lawyer can therefore learn a good deal about his own system by reading Australian decisions (though Australians may also do well to study the Tribunals and Inquiries Act 1958 (U.K.)), and it is to be hoped that Dr Brett's casebook will lead some of my compatriots to the oasis. I am myself grateful to have been made aware, for the first time, of decisions such as *Bailey v. Conole*,² *James v. Pope*³ and *Morrison v. Shire of Morwell*⁴ and of the potentially significant doctrine of official liability resurrected in *Farrington v. Thomson and Bridgland*.⁵

Of these four decisions, three are introduced only by Dr Brett's editorial comments. The main body of the text consists of the reports of fifty-six decisions, of which twenty-seven are English and twenty-four Australian. Except for the surprising intrusion of *Reynolds v. Llanelly Associated Tinplate Co.*⁶ the English decisions are aptly chosen, and none of the Australian cases seems superfluous. The arrangement of material is sometimes controversial; but any three editors would have produced four different plans, and Dr Brett's plan works. He begins with a chapter on

¹ (1931) 46 C.L.R. 73, especially 89-104, *per* Dixon J.; 114-124, *per* Evatt J. See also G. Sawyer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177.

² (1932) 34 W.A.L.R. 18.

³ [1931] S.A.L.R. 441.

⁴ [1948] V.L.R. 73.

⁵ [1959] V.R. 286.

⁶ [1948] 1 All E.R. 140.

the rule of law and the separation of powers, illustrated mainly by extracts from Dicey and Holdsworth. He moves on to the supremacy of Parliament, for which the source materials are largely constitutional statutes; then, the preliminaries over, to the substance of the book—Crown proceedings, the exercise of statutory powers, and judicial remedies. Here the judges hold sway, apart from the occasional glimpse of a statute and some allusions to the works of contemporary writers, who are almost invariably American. My only substantial criticism of the detailed scheme of arrangement is that the implied 'duty to act reasonably' in the exercise of discretionary powers is overstressed by the editor's method of classification at the expense of the more important duty to have regard to all relevant considerations and to disregard the irrelevant. These two duties tend to run into each other, but they are analytically distinct, and unless they are distinguished very clearly the reader will soon find himself entangled in a thicket.

To one experiencing his first introduction to administrative law through the cases, the thickets seem peculiarly prehensile. The significance to be attached to the distinctive features of a given statutory context is something that can rarely be perceived without assistance. The terminology used by the courts, particularly in classifying functions as legislative, administrative, judicial and ministerial, gives rise to many difficulties. The attributes of the parties to the proceedings, the nature of the relief sought and the means by which it is sought are often—too often—of decisive importance. Dr Brett is adept as a mentor as well as a guide, explaining, illustrating, prodding, exhorting his reader not only to see what is but also to ask himself what ought to be. His comments are sound, perceptive and often stimulating. On some issues (notably the implied right to a hearing in licensing matters, and the general exceptions to the *audi alteram partem* rule) he makes good use of American authorities and offers constructive solutions of his own to problems that the courts have failed to resolve satisfactorily.

As the book is likely to go into further editions, a miscellany of *trivia* may be offered by way of suggestion. In the treatment of recent developments in England there are gaps to be filled. The immunity of highway authorities from liability for non-feasance has been abolished with effect from August 1964.⁷ The majority of administrative tribunals must now give reasons for their decisions if requested to do so by an interested party.⁸ Under the Administration of Justice Act 1960, appeals now lie from decisions of the High Court in criminal causes or matters and from orders for the release of detainees on applications for *habeas corpus* (compare with pages 393, 443). In *Ex parte Mwenya*⁹ the Court of Appeal held that *habeas corpus* would issue from the High Court in respect of unlawful detention in a protectorate (which is *not* part of Her Majesty's dominions) provided that the protectorate was effectively in subjection to the Crown (compare with page 441). One would have expected Dr Brett to cock an eyebrow at the Divisional Court's decision in *Regina v. Chertsey Justices; Ex Parte Franks*¹⁰ (digested at pages 439-440), which seems obviously wrong on the meaning of a speaking order. Where members of a tribunal are disqualified for likelihood of bias their decision is voidable, not void (see *Dimes' Case*, digested at page 304), notwithstanding

⁷ Highways (Miscellaneous Provisions) Act 1961, s. 1 (U.K.).

⁸ Tribunals and Inquiries Act 1958, s. 12 (U.K.); cf. page 427.

⁹ [1960] 1 Q.B. 241.

¹⁰ [1961] 2 Q.B. 152.

some dicta to the contrary effect (compare with page 316); and it is not helpful to treat cases of common-law disqualification for pecuniary or other forms of interest as illustrations of a 'rule against bias'. But viewed against the background of Dr Brett's achievement the conventional reviewer's epilogue becomes even more platitudinous than usual. These are indeed small matters.

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Cases and Materials in Criminal Law, by PETER BRETT, LL.B. (Lond.), LL.M. (W. Aust.), S.J.D. (Harv.), and PETER L. WALLER, LL.B. (Melb.), B.C.L. (Oxon.). (Butterworth & Co. (Australia) Ltd, Sydney, 1962), pp. i-xi, 1-726. Price £5 7s. 6d.

Three well recognized instruments of legal education are the hypothetical case, the source-book and the narrative account of the development or present state of the law. Until I read Brett and Waller's *Cases and Materials in Criminal Law* I would have said that any endeavour to use all three extensively in one book was doomed to failure; I am now almost entirely convinced to the contrary. I may have some minor reservations, but I have no doubt that this good book (the first of its kind known to me on the criminal law of the Commonwealth) is something for which all teachers of law should be grateful, and upon which the authors are to be most warmly congratulated.

It is, in effect, divided into twenty-one chapters which begin with a problem or direction to the student to formulate his reasons for judgment in a hypothetical case. These are intended to form the basis of a discussion for which ample background material is provided in the ensuing pages. The problems are well chosen for their purpose. More difficult questions are frequently posed by the authors after their extracts from or accounts of particular cases, but these questions are too specific to form the point of departure and means of concluding the kind of general discussion spread over several hours in class which the book is designed to assist.

The selection of materials has been most catholic, ranging from the Victoria Law Reports to the Jerusalem post. There is a goodly number of American cases in addition to extracts from the decisions of most of the common law jurisdictions of the Commonwealth. It is, however, with regard to the quantity of the materials that I have my minor reservations. In order to make room for their somewhat extensive notes and comment, the authors have not set out full extracts from the judgments in quite as many cases as most people would expect in seven hundred and thirteen pages. They give an account of the facts and decisions in quantities of cases, but there are bound to be some teachers and students who will regard this as a poor substitute for substantial extracts from the judgments. It will be a great pity if this shortcoming militates against the use of *Brett and Waller* as the basic book in classes on criminal law in other universities than that of Melbourne where it is used by the authors, for the amount of time, energy and paper spent on the compilation of materials in Australasian law schools must be stupendous, and it is doubtful whether other fuller compilations will really be any more useful. Nothing can dispense with the need or desirability of referring the student to a great deal that is not included in any circulated materials.

If allowance is made for the decisions more or less fully mentioned by

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