the Lloyd George ministry and suggests that the system of Cabinet government as we know it really dates from that time.

Throughout the book, Professor Mackintosh sets the decision-making power of Cabinet within the context of a whole set of institutions and groups wielding power and influence—political parties, the Press, the houses of parliament, the Crown, the civil service, and organized interest groups. This is a real advance on previous accounts which have presented Cabinet as a self-contained system, and it enables the author to demonstrate the effect of political changes, like the widening of the franchise, on the working of Cabinet government. Nevertheless, in this reviewer's opinion, the book does not go far enough in this direction. Since 1945, the role of interest groups in British politics has expanded spectacularly, and their impact on the decision-making process has been considerable. Professor Mackintosh has not, unfortunately, made much use of the growing body of literature on this topic. Similarly, he dismisses the nationalized industries in a few sentences, yet here again there is a large volume of material which suggests that the functions of ministers, and the relations between government and parliament, have been profoundly affected by the large-scale growth of public enterprise since 1939. Like previous writers on Cabinet government, Professor Mackintosh gives us a picture from the inside looking out, whereas his avowed aim in the book is to correct this usual bias and to set Cabinet in its wider context. Partly because of his reliance on the store of political biographies which abound in Britain, Cabinet government still appears in terms of the doings of individuals; the author's aim, which is to present it as the focus of a complex set of institutional relationships, remains only partly fulfilled.

Another *lacuna* that will be specially noticed by students of law is the absence of any reference to delegated legislation and the growth of administrative discretion. There is no reference to the *Crichel Down Case*,[1] which opened up the whole question of the individual responsibility of a minister for acts done in his name, nor to the report of the Franks committee,[2] although the adoption of its recommendations has meant that, for the first time, the wisdom of departmental policy can be questioned, if only to a limited extent, before a semi-judicial body. This is particularly disappointing because Professor Mackintosh devotes much space to stressing the inability of parliament to exercise any real control over the actions of Cabinet. Yet events such as the setting up of the Council on Tribunals, and the current agitation for an Ombudsman, reflect the existence of public concern over the growth of Cabinet autocracy which can no longer be checked by traditional parliamentary methods, and for which new checks and balances need to be devised.

S. ENCEL*

Oxford Essays in Jurisprudence, edited by A. G. Guest, Fellow of University College, Oxford, Oxford U.P., 1961. xviii and 292 pp. (£2/12/0 in Australia.)

The word "jurisprudence" is a compendious name for a wide range of scholarly tasks to be performed in relation to law. Traditionally, the most valuable English contributions have been confined to one part of this range: the exposure of specific concepts of law to a careful logical analysis, which

[1] *Crichel Down Enquiry* (Cmd. 9176 (1954)).

[2] *Report of the Committee on Administrative Tribunals and Enquiries* (Cmd. 218 (1957)).

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(at its best) will not only reduce the concepts studied to a tidy and attractive picture, but illuminate our understanding of them, and thereby increase their usefulness for the practising lawyer. The same process may, of course, be applied to *jurisprudential* concepts: for these, if they are to be useful tools in the analysis of legal concepts, will often themselves need analysis.

In these *Oxford Essays in Jurisprudence*, the traditional intention is preserved without change. P. J. Fitzgerald examines the key position of "acts" in situations calling for legal regulation, and the meaning of this concept (pp. 1-28); H. L. A. Hart analyses the different legal *foci* of "inadvertent conduct" (pp. 29-49); and J. F. Lever, though he purports to be giving us an essay on "the principles which govern tortious liability where one man has done some act knowing that it would inflict loss or harm on another in circumstances in which mere negligence would not be sufficient to raise liability" (p. 50), in fact proceeds to an analysis of the concept of "motive" in its different legal contexts (pp. 50-68). All these first three essays, in short, are concerned to clarify different (but occasionally overlapping) issues among those which cluster around the central legal problem of "intention". These are followed by a pair of essays on the concepts of "possession" (D. R. Harris, pp. 69-106) and "ownership" (A. M. Honoré, pp. 107-147). The next concept to be discussed is "the *ratio decidendi*" (A. W. Simpson, pp. 148-175), which seems, as always, to hover uncertainly between the classes of legal and jurisprudential concepts. And the last four are clearly jurisprudential talking-points: "logic" as an element in legal reasoning (A. G. Guest, pp. 176-197), "sovereignty" (R. F. Heuston, pp. 198-222); "the rule of law" (N. S. Marsh, pp. 223-264) and "justiciability" (Geoffrey Marshall, pp. 265-287).

But though the traditional intention of English analysts remains, the book is further evidence of the change which recent decades have brought in the method of execution. Traditionally, the presiding deity of English jurisprudence was the looming enigmatic figure of John Austin; today, his throne has tended to be usurped by Ludwig Wittgenstein. And if (for jurisprudents) Wittgenstein as a presiding deity does not loom quite so large as Austin, he is considerably more enigmatic. It is perhaps for precisely this reason that now that the analysts have become "linguistic analysts", one can no longer label them simply as "analysts" at all. Austinian analysis was a precise and rather rigidly circumscribed style of doing jurisprudence. Linguistic analysis, though it too has its precise aims and methods, is a much more conceptually "open" method: with the result that excursions into other jurisprudential regions much more readily creep in. In other words, when one took as one's starting-point the logical analysis of fundamental "principles, distinctions, and notions", in terms of premisses about political structure laid down axiomatically, one tended to keep to one's starting-point, precisely because this was a real and concrete method of work. But to take the analysis of *words* as one's starting-point is (we believe) *not* a concrete method of work: the resort to usage looks admirably realistic and empirical at a distance, but at close quarters its empiricism turns out to be rather illusory. The result is that under the formal heading of "linguistic analysis" each writer tends to include whatever seems *to him* to be interesting and relevant; the analysis of words is little more than a convenient peg on which to hang a general discussion quite unfettered as to methods and sources.

To the extent that this generalisation is accurate, it no doubt points to a defect in the linguistic analysts' programme. Yet, paradoxically, it may also point to great merit in their achievements. To say that analysis is no longer merely analysis *may be* only to say that it is livelier, richer and more fertile, with more room both for detailed empirical reference and for general philosophical insight than was possible in the strict analytical matrix. (We shall see that the present essays have benefited particularly in the former regard.)

We might even say that "strict" analysis was saved from sterility just in so far as it managed to escape its own limitations, and that the relaxing of these limitations cannot but enhance the work that still remains *formally* within them.

But in fact, the position seems to be that whether this more flexible "analysis" is *really* livelier and richer now depends almost entirely on the insight, imagination, and learning of the individual analyst — and, of course, on the susceptibility to insight, imagination, and learning of the particular concept analysed. In the present book, the method is seen at its best in the essays of Hart, Honoré and Heuston. Professor Hart leads us through a fascinating and persuasive speculative probing of the "degrees" of negligence, the core of which is a careful refutation (pp. 31-44) of J. W. Turner's view[1] that no such "degrees" exist, and of his deceptively clear insistence that what is necessary and sufficient for criminal responsibility is that the *actus reus* should be caused by conduct embarked on voluntarily and with "foresight of consequences". To lever up this rock-like phrase and allow light to fall on the shadowy regions beneath it would bring the law much closer to adequacy and flexibility in its handling of "states of mind"; and Hart has taken some very useful steps towards this goal.

Mr. Honoré's discussion is of "ownership" as a concept claimed to be "common" to "mature legal systems". Not the least of its virtues is the careful explanation (pp. 108-109) of exactly what this Austin-like claim means, and also of what it does not mean — a clearer explanation than Austin himself ever gave. The main part of the essay, an enumeration of the "standard incidents" of this common concept (pp. 112 ff.) is also thoroughly satisfying; while his brief exposition of the old English system of limitations in Roman law terminology (pp. 143-144) turns out somewhat unexpectedly to illuminate both. As for Mr. Heuston's essay on "sovereignty", it can only be described by the overworked word "delightful". His opening claim that "The doctrine of parliamentary sovereignty is almost entirely the work of Oxford men" (p. 198) raises momentary fears of Oxonian insularity; but the humorous and critical stance from which he elaborates his claim soon dispels any such fears and leaves the reader free to glean both instruction and enjoyment in ample measure (though one may be permitted to register a mild antipodean protest against giving All Souls College *all* the credit for the late R. T. E. Latham, even while one joins in Heuston's lavish praise for this lamented Australian).

But all ten essays are interesting; and all ten share one vastly important merit which we have so far barely mentioned. We are told in the Preface (p. vi) that "particular emphasis has been laid on the empirical and common-sense approach of the law to the problems which are discussed. The contributors have attempted to look at some of the traditional exercises of jurisprudence with a new and practical eye". This attempt is an almost unqualified success. To adapt some words used by Mr. Heuston in another context (p. 202), the whole book "has the attraction of being couched in the calm, hard, tightly-knit style of the common lawyer rather than in the vague and emotional language of the political scientist".

Yet this also has its dangers. On the one hand, we emphatically agree that the task of jurisprudents (analytical or other) is to illumine *the law*; and that they ought always to keep at least one eye steadily trained on the practical legal problems which are their subject-matter. This is not always easy; the *Begriffshimmel* tempts all jurisprudents, and even those who determine to shun it are likely to find their feet leading them towards it all the

[1] J. W. Turner, "The Mental Element in Crimes at Common Law", in L. Radzinowicz and J. W. Turner (eds.), *The Modern Approach to Criminal Law* (1945) 195-261.

same. But, on the other hand, jurisprudence ought not to be allowed to develop into *mere exposition* of the law: partly because if it does, it is no longer jurisprudence, and partly because the jurisprudent-as-expositor-of-the-law is not likely to be *as good* an expositor as the everyday practising lawyer. For the most part, the contributors to the present book of essays have succeeded admirably in steering an even course between the Scylla of the *Begriffshimmel* and the Charybdis of legal exposition. But it is surely significant that although the whole of Harris' essay on possession is of very high quality, the first half of it, which is predominantly jurisprudential, is more illuminating than the second, which is predominantly an exposition of the law. And inevitably, the attempt to stick close to the fabric of the law has highlighted *occasional* legal deficiencies, or at least over-simplifications. When Fitzgerald, for instance, links the case of *R.* v. *Jarmain*[2] with his analysis of the concept of "act" (p. 9), he seems quite to overlook the fact that the result in that case was in no way an effect of the concept of "act", but of a legal rule quite irrelevant to *his* subject-matter. And how far is it good law for him to say simply (p. 26) that a confession obtained by fraud (as opposed to threats or inducement) is not thereby excluded, "because it is not . . . any the more likely to be untrue" than if it were *not* obtained by fraud?[3] Even if he is right, how does he draw the line between (legitimate) frauds and (illegitimate) inducements, for example in the case of false promises of favour?

Again, one could wish that Lever's analysis of "motive" had benefited by advertence to the Australian High Court's discussions in this area;[4] particularly when Harris (at 91), Honoré (at 112, 115, 139), and Heuston (at 208 ff., 216 ff.) have availed themselves of Australian case law so assuredly and profitably. In this matter of national pride, Marshall's essay on justiciability falls between two stools: at 271 ff. he discusses the remarks in the *Rola Case*[5] and the *Shell Case*[6] on what constitutes "judicial" power: but he shows no awareness of the many more illuminating later High Court decisions on the matter.[7] A much more serious defect in this essay, however, is the total omission of any reference to the major judicial and academic discussions of "justiciability" in international law.[8]

Both this essay and that by Marsh on "the rule of law", indeed, remain on a higher level of generality and abstraction than the others in the volume, though this is no doubt due in part to their subject-matter. Certainly Marsh cannot be reproached for his failure to construct any precise conception of "the rule of law"; on the contrary, he is to be congratulated for bringing together in one essay the vast range of ideological intangibles out of which such a conception must be constructed. And, of course, as to all the deficiencies just listed, it should be added that if we are to insist that to expound the law is not a proper task for jurisprudents, we can hardly reproach them for failing to do it.

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[2] (1946) K.B. 74.

[3] *R.* v. *Thomas* (1836) 7 Car. & P. 345 supports Fitzgerald's view. But see *R.* v. *Dean (No. 2)* (1896) 17 N.S.W.L.R. 224, esp. at 235, and *McDermott* v. *R.* (1948) 76 C.L.R. 501, esp. *per* Dixon, J. at 512, the latter in particular seeming to go beyond the merely statutory basis for the Australian position. And *cf. R.* v. *Voisin* (1918) 1 K.B. 531 at 539; *R.* v. *Histed* (1898) 19 Cox C.C. 16.

[4] See e.g. *Trobridge* v. *Hardy* (1955) 94 C.L.R. 147, esp. *per* Kitto, J. at 162ff.

[5] *Rola Co. (Aust.) Pty. Ltd.* v. *The Commonwealth* (1944) 69 C.L.R. 185.

[6] *Shell Co. of Australia* v. *Federal Commissioner of Taxation* (1931) A.C. 175.

[7] Particularly in *R.* v. *Spicer (The Builders' Labourers Case)* (1957) 100 C.L.R. 277. See also *Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1; *R.* v. *Davison* (1954) 90 C.L.R. 353; *R.* v. *Kirby (The Boilermakers' Case)* (1956) 94 C.L.R. 254; *R.* v. *Spicer (The Waterside Workers' Case)* (1957) 100 C.L.R. 312; and *Farbenfabriken Bayer Aktiengesellschaft* v. *Bayer Pharma Pty. Ltd.* (1959) 101 C.L.R. 652.

[8] See J. Stone, *Legal Controls of International Conflict* (1954) 146ff., and sources there cited.

It should further be added that to expound the law is one thing; to explain and justify it is another. The latter, even when it is done with the uncritical complacency of a Blackstone, is clearly an entirely proper part of the tasks of jurisprudence; and when the present essayists occasionally venture into this area, we applaud this as a welcome phase of the liberation of analytical interests already referred to. In particular, much of Lever's discussion of "motive" consists of an explanation and justification of the handling of motives in the law of torts. Yet his methods of explanation and justification point to a further danger of this "liberated", "flexible" analytical method which is no one clear method at all. The present reviewer would say that where the law is to be explained and justified, this can best be done by pointing to the sociological "interests" involved.[9] Lever, on the other hand, purports to be doing it by employing the "principles", or ethico-legal assumptions, underlying the legal materials; but in fact, along with these, he does employ a rather vague concept of "interests" to an ill-defined but important extent. It may be that an adequate explanation of law must indeed take account of both "interests" and "principles"; but surely in some more satisfying way than this uneasy play between the two.

We implied above that no amount of insight, imagination and learning can give weight to a flimsy subject, or interest to a tiresome one, or life to a dead one. With some reluctance, we feel compelled to illustrate this last point by referring to the editor's own essay on "Logic in the Law". We are surely all agreed today that (i) logic plays an important part in legal reasoning, but that (ii) logic does not "cover the field" of legal reasoning. The questions that then remain hungry for a great deal of further study are *what are the limits* of the "logic" area; and, even more important, what precisely happens *outside* the "logic" area? Guest, however, still devotes much of his essay to attempting to persuade us of the *existence* of the "logic" area (which is preaching to the converted); and the remainder to an analysis of what goes on *within* that area (which includes an excursion (pp. 183-186) into the old red herring about whether it is possible to construct a syllogism with normative premisses). Further, he still seems too anxious to bring within the "logic" area more than it will bear. Thus (pp. 188-190), he seems to be asserting that common law processes of generalization constitute "inductive logic" because, although they are *not* "inductive" in the logical sense, they are "inductive" in the looser Aristotelian sense. Similarly, does not his apparent inclusion of "analogy" in "logic" (pp. 190-193) quite destroy his contention that what was rejected in the New York *Springboard Case*[10] was *not* logic (pp. 179-180)?

No charge of failing to move with the times, however, can be levelled against Simpson's latest revisitation of the *ratio decidendi* of a case. He says little that is new (though his recognition of (as it were) the relevance of "relevance" (pp. 163 ff.) is in line with an important recent trend); but he now incorporates in his position, more clearly than he has done in his previous writings, a recognition and reconciliation of all the different truths that are necessary to a balanced view of the matter—including an acknowledgment that "To search for a satisfying answer to the question 'How do I determine the *ratio decidendi* of a case?' is to search for a phantom" (p. 168).

Evidence of the ability to move with the times is, indeed, what we would finally select as our overall summation of the whole volume. Above all else, the book offers ample proof that as we move into the 1960's, English jurisprudents are vigorously at work. It is an interesting volume, with the promise of more interesting things to come. And, with an eye to

[9] See e.g. J. Stone, *The Province and Function of Law* (1946) 507-603.
[10] *Hynes* v. *New York Central Railroad Co.* (1921) 231 N.Y. 229.

things to come, we conclude this review with two catalogues. One is the usual reviewer's collection of printer's errors — this time an even dozen, a surprisingly large number for the Oxford University Press. The other (offered not by way of criticism, but rather by way of challenge) is a random list of points at which the analyses offered seemed to this reviewer to fall short, or at least to have stopped short.

The printer's errors are on pages 16 (line 18, "no" for "not"), 20 ("Involunatry" in page head), 33 (full stop in second-last line), 35 (line 8, "crinimal"), 140 (lines 28, comma omitted, and 32, "prodecural"), 141 (line 13, "limitatian"), 162 (line 22, "by" for "be"), 197 (line 8, "not" for "nor"), 216 (footnote 2, wrong indicator), 221 (line 8, wrong type) and 228 (line 24, "and" for "an"). And the questions: why does Fitzgerald (pp. 3-4) accept so submissively the questionable distinction between acts and omissions; and how would he reconcile it with his enumeration (pp. 4-5) of cases where liability is incurred despite a *novus actus interveniens*? If, as he seems to suggest (p. 6), "act" *means* "voluntary act", why do all of us (including Fitzgerald himself) continue to feel the need of the phrases "voluntary act" and "involuntary act", when the latter would then be meaningless, and the former a mere tautology? Is Holmes' account of an "act" as easily dismissed as Fitzgerald makes out (pp. 6-9)? And what of Holmes' conclusion[11] that all acts *per se* are legally indifferent? It is obviously true that "stealing" and "murdering" are not legally indifferent, but Holmes is surely entitled to reply that this is because these words are *legal characterisations* of acts. Would the point be so clear as to "taking an article thitherto in the possession of another human being" or "killing another human being"? When, on the other hand, Hart (p. 40) makes a somewhat similar point in relation to "negligence" and "inadvertence", does he really manage to cut through the mass of indeterminacies which befog this distinction, or has he finally succeeded in saying only that "Inadvertence may be reprehensible in situations where it is reprehensible"? And finally, does it really remove the paradox from the self-justification of the rule in the *London Street Tramways Case*[12] to say with Simpson (p. 152) that the case can be meaningfully cited to show what the rule is?

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Current Law and Social Problems, edited by R. St. J. Macdonald for the Faculty of Law, University of Western Ontario. Vol. I (1960) 204 pp., and Vol. II (1961) 261 pp. ($5.50 and $6.50 respectively in Canada).

These two volumes, the first of a series to be published annually, present, in attractive hard-cover format, collections of essays on legal and meta-legal problems. The contents of the present harbinger-volumes are interesting and varied. Yet their very variety makes it sometimes difficult to see how a particular essay contributes to the overall purpose of the series — even though variety is of the essence of this purpose. The purpose is (we are told in an Introductory Statement in Volume I) "to promote collaboration between lawyers, social scientists, juristic philosophers, and others who are interested in exploring social values, processes, and institutions", "to invite discussion of contemporary problems by specialists in different fields whose research may be integrated to present broader aspects of those problems", and to serve as

[11] O. W. Holmes, *The Common Law* (1881) 54.
[12] *London Street Tramways Ltd.* v. *London County Council* (1898) A.C. 375.
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