

BOOK REVIEWS

Convicts and the Colonies, A Study of Penal Transportation from Great Britain and Ireland to Australia and Other Parts of the British Empire, by A. G. L. Shaw, London, Faber and Faber, 1966. 399 pp. (\$5.00).

The methods human societies have used to deal with transgressors constitute a fascinating though sometimes grisly study. Predominantly the reliance has been upon fear, and the bloody catalogue of criminal punishments has commonly sought to deter potential offenders by the complete or partial destruction of convicted criminals. Only comparatively recently has it been recognised that the doctrine of maximum severity, under which the horrible fate of a malefactor is used to deter others, is not only immoral, but is also ineffective to repress crime. Although many years were to pass before his ideas were taken seriously, Sir Samuel Romilly was right when he told an indifferent House of Commons in 1813 that "cruel punishments have an inevitable tendency to produce cruelty in the people. It is not by the destruction of tenderness, — it is not by exciting revenge, that we can hope to generate virtuous conduct in those who are confided to our care."

Transportation as a criminal punishment was the product of a combination of notions, some commendable, others not. There was the idea, persistent from primitive times, of expulsion from the group, allied with the notion that criminals should be compelled to labour in discomfort at dangerous tasks for the common good. Involved, too, was a revulsion from the exaction of the death penalty in cases where the crime though legally heinous was actually trifling. Transportation had also the advantage that it provided unpaid and coerced labour in distant parts while relieving the homeland of malefactors. Above all, it appeared on its face (though in the outcome it was not) a cheap and effective solution of a troublesome problem with which the increasing number of criminal offenders in the 18th century confronted a selfish and insensitive upper class.

The use England made of transportation had many evil features, but even at its worst it never matched the inhumanity of the French system that until very recent times banished *relégués* (incorrigible thieves), *déportés* (political offenders) and *transportés* (murderers and violent criminals) to Guiana with little hope of ever returning to their homeland, even if they managed to survive the brutality of the guards and the debilitating climate. Undoubtedly harsh and capricious, British transportation nevertheless made first and significant contributions to the settling of a continent whose isolated location and forbidding coastline had for centuries discouraged exploration by seafaring adventurers, Asian as well as European. It is only in recent years that the reluctance to face squarely the circumstances of Australia's beginnings has yielded to dispassionate historical research. It was a foolish reluctance, because ignoring facts does not change them, and in any event there is no justification for supposing that convictions for crime are proof of propensities to criminal wrong-doing that are biologically transmissible. Moreover, all accounts establish that the first native-born generation, the currency lads and lasses, "neither inherited the vices nor the failings of their parents", as even the critical and cantankerous Commissioner John Thomas Bigge conceded.

Perhaps it was because of this reluctance that we have had to wait until 1966 for a comprehensive, definitive account of the theory and practice of transportation from the United Kingdom as a criminal punishment and a social phenomenon. No one in Australia or elsewhere knows as much about the history and mechanics of transportation as Professor A. G. L. Shaw, now of Monash University, and those who are acquainted with him personally, or are familiar with his *Story of Australia* and his articles on the convict system, and his piece, "Convicts and Transportation", in the *Australian Encyclopaedia*, 2nd ed., vol. 3., waited patiently but eagerly for the publication of the book for which he began to gather material in 1950. It proves to have been well worth waiting for. Researchers in the convict system have long felt the want of a panoramic but accurate survey of the System, and it is satisfying that the want has now been so adequately met. The heavy and difficult task has been executed with great skill. The author's prose is stylistically agreeable and delightfully lucid. The book is equipped with the necessary apparatus of scholarship; the dispatches and official documents have been examined with care; no material book or pamphlet has been overlooked, and the select bibliography itself is invaluable. Anyone who desires to write upon the System in any of its aspects will find this volume indispensable as a starting point.

It is an achievement of magnitude to present in orderly narrative the history of transportation from the United Kingdom to North America, before the American Revolution, and thereafter to Australia, with incidental mention of the West Indies, Bermuda and Gibraltar. The account, in Chapter 2, of the vacillating approaches of the English government to various schemes for transportation to different parts of the globe under British control, is compact but complete. It is a chastening thought that the selection of New South Wales seems to have been made hesitantly and almost impulsively as a last resort. Beginning as an unorganised and slipshod method of relieving overcrowded gaols, transportation exhibited differing features as economic and domestic circumstances altered with the times. The author presents the various phases of the eighty years of transportation to Australia, from the disembarkation of the First Fleet in January 1788 to the arrival of the last convict transport at Fremantle on 10 January 1868, against a background of the comments and opinions of the various Secretaries of State for the Colonies and English civil servants, of the succession of Governors and Lieutenant-Governors who administered the System in Australia, and of observers as well as of persons actually concerned with its operation. The origins and characters of the convicts transported have been intensively investigated during recent years, and the author discusses them in Chapter 7, "Who were the Convicts? — Great Britain", and Chapter 8, "Who were the Convicts? — Ireland". As time wore on, a decreasing proportion of convicted persons was sentenced to transportation, varying from about a third before 1834, to not much more than a tenth in 1847-8. Even so, a sentence of transportation did not necessarily mean what it said; before 1818, only a third thus sentenced were actually transported, and while the proportion rose occasionally as high as 75 per cent, after 1843 it declined steadily.

Exactly how many felons, male and female, were compulsorily brought to Australia during the eight decades cannot now be determined with certainty, because the records, though many and burdensome to examine, are sometimes contradictory and often incomplete and inaccurate. The number, which used to be given with a false appearance of precision as 160,663, seems to have been about 162,000, of whom nearly 25,000 were women. Professor Shaw remarks, as a matter of speculative curiosity rather than of practical utility, that a century after the cessation of transportation about half a million

Australians "may have some trace of convict blood imported from the United Kingdom" (p. 149).

This work is a superb contribution of unquestionable authority to an important phase of Australian (and English) history. It is, too, an essay of first quality upon penological theories and the way in which they fared when put to the test of practical application. It is cool and balanced; the merits as well as the defects of the System are recognised; and the author's judgments are restrained and judicious, the product of a trained but generous and civilized mind. *Convicts and the Colonies* can be commended warmly and without reservation.

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Cases and Materials on Constitutional and Administrative Law, by Geoffrey Wilson. Cambridge University Press, 1966, xxv and 609 pp. (\$5.75 in Australia).

This book has one notable virtue and two principal drawbacks. The notable virtue is the refreshing breadth of approach adopted by the author. From the outset he rejects the strict Diceyan separation of law from convention. This distinction, he contends, has derived its longevity not only from conceptual considerations but also simply from the fact that lawyers are unaccustomed to dealing with the documentary sources of convention, for example parliamentary debates, committee reports, biographies, and the like. "These practical difficulties" he writes, "have artificially prolonged the life of a dogmatic distinction which is the product of an old fashioned jurisprudence and a narrow and outdated view of a lawyer's role in society."¹

Stirring words! The author then states it as his intention to provide easier access to materials other than the law reports and formal legislation to which lawyers usually confine their attention. And this he does. Thus, such a critical topic as "Cabinet Government and Ministerial Responsibility" can be dealt with in a chapter of its own, rather than appearing as a somewhat awkward footnote in a more conventionally "legal" text. Matters of law and matters of constitutional convention are dealt with side by side, and are illuminated by both "legal" and "non-legal" materials, as appropriate. The subject gains greatly in vivacity from this treatment.

It is also enlivened by the occasional background notes provided by the author himself. Thus, the judgments in *Thomas v. Sawkins*² are preceded by brief notes on the Fascist and Communist meetings held during 1934, and by an extract from the House of Commons debates on the subject of police powers in regard to public meetings. This, as much as the judicial reasoning, serves to clarify the decision.

All this is desirable and, in my opinion, valid. There are signs that the old barriers are beginning to crumble between law on the one hand and non-legal disciplines on the other. Just as criminal lawyers are learning to talk to criminologists, and company lawyers to accountants, so, too, constitutional lawyers can speak with political scientists, historians and administrators. Indeed, any account of constitutional or administrative law which ignores the social context is condemned to abstraction, dryness and legalism. The lawyer may surely be as legitimately concerned with society as with logic.

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¹ At v.

² (1935) 2 K.B. 249.