and they could otherwise make almost any contract by way of bond and the covenant, instruments which were elaborately used until the enforcement of simple contracts. I make these points not, for the present, with any deep critical intention. -My intention is merely to draw attention to the difficulties involved in any single gospel or generalisation. It seems to me that in contract above all must we beware of monistic explanations, whether they be principles of order, control, freedom or status. The reason is that of all our legal devices contract is the most versatile and many-sided, as it is also the most natural and basic. For we might live our lives, our social lives, without committing torts or crimes or even without the formal marriage. But we cannot dispense with making agreements either to ensure the exchange of goods and services or to make possible other reliable means of social co-operation.

III

And there is a final observation. While the English lawyer (with the possible exception of Sir Frederick Pollock) has usually been content to remain within the strict limits of technical contract, modern American lawyers are not at all unwilling to make contract the starting-point for much wider theoretical legal thinking. Indeed, in the United States there has, in recent years, been a surprisingly close connection between "contract" and "jurisprudence": witness, for example, the well-known dual interests of such men as Llewellyn, Patterson, Goble and Fuller. Is there for this a deeper reason, a reason that goes beyond the merely accidental or subjective? If there is, the objective reason would have to include several factors. Perhaps first and foremost is the extraordinary richness of material which is continuously to hand and always presents a challenge to the American contract expert. A second factor is, without doubt, the dynamic of the major American law schools, their great intellectual activity that tends to become a competitive quest for the better approach and the more inclusive explanation. The third factor, however, must be found in the enormous scale of American contract problems. At the one end of the scale is the constitutional problem of the impairment of obligations. At the other end, there are the great economic questions thrown up by price-fixing or market-sharing agreements only vaguely controlled by the anti-trust legislation. And in between, American lawyers also had to find, through the law of contract (i.e. through enforceable charitable subscription promises) a dependable financial basis for the operation of the voluntary foundation. These pulls, at any rate, must have helped to tear open what to an English lawyer could remain a technically "closed" system; and once the system was forced open, it also prepared the way for that more theoretical (or fundamentalist) thinking that characterises the Americans' approach to their case-law of contract. The "kingless commonwealths on the other shore of the Atlantic Ocean"[13] may at one time have been but the receivers of English law from Bracton to Blackstone; assuredly they have now become the pioneers of Anglo-American contractual jurisprudence.

SAMUEL J. STOLJAR *

A FIRST COURSE IN LAW

It may seem odd to do much more than note the appearance of the second edition of an introductory text-book for students, even if the book has undergone a considerable change since its first appearance.† It is not inappropriate,

[13] *Cf.* 2 F. Pollock and F. W. Maitland, *History of English Law*, 674.

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† *A First Book of English Law* by O. Hood-Phillips, M.A., B.C.L. (Oxon.), of Gray's Inn, Barrister-at-Law, Dean of the Faculty of Law and Barber Professor of Jurisprudence in the University of Birmingham. 2 ed. 1953, Sweet & Maxwell Ltd., xxiv - 293. £1/4/6 in Australia.

however, at a time when the aims and methods of legal education are being discussed and questioned more than they have been for the last seventy or eighty years, to make the review of such a book the excuse for discussing the problem of introducing students to the law. The problem has several aspects which deserve separate consideration. Especially is that so in those Law Schools which attempt the dual task of providing a University education for their students and of preparing them at the same time for legal practice. And it is so, whether the dual task is undertaken by design, as in Australia and America, or by the accident of circumstance, as in Professor Hood-Phillips' School at Birmingham. It is the firm belief of this reviewer, in opposition to the belief of most English law teachers, that to join the performance of those two tasks is not only possible but highly desirable. It is believed that success in each can be of higher degree, as the result of the contemporary pursuit of the other.

That is not to assert that the way is easy,—it is not; nor is it to assert that a satisfactory joinder has yet been achieved, but merely that it can and will be achieved. For as on so many related questions, there are two schools of thought on the question how to begin legal education. One is the "put it before them and let those eat who can" school; and the other is the "careful spoon-feeding" school. The first is dominant, though by no means exclusive, in the United States. In England the second, at least by implication, holds sway and Professor Hood-Phillips' little book is an example of the "spoons" employed. In the great Law Schools of the United States, the plan seems to be one in which the beginner law student, all ignorant from College, finds himself on his first day, case-book in hand, in a Criminal Law, Contracts, or Torts class where he is expected to argue the law. He eats the carefully selected raw material presented to him, learns to digest, and grows in the law, or he starves and soon is seen no more.

It is not proposed to argue the merits and demerits of such a method, except to say two things. Firstly, the typical American law student has already spent at least three years (and many have spent four) of undergraduate study in the Arts or Sciences before entering Law School. He is in that respect unlike the English or Australian student, who enters straight from school. Secondly, though it is of course true that the student of law must learn to fend for himself, that he must develop skills in handling and arguing from raw materials, and therefore must not be "spoon-fed" in his education, it does not follow that he must not be spoon-fed during his introductory period.

The law student enters a discipline with its own distinctive language, habits of thought, traditions, history, practices, and so on. Much of the strength of the legal systems in common law countries can be attributed to the common familiarity with those things enjoyed by all members of the profession. One of the risks of a too-rigid policy of excluding "spoon-feeding" altogether from legal education, is the production of a high proportion of young lawyers who are confident in their own ability, vigorously self-assertive, quick and decisive in dealing with legal problems *ad hoc*, but who are woefully ignorant.

If it is assumed that an initiation period is desirable, and that some careful "spoon-feeding" at the beginning will make for sounder growth later, then something like a "First Book of English Law" is a necessity. But what should be the content of such a book? What should be its style, its method, and its use? Clearly, to write a book to meet the need is one of the most difficult tasks a lawyer can undertake. It must be a lawyer who writes it, and that in itself makes for difficulties. The book is for readers who know no law, and therefore it should not include matter which has no meaning standing by itself. But what writer giving a simplified and admittedly introductory explanation of processes which he knows to be complex and fraught with obscurities can refrain from demonstrating, if only to silence his fully initiated critics, that he is aware of the complexities and has given thought to the obscurities? Professor

Hood-Phillips has not avoided this pitfall, as is remarked below.

Much class-time spent furnishing students with information to be learned which could be as well set in type, is wasted effort still too common in English and Australian Law Schools. So far as possible, class-work should be concentrated on explanation of the significance of information already supplied, on argument of problems not yet reduced to dogmatic solution in the law, and, most important, on practice in the basic skills of the lawyer's discipline. Those skills can only be developed by 'doing'. A *first book* and a *first course* then should not be just the same thing, one written and one spoken. Much of the content of an appropriate introductory course for law students could not be put into a text-book, and much that should in a *first book* should not waste class-time in a *first course*. The book should provide the necessary basic information and so much of the explanation as can be written. It should then be both required preliminary reading for the *first course* and the ever-present background for the work done in class during that course. What then should the *book* contain and what the *course*?

Professor Hood-Phillips' book is one answer to the first part of the question. That it also, it is suspected, represents the *course* does not necessarily detract from its value as the *book*.

It is with considerable relief that the reader finds on opening "A First Book of English Law" that the first chapter does not begin by asking the question "what is Law?" That the great Pollock began that way was one of his grosser sins![1] That is one of the more difficult questions, and one which the student should be asked to examine only after he has gained some understanding of legal systems as they function and the rules which control their parts.

In his introductory chapter, Professor Hood-Phillips opens by saying that English law means the law of England, and then proceeds to explain the broad divisions of the United Kingdom into legal districts. He gives an outline explanation in some fifteen pages, of the historical growth of English law. In Part I of the book he describes the structure of the legal institutions in England. With the exception of some preliminary remarks directed to the exercise of the Royal prerogative in the administration of justice, the appointment and position of judges, the legal profession, and trial by jury, however, this Part is concerned exclusively with a description of the courts at present finding a place in the English judicial system.

Part II, under the general heading "The Sources of English Law", contains a brief and traditionally orthodox account of statutes and other legislation, the interpretation of statutes and the rules governing that interpretation, judicial precedent and the problem of finding the *ratio decidendi*, the system of law-reporting and its history, custom and the rules for accepting customs into the law of England, and an explanation of the use made of text-books by the courts. These topics, difficult, in some particulars at least, for anyone, are dealt with within a hundred pages. This is perhaps the least satisfactory part of the book, from the point of view of the beginner student. The material would serve comparatively well as expansive notes of a course of lectures to be given to students who are at the same time studying the cases and other materials cited as illustrations of the propositions laid down by the lecturer. As an explanation to a beginner who is after all coming to the subject as a layman, it is deficient at many points. For example, the beginner would make little of Professor Hood-Phillips' complex account of the attitude of the Court of Appeal to its own previous decisions[2] and of his comment

[1] His book was entitled "A First Book of Jurisprudence" and to such the question may be apt. But his preface discloses the intention of writing "A First Book of Law".

[2] At p. 118, the author writes: "2. *The Court of Appeal* has recently settled doubts by holding that it is bound by its own previous decisions, and by those courts of co-ordinate jurisdiction. This was settled by a full Court of Appeal (whose authority, however, was held to be no greater than that of the ordinary court of three Lords Justices) composed of

on the exceptional case where the Court must refuse to follow a decision of its own which, in its opinion, is inconsistent with a decision of the House of Lords.[3] Again, a layman might not gain much enlightenment from the cryptic manner in which Professor Hood-Phillips deals with the attitude of the courts to books not of authority.[4]

While the author is to be commended for keeping footnotes to the barest minimum, he has still cluttered up the text with many references[5] which have no meaning as they stand and can only aid the reader if he does considerable outside work filling in his own illustrations. As was said at the outset, the value of a book like this as a genuine introductory book is to be measured to a considerable extent by the degree to which it provides satisfactory information and explanation as it stands, and without further assistance.

A further criticism of this part is one of sequence. Chapter XII, coming towards the end, is headed "Law Reports". This chapter provides concise and useful information about the reported material used by courts in discovering the law. From this chapter, a diligent student could begin using a Law Library. A notable deficiency, however, is the lack of any adequate reference to Legal Digests and Encyclopaediae. But if the author sprinkles his text with references to cases and other authoritative legal material, then surely the unenlightened reader should have been assisted by having the chapter on Law Reports (the only real guide to a Law Library in the book) placed earlier in the book, so that its benefit could have been felt when the complex parts of the law, such as the problem of finding the *ratio decidendi*, are being explained by reference to cases.

The third and last Part of the book is headed "General Principles of English Law". In this Part, the author deals briefly and concisely with the criminal law, the law of property, the law of torts, the law of contract, and the law of persons. There is a number of propositions made with which this reviewer would disagree; but it is fair to say that an exceedingly workmanlike job of compressing the more important and authoritatively supported propositions of law naturally falling under those headings has been successfully

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the Master of the Rolls and five Lords Justices in *Young* v. *Bristol Aeroplane Co.* (1944) K.B. 718. It had already been laid down by Jessel, M.R. that the Court of Appeal was bound by decisions of the Court of Exchequer Chamber (*Ex parte Drake* (1877) 5 Ch. D. 866, 871) and of the Court of Appeal in Chancery (*Ex parte M'George* (1882) 20 Ch. D. 697, 700).

The court in *Young* v. *Bristol Aeroplane Co.* were influenced by the decision of the House of Lords in the *London Street Tramways Case* (*supra*), as is shown by their quotation from the judgment of Lord Cozens-Hardy M.R. in *Velasquez Ltd.* v. *Inland Revenue Commissioners* (1914) 3 K.B. 458, 461. Lord Greene, M.R., who delivered the judgment of the court, quoted a number of cases in which members of the Court of Appeal had held themselves bound by previous decisions of the court with which they did not agree and had expressed the hope that the House of Lords would reverse them. Against this, the Court of Appeal in *Wynne-Finch* v. *Chaytor* (1903) 2 Ch. 475, had "overruled" *Daglish* v. *Barton* (1900) 1 Q.B. 284 (see *per* Stirling, L.J. (1903) 2 Ch. 475 at 485; and cf. *per* Greer, L.J. in *Newsholme Bros.* v. *Road Transport and General Insurance Co.* (1929) 2 K.B. 356, 384-5, and *Re Shoesmith* (1938) 2 K.B. 637, 644)." The material is not made any the clearer by the addition in a footnote to the first reference to *Young* v. *Bristol Aeroplane Co.*: "It is immaterial for present purposes that the decision in this case was reversed by the House of Lords on the substantive point involved."

[3] At p. 119: "Some difficulty has been caused by exception (ii), which must apparently be limited to the position where the House of Lords decision is later than the previous Court of Appeal decision in question; for where the House of Lords decision was the earlier, the Court of Appeal cannot be taken (except, of course, in the House of Lords) to have misunderstood that decision (*Williams* v. *Glasbrook*) (1947) 2 All E.R. 884; but cf. *Fitzsimons* v. *Ford Motor Co. Ltd.* (1946) 1 All E.R. 429; *Wilson* v. *Chatterton* (1946) 1 K.B. 360."

[4] At p. 174: "The critical way in which the other class of textbook" (books not of authority) "is treated by the courts may be illustrated by another passage from Lord Porter's judgment in *Joyce* v. *Director of Public Prosecutions* (*supra*): 'The Attorney-General supported this contention by a reference to Archbold's *Criminal Practice* (31st ed.) (1943), p. 330 . . . The true principle is, I think, set out in *Phipson on Evidence*, 8th ed., p. 34, and *Best on Evidence*, 12th ed., p. 252'."

[5] See the illustrations in nn. 2, 3 and 4.

carried out. The main criticism is much like the criticism made of Part II, though it is not so striking in this part—that is, that much of the material is of a kind that one suspects a student will "learn" long before he understands. For example, what will a student who comes fresh to this book and knowing no law make of the following:

> A contract in itself creates rights *in personam* enforceable only against the other party or parties (*Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (1915) A.C. 847), though there is also a right *in rem* against all other persons not to interfere unjustifiably with the performance of the contract, breach of which right *in rem* is a tort (*Lumley* v. *Gye* (1853) 2 E. & B. 216)[6]

This much help is given the reader, of course, that by the time he reads that proposition he will have already read 238½ pages of this introductory book and so will have been to a considerable extent prepared for it.

What then, in the light of the few criticisms made, should be included in this book that is not there, or should be left out that is? Let it be said at the outset that there is no major topic dealt with in this book that should be left out of it. The scope or coverage, however, could be shortened by making the book much less satisfactory to the eyes of a trained lawyer, much less complete in its reference, much less accurate in its precise statement of the law, but much more revealing of general ideas to the layman.

It is submitted, however, that there are many matters not included which could and should be included in an introductory book for law students. It is suggested that very many law students coming straight from school are surprisingly ignorant of the place of a legal system in a community such as ours. This is not only true of Australian law students; it is true, in my experience, of English law students at the best Universities.

Unless the young man has been brought up in a legal household, his notions of the role of courts, of the lawyer, of the government official concerned with legal institutions, of law-makers in the legislature, are vague and confused, to say the least. It is true that those students who have been well-grounded in English history at school have a fairly clear notion of the role of the Houses of Parliament and their history and their relationship to the political executive. Beyond that, however, little is understood or known. The law to the average young man of 17 or 18 tends to be thought of in images which include, I suppose, Judges in wigs, leading Silks addressing Juries, and more importantly, the Policeman in or out of uniform. With the exception of the most gifted and the most diligent, the young man at this stage of his life tends to gain understanding more quickly by attention to the concrete and the particular than to the general and the speculative. For these reasons, it is reiterated that it is a sin to commence an introductory course by examining such questions as "what is Law?"

At Melbourne at the present time a great deal of attention is being given to the introductory course in law which has been developed over the last few decades. Attempts are being made to re-organise that course and to re-think its content and its method. To illustrate the theme here expressed, it is hoped at Melbourne to start the beginner law student on materials relevant to the institutions of the law, concerned with the making, application and enforcement of the law, and to proceed thence to the materials relevant to the processes of litigation and of law-making, though not, at this stage, materials relating to the problems of judicial precedent. Thereafter, the student will be introduced to the way in which rules of law are classified and to the main branches of Public and Private Law, at the same time receiving instruction as to the art of "finding the law" in a Law Library. With all these materials

[6] At p. 238.

as a basis, the student will then be introduced to a more detailed consideration of the techniques and problems of legal reasoning and the judicial process and will finally consider the question: "What then is law, and what is the Law?"[7]

It is the intention that the materials outlined should be provided in such a way as to convey meaning, however general and perhaps superficial, when read without further instruction. The method, then, is to employ as much class time as possible during the course in requiring students to work through appropriate legal materials and thereby gain greater understanding of and give greater content to the general notions outlined in the introductory materials. Classes would be engaged for a considerable part of their first year in analysing cases and producing headnotes, on the one hand; and on the other, in interpreting statutes so as to apply them to particular fact-situations, and in producing written opinions on problems. Class discussion

[7] In greater detail, the proposed first book at Melbourne will include the following:

Part I.—The Legal System.

Chapter I: *The Institutions of the Law.* This chapter describes those institutions which are important from the lawyer's point of view, in the making, the application, or the enforcement of legal rules. It deals in descriptive outline with the following: Parliament, the Executive Government (including some description of the Departments of Government which are directly concerned with the courts and the enforcement of law), the Courts, the Police, the Prison System, and the legal profession.

Chapter II: *The Process of Litigation.* This chapter is divided into two parts: (1) Criminal Proceedings; (2) Civil Proceedings. The chapter concerns itself with a fairly complete explanation of the broad principles adopted by our legal system for resolving disputes of various kinds and provides an adequate explanation of the Anglo-American system of trial in contrast with certain continental systems. The truisms of the common law are presented to the student with illustrations to make them live.

Chapter III: *Law-making.* This chapter is devoted to the authoritative sources of rules of law, and deals briefly with (i) the process of legislation (a) by Parliament, (b) by delegation to the Executive, (c) by delegation to subordinate law-making bodies such as Municipal Councils or other independent by-law making authorities, and (ii) the common law process of law-making by Judges from cases. This section is in brief outline only, and does not introduce the student to problems of precedent or of *ratio decidendi*.

PART II.—THE CONTENT OF THE LAW.

Chapter IV: *Classification of the Law.* This chapter explains the way in which the rules of law are classified at present and the purposes to which such classification is put. The chapter should operate as an introduction to the next two chapters, which deal with the content of particular categories. The chapter includes an explanation of the primary distinctions between Statute Law, Common Law, and Equity.

Chapter V: *Public Law.* This chapter deals in sections with the classification of Public Law into the following—and gives some indication of the content of each: Constitutional Law, Administrative Law, Criminal Law, Industrial Law, Tax Law, International Law.

Chapted VI: *Private Law.* This chapter does the same sort of thing as Chapter V does, but with respect to Contract, Torts, Real and Personal Property, Succession, Family Law.

Chapter VII: *Finding the Law.* This chapter provides a complete explanatory basis for classwork during the year on the materials issued, and for work in the Law Library. It explains the use of Reports, Digests, and Encyclopaediae, and also the use of text-books and legal periodic literature in the process of finding the law.

PART III.—LEGAL REASONING AND THE JUDICIAL PROCESS.

Chapter VIII: *Language and the Law—the Problem of Communication.* This chapter provides an introduction to the basic problems arising out of the attempt to use words to control action. It does not take the student very far in the problems he may study later in Jurisprudence, but it gives him some initial understanding of the inevitable difficulties involved in the problems of making or applying any rules, whether of strict law or otherwise.

Chapter IX: *Law-making Through the Cases.* This chapter deals with the general application of the case-law-making process. The use of precedents in particular legal systems is described. The doctrine of precedent as embedded in our law, and the relationship of courts in hierarchical organization, is examined in some detail. Sufficient general explanation is given to lay the ground-work for class work on cases and class-exercises in the extraction of authority from cases.

Chapter X: *The Operation and Interpretation of Statutes.* This chapter deals with the problems encountered and the methods employed by courts in interpreting and applying statutory materials. An explanation of the primary rules expressed by the courts as controlling the process of interpretation of statutes is given. Both the operation, and to some extent, the deficiencies of such rules are outlined.

Chapter XI: *Techniques of the Law.* This chapter takes up as examples of common law legal logic some selected problems which involve legal concepts, standards, rules, and so on. An explanation of the common law structure of rights and duties, or property and ownership

and lecture illustration in greater detail of the more informatory aspects of the materials issued would complete the remainder of the course work.

It should be emphasised that the students undertaking such a course would at the same time be undertaking courses in Legal History and in Constitutional History designed to supply the traditional background needed by a common lawyer. Furthermore, it is believed that the first year should include one common law subject (perhaps Contracts or Criminal Law) in which the students will have to struggle with case-law and in which "spoon-feeding" would be at a minimum.

It is submitted that the design of such a *course* is a separate problem from the design of the introductory *book*, which should precede the course and be used in support of the course throughout.

Professor Hood-Phillips' book, insofar as it attempts to be both the introductory material and the course itself, fails fully to achieve the general aim asserted in this review. It fails because it is trying to be both things at once. Insofar as an attempt to be both things at once can be successful, Professor Hood-Phillips' book is to be applauded. It is, and will continue to be, a considerable aid to those law teachers who have the fascinating but perhaps unenviable task of conducting a first course for law students.

DAVID P. DERHAM*

DEAD BODIES

Recent legislation in two Australian states and a Bill at present before the N.S.W. Parliament[1] have focussed attention on the subject of dead bodies and on the rights, duties and obligations which attach to their disposal.[2] In South Australia there have been passed two Acts amending the Anatomy Act[3] and Tasmania has passed one such Act.[4]

The class of persons in the community which is probably the most closely associated with the subject of dead bodies and their disposal is that of coroners, on whom falls the duty of inquiring into the cause of death in cases where they have reasonable cause to suspect that a person has died either a violent death or an unnatural death or has died a sudden death the cause of which is unknown. However, it is not proposed to deal in detail with the rights and duties of coroners, a matter on which legal practice is fairly well settled,[5] nor discuss the position of medical practitioners[6], but to confine the present note

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are suggested as material for study.

PART IV.

Chapter XII: *What then is law, and what is the Law?* This chapter, using materials described in the previous chapters, attempts to introduce the student to some of the general theories about Law at a very elementary level. Some explanation of the Austinian theory, and a brief introduction to some of the criticisms of that theory, seem to be the most appropriate way to introduce this area of thought to English and Australian law students at least.

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[1] Corneal and Tissue Grafting Bill, 1955 (N.S.W.). (Now Act No. 32 of 1955—*General Editor.*)

[2] Certain references have also recently been made in various newspapers to the alleged unlawful disposal of dead bodies, particularly of the bodies of persons who have died in hospitals.

[3] Anatomy Act Amendment Act, 1954 (S. Aust.) No. 12, 1954; Anatomy Act Amendment Act (No. 2) 1954 (S. Aust.) No. 25, 1954.

[4] Anatomy Act Amendment Act, 1954 (Tas.) No. 26, 1954.

[5] On the subject of coroners generally and of their specific rights and duties, see *Halsbury's Laws of England* (3 ed.) 460ff.; *Halsbury's Statutes* (2 ed.) 834ff.

[6] Apart from the direction of a coroner (as to which see n. 5 *supra*) and the provisions of the various Anatomy Acts (as to which see *infra* n. 64) a medical practitioner is not permitted by law to examine the body of a deceased person. (The Anatomy Acts make the receipt of a body for purposes of anatomical examination other than in accordance with the provisions of the Acts, a misdemeanour. See n. 135 *infra.*) Where a medical practi-