criticism of the decision of the Court of Session in *Bliersbach* v. *McEwan*.[23] In that case two minors both domiciled in Holland sought to marry in Scotland without parental consent as required by Dutch law. Under Dutch law lack of consent rendered the marriage voidable. Under Scots law no parental consent was required. The Court, following the English case of *Ogden* v. *Ogden*,[24] classified the Dutch requirement as one relating to formalities and hence inapplicable to marriages celebrated in Scotland. At first sight the Court of Session would appear to be open to criticism for blindly following a much criticized English case. But it only did so for considerations of policy. Under Dutch law the marriage would be voidable, not void *ab initio*. If a Scottish court declared such marriages to be void, a limping marriage might result if the parents in Holland accepted a *fait accompli* and did not seek to annul the marriage. On the other hand, if the Scottish courts refused to intervene the matter was left in its proper forum; any annulment pronounced by a Dutch court would be entitled to recognition in Scotland as the decree of the domicile of both parties.[25] The Court of Session left open the question which would arise if under Dutch law the lack of parental consent had rendered the marriage void *ab initio*.

At p. 86, and again at p. 511, the author puts forward the view that Scottish courts should not hesitate to exercise a discretionary power conferred by foreign law upon a foreign court. At p. 511, this suggestion was made specifically in relation to the English Inheritance (Family Provision) Act 1938. It is hard to see that justice would be served by Scottish courts assuming functions with which they are not familiar unless there is no other forum reasonably available. Fortunately in Australia there is good authority against the assumption of the discretionary powers conferred under the Family Provision legislation of other jurisdictions.[26]

P. E. NYGH*

Principles of Australian Administrative Law (3d. ed.) by D. G. Benjafield and H. Whitmore, Sydney, The Law Book Co. Ltd., 1966. XXXI and 368 pp. ($7.50).

This book is a skilful and useful amalgam. It is an excellent presentation of the laws as expounded in the cases. It sets the Australian law against the background of the mother law of England as it has been and is today. It treats well, and I would hazard exhaustively, the Australian law. At the same time, it offers an informed and scholarly presentation of the political and general law background of the subject. Finally it is a critical account of both theory and judicial practice.

If the book has a weakness, it is in its somewhat conventional and derivative treatment of general ideas. The authors are apt to fall back on fashionable critical clichés which have been going the rounds now for sometime. The authors for example protest in a self-satisfied way that "they have no confidence in conceptual classification (indeed they don't understand it)" (p. 110) and "that the courts will never develop a rational approach while they feel obliged to apply conceptual classification". (p. 112). This sort of language is

[23] (1959) S.C. 43.
[24] (1908) P. 46.
[25] *Administrator of Australian Property* v. *Salvesen* (1927) S.C. (H.L.) 80.
[26] Re Paulin (1950) V.L.R. 462).
* S.J.D. (Mich.), LL.M. (Sydney), Senior Lecturer in Law, University of Sydney.

common coin today but if taken at its face value, it is fatuous and contradictory. A system of law lives by general ideas and concepts—and no doubt may die of them if they are used in a rigid and unthinking way. It is the latter point which the authors no doubt mean to make but "rational" decisions without the aid of concepts is like making bricks without straw. What we need, what we always need is better, more apt, concepts. We test, we discard, we define and redefine. The concepts "legislative" and "judicial" are not easy to use and as our authors show, have led the Australian courts to some unfortunate results. But these concepts are the results of hard fought battles for fairness and for efficiency. The distinction between legislative and judicial means, for example, that when a particular individual is singled out for invidious treatment, when he is disturbed in his life, liberty or property, he is entitled to certain procedural protections which may not be required when persons are affected as a class. We could arrive at this result without explicit use of the concepts "legislative" and "judicial" but in our discourse and decisions we need some concept or other. These have come to embody the values on question, they guide thinking, they limit choice. They stand guard against the erosion of individual protection by appeals to expediency.

It is a token of the occasional lack of sophistication of the book that our authors often criticize a concept because it does not produce certainty, because it requires the drawing of lines and the making of *ad hoc* judgments. Can it be otherwise if we are to have a law which is alive to significant differences, which is to grow from day to day and to take account of movement and change? Writing of the maxim "audi alteram"—the requirement that a person be heard—they say, ". . . it is, perhaps one of the major failures of British and Australian law that in 1965 no clear principles have been developed to guide the practitioner in this difficult area. All that can be said is that the detailed requirements of audi alteram partem range in a continuum" (p. 156). I would challenge that statement. Lawyers and courts are well aware of the basic concepts of the law in this area; in the overwhelming majority of cases which they meet in their practice the application of the concept is perfectly known. On the other hand, for purposes of deciding the occasional novel case, the concept is fortunately flexible and open. Would our authors have it otherwise?

The least satisfactory treatment in the book, one that particularly suffers from our authors' unwillingness to seek out and formulate useful concepts is that dealing with judicial review of discretionary administrative action. In question are cases in which the administrator is acting under a broad, vague delegation of power. Our authors conclude: "[i]n many, if not most, of the cases where exercises of discretionary powers have been reviewed the court has, by a process of statutory 'interpretation' converted apparently absolute discretions into discretions which are hedged about by limitations which would have startled the parliamentary draftsmen". (p. 186) This conclusion "startles" me by its assumptions. Do our authors suggest that "apparently absolute discretions" are in fact meant by Parliament to be "absolute". I would have supposed with our tradition of an executive bound by law—by tradition, custom, fairness, honesty, decency—that absolute discretion (however "apparent") is precisely what has not been delegated. The logical weakness of the argument is revealed by their critical reference to a court "finding" limits "outside the words of the statute". This, of course, derives from the naive conception of a statute as an isolated, discrete, collection of sterile words without a context of statutory purpose, and without relation to the existing corpus of the law. Fortunately our best judges whether consciously or unconsciously reject this position. They know that the legislators would indeed be "startled" if they treated grants of discretion as "absolute". If each statute had to embody every relevant limitation which purpose, fairness and consistency with the general

body of the law imply, the business of statute making would be impossible. For centuries the courts have been doing the necessary; when a statute is passed it is against this background, and in the expectation of such judicial control.

Will such a concept of judicial review enable us to predict the outcome of each case? Of course not. But it does state the role of the judge and of the lawyers. It takes for granted that in all important judging there is a choice and if that choice is rationally made we must be content. We must accept the proposition that the judge is participating in the law making process. From this there is no escape unless we are to look to the legislature for every decision or to give the executive *carte blanche*.

Our authors' unhappiness with this situation is exemplified by their treatment of two cases. In one case educational authorities sought economy by dismissing teachers and rehiring them at reduced salaries. This was held *ultra vires* because not based on "educational grounds". *Sadler* v. *Sheffield Corp.*, (1924) 1 Ch. 483. In the other case a female teacher was dismissed because she was married. This decision, it was held, was not grounded in a consideration irrelevant to educational concerns. *Short* v. *Poole Corp.*, (1926) 1 Ch. 66. ". . . one may be pardoned" conclude our authors "for asking whether there is any conceivable *rational* (emphasis original) distinction between this and the previous case". (p. 179) It is difficult to answer this question because it is not clear what is being asked. One comes back to their failure to define the concepts which are to govern reasoning about such cases. We may agree that the two cases do not follow from a stated rule. But it is agreed, I take it, that it is not the business of the Court to make rules for the dismissal of school teachers. In both cases the Court proceeded on the same statutory premise: the educational authorities could dismiss only for educational reasons. In the first case it was clear that the dismissal was for economic reasons and the Court did not believe that such a reason was what Parliament had in mind as "educational". In the second case the motivation of the authorities was on the record ambiguous. If the consideration had been that married women should look to their husbands for support and should not displace an unmarried woman, the consideration was not educational and was *ultra vires*. If the consideration had been that a married woman because of her extracurricular concerns does not make as good a teacher, the motivation was of an educational character, and not so unreasonable that the Court would substitute its own policy judgment. The trial and appellate courts differed as to what in fact was the motivation. The appellate court was willing to give the authorities the benefit of the doubt. We may prefer the decisions of the lower court but surely the two cases were decided on a rational basis.

If I make these points it is not to call into question the value or usefulness of this book which I think is very considerable. The authors have themselves opened up these basic questions. It has seemed to me an appropriate occasion to keep the discussion alive.

LOUIS L. JAFFE*

* Professor of Law, Harvard University.