BOOK REVIEWS

RUSSELL ON CRIME, 12th Ed. By J. W. Cecil Turner. [London: Stevens. 1964. 2 Vols. clviii + 1,583 + 62 (index) pp. 14 gns.]

Russell on Crime is now 145 years old. Nine editors and co-editors have assisted Sir William Oldnall Russell's original work through this period, Mr. J.W. Cecil Turner having been responsible for the three post-War editions. This reviewer is in no position to ascertain the extent of the necessarily continuous modifications of the original at the hands of its successive editors, but it is apparent that Mr. Turner's views, as expressed, particularly, in his contributions to *Modern Approach to Criminal Law,* have impressed themselves on *Russell* as it now reads. This is confirmed by the similarity of attitude on most matters between *Russell* and *Kenny's Outlines of Criminal Law,* the last three editions of which have also been by Mr. Turner. Although *Russell* in name, the Russell flavour now contains additives.

This, of course, is in no way to detract from *Russell* as the leading repository of the whole of the present English law of indictable crime. The repository now consists of some 1,600 pages of text, with references to about 4,700 cases and liberal reproduction of statutory provisions. References to the classical writers on Crown Law (particularly, Coke, Hale, Hawkins, Foster, Blackstone and East) still abound.

Before turning to this particular edition, some general features of the present *Russell* may be noted. *Russell's* primary concern is with the principles of the common law relating to criminal liability. These principles have been evolving since the "earliest recorded periods" and so must be approached, indeed can only be understood, historically. For this purpose the classical writers are of great importance (see p. 17). Criminal statutes either plug holes in the common law by *ad hoc* attempts to repress particular mischiefs, or they consolidate the common law. Statutes of the first kind are not notable for their regard for general principle and so are better excluded (they create mainly summary offences anyway) from any attempt to obtain a clear picture of the general principles of criminal liability, which in England are a product of common law growth (pp. 64-5).

Two main difficulties with the present *Russell's* emphasis on general principles can be suggested. The first is that principles pushed too far are likely to yield artificial results. The second is that the principles settled for do not always fit the cases.

To illustrate the first difficulty, the basic common law principle given is, unsurprisingly, *actus non facit reum nisi mens sit rea.* One of the results of the citation of this maxim is the attempt to distinguish and define *actus reus* ("the physical element") and *mens rea* ("the mental element") and to stress the value of analysing criminal liability in terms of these two concepts. An *actus* is defined as the physical result of human conduct and it is *reus* if prohibited by law (pp. 25-8). *Mens rea* is defined, primarily, as a realisation by an accused that the *actus reus* would or might(?) result from his conduct (pp. 39, 52). Where, then, is the intent-to-commit-a-felony requirement of burgulary to be placed. It cannot properly be classified, on the above definitions, as either *actus* or *mens*, although it obviously partakes of the mental rather than the physical. It is treated in *Russell* as part of the *actus.* These definitions also give rise to a difficulty with the requirement that an accused's conduct be voluntary. Because this voluntariness must be a characteristic of the accused's conduct, there are good grounds for treating it as a necessary ingredient of the physical element (as has Glanville Williams), but then, as is indicated in *Russell* (pp. 36-8), voluntariness has been historically associated with the *mens rea* requirement. *Russell* takes neither of these positions, but adds voluntariness as a third requirement of criminal liability. This would

seem to undermine the basic *actus reus/mens rea* principle, for surely not only should those two requirements be necessary for criminal liability, they should also be sufficient. Again, mistake appears to be treated as negativing *actus reus* rather than, as would be expected, *mens rea* (pp. 71-80). The *actus/mens* dichotomy is not always respected in *Russell's* treatment of the various crimes, *e.g., bona fide* claim of right is discussed under "unlawfully" rather than under "maliciously" in the treatment of malicious damage to property, and justifiable homicide seems to be treated under *Mens Rea* in Homicide.

The second difficulty encountered by the *Russell* use of general principles is that they sometimes do not fit the cases. This results in criticisms of a length and scope contendably out of place in a book intended, as this is, for the practitioner (p. 65). Thus on the basis of the principle that the *mens rea* must accompany the conduct resulting in the *actus reus, Meli* is set up and attacked as in violation of it. On the principle that malice in murder should be limited to intention or recklessness as to the victim's death and that the constructive malice manifestation of absolute liability should be treated as a thing of the past, *Beard* and *Vickers* are attacked. *Vickers* seems to be the subject of attack, together with s. 1 of the Homicide Act, because of the distinction drawn in both between constructive malice (which is abolished) and implied malice (which is not). An historical appreciation of malice apparently makes clear that the two things are the same. Although no reference is made to the Homicide Act, 1957, during the discussion of *Beard,* it is indicated later that the retention of implied malice in that Act has necessitated retention in *Russell* of constructive malice cases such as *Beard.* Again, on the principle that *mens rea* should always be subjective, *Ward* and *D.P.P.* v. *Smith* are vigorously assailed. Similarly, on the basis that the criteria for provocation have historically been wholly subjective, the "reasonableness" requirement cases are criticised, particularly *McCarthy* and *Bedder.* Contrary to Mr. Turner's view, it is submitted that little help is to be obtained from *Lee Chun-Chuen* in resisting the reasonable proportionality criterion in provocation. And alleged misunderstandings of the principles of larceny lead to protracted criticisms of *Middleton* and *Riley* (with references to *Modern Approach)* and *Ashwell,* which, despite a number of statements and suggestions (pp. 978, 980, 1553, 1574) that it has been overruled by *Moynes* v. *Coopper,* is criticised in a lengthy appendix; the case is also said in the text to decide nothing (p. 979), although in Turner and Armitage's *Cases,* 3rd ed., 1964, the case is accepted as "fixing the law" (p. 474). Even *Pear* (the original larceny by a trick case of 1779) is still being assailed as against principle. One wonders how far it is possible for the Courts to exercise an influence on *Russell's* general principles. The recent House of Lords case of *Welham* (on forgery) is also exposed at length as illogical and unprincipled.

Another cause for comment is the exclusion or, at best, scanty treatment of matters of evidence and procedure, even when such matters are necessary for a satisfactory understanding of the substantive law. Thus there is no mention of possession of recently stolen property as evidence of guilty knowledge in receiving cases, corroboration other than as required by statute or of a consenting partner accomplice in sodomy cases is not dealt with, insanity other than as affecting criminal responsibility (which itself is dealt with in only 20 pages) is dealt with thinly — *Podola, e.g.,* in relation to fitness to plead is not mentioned. Perhaps the most suprising neglect in this regard is as to burden of proof. This topic is adverted to in about 10 different places throughout the book but nowhere is it dealt with comprehensively or with a view to underlying principles.

Further, it is submitted that the scanty treatment of burden of proof reveals some misconceptions. The main one is the confusion of raising a reasonable doubt with proof on the balance of probabilities (see pp. 36 n. 88, 73-5, 123 n. 10, 849, n. 15). This confusion results in the statement (at p. 102) that, following *Woolmington,* an accused need only raise a doubt as to his sanity to succeed on a plea of insanity, a statement which is contrary to the treatment of insanity in *Woolmington* as an exception to the general rule that the accused need only raise a doubt. There are some other minor errors which should be noted. In *Subramaniam* (p. 91) the Privy Council held not that "duress would afford a defence within the words 'lawful excuse' in Regulation 4 of the Malayan Emergency Regulations, 1951", but that the exception for duress under the Penal Code was not ousted by the 'lawful excuse' provisions of the Regulations. While on references to Malayan matters, why not Malayan (rather than Malay) Emergency Regulations at p. 849, n. 13? The High Court of Australia in *Parker* has flatly repudiated *D.P.P.* v.

Smith, not *Vickers* (p. 507). *(Parker,* by the way, has some interesting judgments on provocation, which, were it not for the apparent general policy of *Russell* not to refer to non-English cases, could usefully have been cited. Now that a Privy Council decision in *Parker* has been given, the case may find a place in the next edition). An attempt to commit suicide is stated to be a crime at p. 176 but, since the Suicide Act, 1961, no crime at all at p. 558, n.7.

There could be other views as to the desirability of retaining some of the material still appearing in *Russell.* Thus the section on excusable homicide seems now only of historical interest, as surely are those constructive murder cases which must be caught by section 1 of the Homicide Act. It is difficult, also, to see any continuing need for the chapter (100) on "Forestalling, Regrating and Ingrossing." This throws up a perhaps more basic point — are there not too many dead trees in the English criminal law forest? Chapter headings such as: "Barratry, Maintenance, Champerty, Buying and Selling Protected Titles, and Embracery" (Ch. 23), "Eavesdroppers, Common Scolds, and Night-Walkers" (Ch. 93), "Dealing in Slaves, Etc." (Ch. 108), suggest an answer. Also the offences against property (Part 7, Chs. 45-90) would seem to offer enormous scope for reducing to lower common denominators the types of property these offences cover. Some of the nuisance offences *(e.g.,* in relation to public entertainments, bawdy-houses) clearly belong to a past era.

Again there appears to be scope for more rational arrangement of the material in *Russell* in a few places. This is particularly so in the chapters on Homicide, Murder and Manslaughter (28, 29 and 31). Under Homicide, to start with, justifiable homicide as already mentioned, appears to be treated under the heading *"Mens Rea* in Homicide", and the heading "Where Death is Caused in Self-Defence" appears to be treated as the third aspect of Homicide after *Actus Reus* and *Mens Rea* therein, rather than as part of Justifiable Homicide (and this is confirmed in the Table of Contents). More importantly, provocation is treated under Murder, not Manslaughter, while the views of the classical writers on homicide are given under Manslaughter, not under Homicide or Murder. Resistance to arrest is treated both under Homicide and Murder. The treatment of causation under Homicide could be rationalised, the nine differently-headed sections plus the introductory section revealing as many overlaps as principles. Subject to what has been said about the law as to offences against property, that area of the law is likely to be the better understood the more rational is its organisation in the texts. Thus larceny would seem more appropriate as opener for this team of offences than the breaking and entering offences (and this would allow stealing in a dwelling-house to be dealt with after larceny, rather than before, as now). Also there could be considerable consolidation of the stealing and malicious damage offences, in particular, dealing with different kinds of property. Again, indictable road traffic offences could perhaps be given more than four pages, but not, as now, in a chapter also dealing with conspiracy, incitement and attempts to murder (Ch. 33).

As to this particular edition of *Russell,* we note the rather unusual but salutary phenomenon of a reduction in size from the previous edition. There are in fact 260 fewer pages of text. The size of this edition, it is stated in the Preface, has been reduced by the relegation of a number of old cases to footnote references. The content of each page is however somewhat more than in the previous edition, so that with the addition of new material, there is probably no great reduction in length. It is also stated in the Preface that: "In few, if any, decades can there have been so many judgments in criminal cases to attract criticism as have occurred since 1954; prominent among these are *Bedder* v. *D.P.P., R.* v. *Vickers, Welham* v. *D.P.P., Sykes* v. *D.P.P., Shaw* v. *D.P.P.* and *Fisher* v. *Raven,* all of which it has been necessary to mention in this edition." This is all a little strange. The previous edition was in 1958 and *Bedder* and *Vickers* were discussed in that. *Shaw* and *Fisher* v. *Raven* are discussed only cursorily — *Shaw* under the Obscene Publications Act and not under conspiracy; *Fisher* v.*Raven* without mentioning that that case has overruled *Ingram,* which is discussed in more detail. Perhaps most surprising is the failure to mention in the Preface *D.P.P.* v. *Smith,* probably the most criticised case of the decade. The last one-third of the Preface is concerned with the "benevolent attitude towards gambling of all kinds to which the population of this country has become increasingly addicted" that is reflected in the Betting, Gaming and Lotteries Act, 1963 (surely, not the "Betting and Gaming Act, 1962" as stated in the Preface). The editor seems somewhat disturbed by this official attitude, as is borne out by the treatment of gaming and betting offences at pp.

1442-1456. It is difficult to see, however, that this legislation has much to do with principles of criminal liability, which are *Russell's* stated concern.

As *Russell* is primarily a reference work, its utility will to some extent depend on its index and tables (of cases and statutes) and here there are some shortcomings. Regarding the index, burden of proof questions are discussed in at least 5 places that are not indexed under "Burden of Proof" (at pp. 102, 123, 453, 683, 763), and of the three places that are indexed, the page number of one is misprinted. ("Proof of" under "insanity" also has the wrong page number.) The strict liability of the old common law that is referred to so often in the text is not indexed, nor are subjective or objective *mens rea* which are mentioned equally often. "Dangerous driving causing death" is referred to in the Manslaughter section of the text, but neither are indexed under the other. The scattered text references to conspiracy are sometimes not indexed *(e.g.* those at pp. 1155, 1302, 1394-5, 1429). For "building" entered under "Society" the reader is informed *"See* Building Society" which is not in the index, and the same for "industrial" and "provident". "Suicide" says *"See also* FELO DE SE", which says only *"See* Suicide". "Carnal Knowledge" says *"See* Sexual Intercourse", which is not indexed. There are errors also in the text references given in the table of case, *e.g., Davenport* (1954), *Davies* (1954), *D.P.P.* v. *Smith, Fisher* v. *Raven, Rose* (1961) and *Welham* v. *D.P.P.* have references to pages on which these cases are not cited, while *Hill* v. *Baxter* has no references to pp. 40 and 64 where it is cited. (This case, strangely, is not discussed in the treatment of voluntariness.) And could not the tabling of cases under D.P.P., A.-G., etc., rather than under the accused's name, be discontinued.

Some misprints in the text and footnotes were also noticed — pp. 30 n. 49 ("416"), 203 last line, 540 n. 15 ("(iii)"), 559 n. 10, 657 n. 28 ("7"), 779 line 1 ("Osborne"), 849 n. 13 ("[1954]"), 1139 n. 5 ("1132"), 1442 n. 63 ("97"), 1465 n. 15 ("462"), 1476 line 11 ("p. 1") — but that is hardly surprising in a work of this length.

A feature of the footnoting is the variety of ways in which a book referred to many times is liable to be cited. Thus Foster's *Crown Law* is cited in at least nine diiferent ways (see pp. 27, 34 (two ways), 74, 91, 132, 445, 463, 573), and *Modern Approach to Criminal Law* in at least seven different ways (see pp. 18, 32, 38, 61, 117, 425, 483). Glanville Williams' *Criminal Law* (presumably) is first cited (at p. 25, n. 24) as Williams, *op.cit.* It is generally not possible to be certain from *Russell's* citations which edition of Williams' *Criminal Law* is the subject of (often quite hostile) reference.

There is unnecessary formal variety in two other ways. Some citations appear in the text and not in the footnotes (see, *e.g.,* at pp. 68, 85, 472-6, 765, 1026, 1253). Also, variation in print size in the text does not always follow the pattern of abstract of cases, quotes and statutory provisions, in smaller print (see *e.g.,* pp. 113-4, 405-8, 883, 1378).

Most of the above remarks are as to details and formalities and are not intended to detract from the value of *Russell* as a repository of English criminal law presented with a view to general principles and historical perspectives. There must, however, be a growing doubt as to how much longer *Russell* can usefully withstand time and the accumulating views of successive editors.

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