

A CASEBOOK ON COMPANY LAW. By H. R. HAHLO. [London: Sweet & Maxwell. 1970. xxviii + 593 with Index). Paperback: £3.50 net].

Students of Company Law have hitherto been at a serious disadvantage owing to the conspicuous absence in the market of a readable and manageable textbook and casebook on the subject. *Gower* is of course an excellent work, but most people would agree that it is pretty hard going. One of the main reasons for this is that in order to allow himself more space in the book to discuss critically the legal principles and policy assumptions of the law Professor Gower had to dispense with the facts of many important cases and extracts of certain judgments. The result is that it is very difficult to follow the text unless one is already familiar with the cases he refers to or at least has immediate access to a casebook. As Professor Gower points out in his *Foreword* to Hahlo's *Casebook*, "we have not had any book of cases and other materials comparable, say, to *Smith & Thomas on Contract*" and "have looked enviously at South Africa where Professor Hahlo's excellent *Company Law Through the Cases*, now in its second edition." Fortunately Professor Hahlo was finally persuaded to prepare what he has called "an English version" of his South African publication, and the result is a book which in filling a serious gap adds, in Gower's words, "a new dimension to the study of Company Law." Although the original South African edition of the book was modestly intended for "students of Commerce and accountancy, practising accountants and, within limits, the legal profession", the collection of

materials was scholarly and impressive. The materials in the new edition are, as Gower observes in the *Foreword*, equally if not even more "catholic, perceptive and up to date."

Professor Hahlo sees his casebook as "a teaching tool", "intended to supplement a textbook, but not to replace it." In his selection of the cases he had "acted on the assumption that it is better to have too many cases rather than too few", leaving to individual teachers the task of choosing for themselves the cases which they wish their students to read. Cases and statutory provisions from Australia, New Zealand and Canada are included in addition to the English materials in areas where it was thought that comparative law would be of help in casting light on various points and approaches. A small but significant selection of American materials is also included for this reason. Professor Hahlo's concern for company law reform is clearly reflected in his use of comparative law. Extremely interesting and important extracts are also taken from the Cohen and Jenkins Reports in England, the Ontario Select Committee Report on Company Law in Canada, and Gower's Draft Companies Code of Ghana. The Ontario Report and the Ghana Code are not easily available. Strangely, however, there are no extracts from the Australian Eggleston Reports, which too are not easily available.

It is quite clear from his selection of materials that Professor Hahlo is concerned that the student should not merely deal with the law as it *is* but should venture further to inquire what the law *ought* to be. One way of furthering this objective is to introduce comparative law materials in order to enable students to see what has been done or is being done in other countries which have comparable systems of law. But it is submitted that this approach must remain secondary to a more basic one, namely, in this context, the sociology of company law approach. What the student should be made aware of, above all, are the extra-legal sources which deal with business practice, the economic and social functions of business organisations, their structures, their social, economic and political impact on society, and other matters affecting the expectations and behaviour of investors, managerial staff, workers and the State. The student should surely be informed, for example, of the social and economic functions of the debenture, the take-over bid, etc. It is submitted that it is quite impossible to really understand the law as it *is* in practice without a relatively sound knowledge of certain extra-legal materials. Increasingly it is being recognised even in England that the sociology of law approach is basic to any venture towards law reform: cf. the approach of the Donovan Commission on Trade Unions and Employers Associations, Cmnd. 3623 (1968). To suggest that a similar approach should be taken in the preparation of a legal casebook is not really as radical as it may sound to some. This was the approach adopted by Llewellyn in his *Cases and Materials on the Law of Sales*, first published in 1931: cf. Twining, 'Two Works of Karl Llewellyn' (1967) 30 M.L.R. 514, at pp. 517ff. More recently, the Ormrod Report on Legal Education, Cmnd.4595 (1971), para. 96, observed: "the influence of ideas, knowledge and attitudes derived from psychology, sociology and criminology, and the other sciences, must make an increasing impact on the law in practice and the profession will need to equip itself to use such material in an informed and critical manner." (One informed commentator has criticised that nevertheless "both by example and by prescription, the Committee demonstrates a disdain for the social sciences" — Arthurs, 'The Ormrod Report: A Canadian Reaction' (1971) 34 M.L.R. 642, at p. 651.)

It is in the failure to adopt a sociology of law approach in the selection of materials that one finds in *Hahlo* certain disappointment. The materials on pages 30-33 entitled 'The Reality of the Modern Company', though well served by Professor Hahlo's introduction (pp. 27-29), are surely inadequate. Much of the extracts in this section are simply too brief, varying from two to four lines. And the few lines on page 33 taken from Hobbes' *Leviathan* should surely be omitted! On the other hand, mention at least might have been made of Robin Marris' celebrated work, *The Economic Theory of Managerial Capitalism*. Indeed, this reviewer would go further and suggest that extracts from various parts of this highly original and important work should have been included in the casebook.

Generally the classification and arrangement of subject-matter is more helpful and certainly less confusing than that in *Gower*. Apart from the author's deliberate omission of a chapter on the liquidation of companies — which is hard to justify — it does seem odd that the last chapter should be on 'Accounts and Accountants', and the materials on 'Prospectuses' squeezed in between 'Promoters' and 'Pre-incorporation Contracts' in Chapter 3. The headings and sub-headings in each chapter are helpful.

Each chapter begins with a detailed table of contents. The cases are preceded by an introduction to the relevant statutory provisions, and detailed notes are provided at the end of each section of materials. There are a few technical mistakes, one or two of which are rather odd. For example, the case of *Einhorn v. Westmount Investments Ltd.* (1969) 6 D.L.R. (3d) 71 is mistaken for *Torquay Hotel Co. v. Cousins* on pages 21 and 450. Other matters of detail might also be the subject of criticism. On page 25 the reference to statutory provisions on unit trusts could have been usefully followed up with a short bibliography on the subject. On page 40 the note on the distinction between an illegal and an *ultra vires* act fails to mention *Anderson v. Midland Ry.* [1902] 1 Ch. 369 which deals with this point very clearly. The materials on 'Implied Powers' (pp. 44-47) might have included extracts from the Third Schedule of the Australian Uniform Companies Act which contains uniquely wide statutorily implied powers. Also s. 19 of the Australian Act might have been mentioned on page 51 along with the notes on charitable donations by companies. On pages 59-61 the lengthy notes on the consequences of *ultra vires* transactions fail to include *Re K.L.Tractors* (1961) 106 C.L.R. 318 and *Breckenridge Speedway v. R.* (1967) 64 D.L.R. (2d) 488. On pages 66-67 the reform of *ultra vires* provision is taken from the American Model Business Corporation Act, on which the Australian section 20 is based. The Singapore provision on this point (also s. 20), though based on the Australian provision, is somewhat different and is arguably closer in effect to the Californian provision, which represents a more radical reform of *ultra vires*. Both the Singapore and Californian provisions are not mentioned by Professor Hahlo although they present a significant alternative model for reform. The notes on page 67 do not relate to the preceding section on the reform of *ultra vires*, though there is an interesting collection of American materials on the subject which might have been usefully 'noted' at this point. For example, reference might have been made to a note by J. E. Kennedy in (1958-59) 34 Notre Dame Lawyer 99-108, where the relevance of the distinction between an illegal and an *ultra vires* act to the analysis of statutory provisions reforming the *ultra vires* doctrine is discussed. Instead, however, the notes on page 67 strangely refer at this juncture to the position of the old chartered companies. Even so the notes fail to mention the crucial case of *Sutton's Hospital* (1613) 10 Co. Rep. 1a.

On pages 72-76 the materials on 'Alteration of Articles' do not even contain reference to the dismissal of managing directors cases. *Southern Foundries Ltd. v. Shirlaw* and other cases on the point are dealt with in another portion of the book on pages 304-12. There should therefore be a reference on page 76 to the cases in pages 304-12. In the introduction to 'Prospectuses' on pages 88-89 mere reference to the Prevention of Fraud (Investments) Act and the Theft Act is surely not enough. Either extracts or a summary of ss. 13-16 of the former Act and s. 19 of the Theft Act should have been included in the materials. On page 99 s. 1 of the Misrepresentation Act 1967 should have been mentioned in the notes. The notes on debentures at pages 147-48 might have mentioned *Knightsbridge Estates Trust Ltd. v. Byrne* [1940] A.C. 613. The materials on Floating Charges (pp. 150-53) make no reference to the relevant provisions of the Bill of Sales Act. Pennington's 'The Genesis of the Floating Charge' (1960) 23 M.L.R. 630 might have been suggested for further reading. On page 247 the notes on the transfer of shares might have dealt with *Re Ogilvy* (1966) 58 D.L.R. (2d) 385 on the relevance of the perpetuity rule. On page 316 the extract from *Re Richmond Gate Property Co. Ltd.* omits the passage in which Plowman J. said that the parties agreed that the managing director was not to receive any remuneration until after the company had got firmly on its feet: [1965] 1 W.L.R. 335, at p. 338. Arguably this passage was crucial in this case: cf. Marshall Evans, 'Quantum Meruit and the Managing Director' (1966) 29 M.L.R. 608. It is of interest to note that *Bamford v. Bamford* is treated in the section dealing with the residual powers of the general meeting (p. 349) while *Hogg v. Cramphorn* is put in the section on Director's Fiduciary Duties (p. 375). There should be a cross-reference to *Hogg's* case at the end of the *Bamford* extracts. There appears to be no mention of the Australian provision on the director's statutory duty of diligence and Ross Parsons' analysis of this in the Melbourne University Law Review in the section of the book on directors' duties of care and skill. The discussion on *Re Roith Ltd.* in the notes on fiduciary duties (p. 381) does not provide a cross-reference to the section on pp. 49ff dealing with *Re Lee, Behrens & Co.* The decision of the Supreme Court of Canada in *Pre-Cam Exploration & Development Ltd. v. McTavish* (1966) 56 W.W.R. 697 might have been mentioned along with the *Cranleigh Precision* case on page 400. *Cook v. Deeks* (p. 400) is not followed up with notes on the ratification point. Instead, after that case extracts from two South African cases on theft by directors are provided, and the notes on page 406 refer to a Canadian case also on theft. But there is no mention of the relevant provisions of the English Theft Act. It is

suggested that the theft cases should be treated separately from cases like *Cook v. Deeks* and that a different sub-heading should be given for them. On pages 410-11 detailed notes on insider trading are provided, including the seminal *Texas Gulf Sulphur* case from the U.S. But the Australian provision on insider trading is to be found on page 370 and there is no cross-reference to it on pages 410-11. The American case of *Diamond v. Oreamuno* (on page 417) surely deserves more elaborate treatment than in mere note form. It would seem that the new Securities Industry Act 1970 from New South Wales did not appear in time for consideration for this casebook. However, the 'market rigging' section (pp. 413-17) might have mentioned the relevant provisions of the English Prevention of Fraud (Investments) Act 1958.

On page 444 the notes on the Rule in *Turquand's* case do not refer to Montrose's article on the *Freeman & Lockyear* case published in the 1965 volume of this *Review*, now also printed in Hanbury's *Precedent in English Law* (1968), a collection of papers by Montrose. A much earlier article on the subject by Montrose published in the 1934 volume of the *Law Quarterly Review* is mentioned instead! There is no comment in the notes on the relation between the Rule in *Turquand's* case and the *ultra vires* reform provisions dealt with earlier. It is submitted that the effect of the Singapore and Californian provisions on *ultra vires* is to greatly strengthen the Rule in *Turquand's* case by the implicit abolition of the constructive notice doctrine, thus providing greater protection for the company's creditors and other contractors. It is further submitted that the Australian section 20 does not have this effect. Professor Hahlo fails to deal with this point even though any attempt to reform the *ultra vires* doctrine must inevitably grapple with the problems raised by it.

On page 491 *Heyting v. Dupont* is merely referred to in note form: this is surely inadequate. The ratification point mentioned in the notes on this page might have referred to *Salmon v. Quin & Axtens Ltd.* (extracts provided on p. 335) and *Hogg v. Cramphorn* (cf. p. 453). The notes on the sale of corporate control on page 497 might have mentioned *Jones v. H. F. Ahmanson & Co.*, 460 P.2d 464 (1969). The materials on sections 210 and 222 of the English Companies Act 1948 might have been enhanced by a reference to section 181 of the Singapore Companies Act, a very radical provision, discussed by Polack in (1969) 11 *Malaya Law Rev.* 345. See also Afterman, 'Statutory Protection for Oppressed Minority Shareholders: A Model for Reform' (1969) *Virginia L.R.* 1043. The views of the Ontario Select Committee on this subject are most interesting, and the reader should be grateful to Professor Hahlo for including the relevant Ontario extracts. The Committee surely reported in 1967, not 2967 (p. 516).

Throughout the book there are scattered extracts from the cases which are much too brief to be of help: see for example, pages 44, 70, 126, 145, 183, 193, 226, 258, 372 and 467. The *Hiekman* case is given on page 70 without the facts; *Re National Telephone Co.* (on p. 126) might have been replaced by *Re Isle of Thanet Electricity Supply Co. Ltd.* which appears only in note form on page 131. The facts of *Boschoek Proprietary Co. Ltd. v. Fuke* (pp. 258-59) might have been given in order to clarify the alleged irregularity referred to in the judgment. Other critics might go further and suggest that by and large the extracts taken from the cases throughout the book are much too brief. Professor Twining has argued with Llewellyn that "the facts of cases have a significance that transcends their significance as precedents and illustrations of doctrine; they are concrete illustrations of business situations, which give a flavour of practice beyond the particular legal issues involved; they are also excellent raw material for students to treat as problems, more closely related to 'real life' than artificial hypothetical fact-situations dreamed up by academic lawyers." (See Twining, *op. cit.*, p. 521). This argument, however, can be carried too far. As Professor Kahn-Freund pointed out on several occasions, while it is true that "litigation is a pathological phenomenon" and "the reported cases are the cases of the most serious diseases" which require the lawyer's attention, the result is that the lawyer's mind tends to concentrate "on phenomena which are socially marginal." From the educational point of view, "is legal education based on case law not like a medical education which would plunge the student into morbid anatomy and pathology without having taught him the anatomy and physiology of the healthy body? More than that, is the concentration on decided, and especially on reported, cases not like a clinical education which would enable the doctor to diagnose and to treat some complicated brain tumor without ever telling him how to help a patient suffering from a simple stomach upset?" (Kahn-Freund, 'Reflections on Legal Education' (1966) 29 *M.L.R.* 121, at p. 127.) This point, however, is not necessarily opposed to the Twining-Llewellyn argument. In the context of Hahlo's casebook there is,

it is submitted, justification in the criticism that the extracts from the cases are much too brief. At the same time, Professor Kahn-Freund's point may also, with justification, be levelled as a criticism of Hahlo's approach. This brings us back to the point made earlier that a most serious flaw in this casebook lies in its reflection of the author's failure to adopt a systematic sociology of law approach. Had such an approach been taken in the selection of materials the student might have been made aware, for instance, in the section on *ultra vires* and the chapter on directors' fiduciary duties, that in many schemes of group reorganisation the transfer of assets from one company in the group to another is in practice made at book value, which is in many cases well below the actual value: cf. Monroe [1963] B.T.R. 38. There are other instances where trading stock is sold by one company to another in the group at a derisory price for tax purposes. In one case, Lord Denning, M.R. said that this "is just on a par with a case where a company gives its money away" or chooses "to give things away or throw them into the sea." (See *Petrotim Securities Ltd. v. Ayres* [1964] 1 All E.R. 269.)

In his notes to the cases Professor Hahlo does not attempt to raise questions about the policy assumptions of the rules of law. Thus, for example, the student's mind is not directed to inquire whether companies should be amenable to the criminal law. As Dr. Sealy points out: "If fines are imposed on a company and further fines on its directors, then the latter (if shareholders) are doubly punished; but other totally innocent shareholders, and even employees and customers, will also suffer indirect penalties for acts over which they may have had no control." (Sealy in Jolowicz, *The Division and Classification of the Law* (1970), at p. 76.) Further, in a traditional approach to the subject it is somewhat inevitable that there should be a failure to deal with the problems of workers' representation in boards of directors, now the subject of a fairly rich literature in the journals, and, significantly, the subject of a whole chapter in the Donovan Report, referred to above. Similarly, Professor Hahlo makes no mention of the labour problems attendant upon an amalgamation or take-over and their relevance to the company law rules. Other omissions of this nature could be multiplied. What all this shows is that the traditional approach in the preparation of a casebook does restrict the range of materials which may otherwise be thought to be of direct relevance to an understanding of the law in operation. To point this out, however, is not necessarily to suggest that Professor Hahlo should have published an entirely different book. Opinions are bound to differ as to teaching techniques and educational objectives. And the debates on these issues are bound to continue in the years to come.

It is the conclusion of this reviewer that *Hahlo* is quite the best work of its kind in the market. It is unquestionably an indispensable companion to *Gower*.