

## BOOK REVIEWS

*Australian Federal Constitutional Law*, by COLIN HOWARD, LL.M. (Lond.), Ph.D. (Adelaide). (Law Book Company Ltd, Australia, 1968), pp. 1-371 and index. Price \$12.00.

This is not just another book on Australian constitutional law adding to the many and diverse works on aspects of that subject which have been published since the dramatic growth of Commonwealth power during and since the Second World War: it does not profess the comprehensiveness nor size of Wynes, the apparent but cryptic simplicity of Lane, *Australian Constitutional Law* (1964), nor the non-legal character of Sawyer, *Australian Federalism in the Courts* (1967); if a comparison with any previous work in this field has to be made it would most closely resemble the late Professor Harrison Moore's student edition of *The Commonwealth of Australia* (1910), published nearly fifty years ago, which exhibited a masterly style as well as profound understanding of the Constitution.

Professor Howard, who coincidentally also occupies a Chair of Law at the University of Melbourne has been conscious of the problems of writing a book on the Australian Constitution which would be of proper proportions and suitably orientated. He has excluded historical material relating to the drafting of the Constitution and has not treated political or governmental factors as relevant. It is thus a book written essentially by a lawyer and for readers who have a general knowledge of the law but not necessarily of the Constitution. For this reason, as well as for the clarity and conciseness of expression, the work will be an admirable text book for students.

One advantage possessed by a work on Australian constitutional law written at this time is, as Professor Howard demonstrates, that there is now a reasonably static body of constitutional doctrine, due largely no doubt to the impact of the views of Dixon J. as a member of the High Court from 1929 to 1964, of which the last twelve years were as Chief Justice. His influence and the acceptance by his contemporaries of the principles and interpretations he has expounded over many years have left relatively small margin for any substantial measure of dissent and little room for any major doubts about questions of validity in the traditional fields of power. It accordingly is cheering to the student and the lawyer alike to be able to read, at the end of each Chapter or separate topic, within a short compass, the present position with respect to various aspects of constitutional power without being troubled too much by historical developments and to know that most of the conclusions expressed by the author have the consistent support of several judgments or of a unanimous High Court. Where this is not so Professor Howard has not shirked the responsibility of formulating and stating his own views—not with the dogmatism which sometimes embellishes academic utterances—but with a sound blending of judgment and deference. On some of these matters there may be disagreement and on others the uncertain state of the law defies clear formulation so that, as he says on the subject of the territories power in section 122, '[t]he best one can do is guess from the apparent course of judicial opinion'. (p. 343).

Particularly deserving of commendation is Chapter 5, 'Trade and Commerce', which occupies more than one hundred pages and the major part of which is devoted to a discussion of section 92. In this, perforce, some historical treatment has been inevitable because so many of the problems of construction and application of the section stem from *McArthur's* case;<sup>1</sup> it may even be that some fuller exposition could with advantage have been undertaken of the attempts between 1920 and 1930 to develop a state 'police power', as Higgins J. called it, and how this failed with the passage from the judicial stage of Higgins and Isaacs JJ. in 1929 and 1930. The development of judicial doctrine in the years down to 1936 and in the period from the *Bank Nationalization* case<sup>2</sup> to date is excellently covered and when the part of the Privy Council is laid bare by clear analysis, no illusion is left of that body's lack of true understanding of the problems created by section 51(i) and section 92; at

<sup>1</sup> (1920) 28 C.L.R. 530.

<sup>2</sup> (1949) 79 C.L.R. 497.

the best the Privy Council has done little more in this field than resolve deadlocks or quieten the dissents which had beset decisions of the High Court.

It would, however, not give a true balance to this book to make special claims for one chapter; its quality is uniformly sound and if, as has been predicted, the present body of constitutional doctrine remains reasonably static for a little time in the future, it should prove a most useful text book for students and lawyers for many years to come.

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*A Multitude of Counsellors—A History of the Victorian Bar*, by the Hon. SIR ARTHUR DEAN, Kt., Q.C., LL.M., Hon. LL.D. (Melb. and W.A.). (F. W. Cheshire Pty Ltd for the Bar Council of Victoria, Melbourne, 1968), Contents and Introduction (pages unnumbered), pp. 1-327; Index pp. 329-332. Price \$10.50.

'The dependency, in our system of law, of the Bench upon the Bar can hardly be exaggerated.' So spoke Sir Owen Dixon in Perth in 1952. It is in part that dependency which renders necessary the mention in the law reports of the names of counsel and of a summary of their arguments. (Why the practice of the Victorian Reports not to record any argument at all is tolerated by the Council of Law Reporting this reviewer cannot understand). For an appreciation of the precise weight to be accorded to any reported case a good deal must be known about the judge, including his professional life before he reached the Bench, and about the counsel by whom and about the way in which the case was argued. It is assumed, for example, that any dictum by Weigall A.J. upon a point of equity must be seriously regarded, for while he was only an acting judge of the Supreme Court of Victoria for little more than three years he was for about twenty years the undisputed leader of the Equity Bar. No argument by the late Stanley Lewis upon a point of practice, (and it is probable that every practice point that could be argued was argued at one time or another by Stanley), ever omitted any relevant consideration. Examples might be multiplied.

It is therefore not merely for entertainment that we lawyers seek to know something of those of our profession *qui ante nos in mundo fuere*, as the old student song has it. While judgments deemed worthy of reporting are preserved and with them something of the judges, little is known of Counsel after a generation or so. Their names and their deeds are entombed in the urns and sepulchres of mortality and all that their successors commonly may know of them is what may be gathered from brief mention in the law reports. The labours of such as Sir Arthur Dean are accordingly of far more importance than the casual reader would realize. Unless succeeding generations of counsel know of what manner of men their predecessors were, under what conditions their work was done and what the nature of the society in which they lived was, much of what is essential to a proper understanding of the law as stated in the authorities cannot be known. Moreover, the members of the Victorian Bar in particular, when they think of the future, need to know the history of their Bar as an institution. It has in remarkable fashion succeeded in preserving itself *de facto* as a separate entity despite the statutory amalgamation of the two branches of the profession in 1891 and various attempts in the succeeding years to make that amalgamation a fact.

Apart from Forde, *The Story of the Bar of Victoria* (1913) which professed to carry the story up to the amalgamation of 1891, nothing in the nature of an historical account of that Bar existed before Sir Arthur's work. Forde's book is interesting but he was a journalist and not a lawyer, and his volume suffers accordingly. The late P. A. Jacobs of counsel taught many of us in delightful fashion at bar dinners much about men of the early years of this century and some of this he published in newspaper articles and in three books of legal anecdote. Tradition preserved something; but with the relatively recent rapid expansion of the Bar it became probable that such tradition as existed might die out. And so the Bar Council entrusted Sir Arthur Dean on his retirement from the Bench in May 1965 with the compilation of materials for this history and ultimately with the writing of it.

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