BOOK REVIEWS

Essays on the Australian Constitution, edited by R. ELSE-MITCHELL, LL.B. (Syd.). (The Law Book Co. of Australasia Pty. Ltd., 1952), pp. xxix, 313 and index. Price £2 2s.

The Australian Constitution, by H. S. NICHOLAS, M.A. (Oxon) of the Inner Temple, Barrister-at-Law, formerly Chief Judge in Equity of the Supreme Court of New South Wales. (The Law Book Co. of Australasia Pty. Ltd., 2nd edition, 1952), pp. xxxvii, 444 and index. Price £3 10s.

Federalism—An Australian Jubilee Study, edited by Professor GEOFFREY SAWER, of the Australian National University. (F. W. Cheshire, for the Australian National University), pp. xii, 278 and index. Price £1 19s.6d.

The recent Commonwealth Jubilee has proved a considerable stimulus in the field of Constitutional Law. The Legal Convention in Sydney heard and discussed Professor Bailey's evaluation of the first fifty years of the Commonwealth.[1] The Law Book Company is to be congratulated both on a timely second edition of Nicholas on *The Australian Constitution,* and a series of *Essays on the Australian Constitution* by a panel of distinguished public figures. Finally, at Canberra, the National University organized two seminars on Federalism, the proceedings of which have now been published under the editorship of Professor Sawer.[2]

The *Essays* are edited by R. Else-Mitchell, lecturer in Constitutional Law at the University of Sydney.[3] There is a formidable list of contributors, which achieves a neat balance between "academic" and "practical", with Mr. A. J. Hannan, formerly Crown Solicitor of South Australia, representing perhaps the State Administrations, and Sir John Latham initiating and presiding as representing the Judiciary.[4]

The volume, naturally enough, does not attempt "to cover in a logical and comprehensive way the entire field of Australian constitutional history and legal development since 1901", but rather to

[1] 25 A.L.J. 314.

[2] These seminars also prompted the article "Judicial Review under Section 90 of the Constitution—an Economist's View" (25 A. L. J. 667, 706) by Professor Arndt, Canberra University College.

[3] One of the general editors of the A.L.J.

[4] Other contributors include F. R. Beasley, B.A. (Oxon), LL.B. (Syd.); Geoffrey Sawer, B.A., LL.M. (Melb.); Ross Anderson, M.A. (Oxon), LL.B. (W.A.); Douglas I. Menzies, Q.C.; R. W. Baker, B.C.L. (Oxon), B.Litt. (Oxon), LL.B. (Tas.); R. M. Eggleston, Q.C., LL.B. (Melb.); P. D. Phillips, Q.C., M.A., LL.M. (Melb.); J. G. Starke, B.A., LL.B., B.C.L. (Oxon).

"highlight particular features of Australian federalism and of the Constitution, to discuss a few of the more important Commonwealth powers and to indicate how the Commonwealth has, in some fields, achieved wider powers and a higher status". The hope is expressed that the topics "will have a wider appeal for the political scientist, the economist and the student of public administration" as well as the constitutional lawyer. And, it might be added, for the layman as well. My impression was that the essays were eminently readable and mostly on topics which directly affect the ordinary citizen in his daily life. If the man in the street is expected to grapple with the technicalities of nuclear fission, he could surely easily master most of this volume, though he might be forgiven if he despaired at some of the intricacies of s. 92, or the problems of "double jurisdiction" and "*inter se* questions", however lucidly dealt with by Professor Sawer (pp. 86-93).

I should think this volume would be invaluable also for students who all too often tend to be lost in the "wilderness of single instances". The essays are more concerned with the actual working of the Constitution than with detailed analysis or attempted reconciliations of the many cases. They illustrate general trends and developments, providing a pattern or background against which the single cases can be viewed and understood.

It would be invidious to single out any particular essay for special comment, and it is impossible to deal with each essay with any degree of adequacy. Hence what follow are a few comments taken at random from impressions gained on reading the whole series.

In such a volume, and with such contributors, it would obviously be absurd to attempt any uniformity of treatment. It might have been done with lesser contributors and a more dictatorial editor. But Mr. Else-Mitchell apparently gave the writers a free rein, with happier results. The diversity of approach, the different viewpoints taken, do not destroy the underlying unity of the work, an evaluation of the Constitution as a working instrument of government. Thus Mr. D. I. Menzies and Professor Baker consider that the defence power[5] and the compulsory acquisition[6] powers have proved more than adequate to the demands made upon them. Writing on Commonwealth-State relations,[7] Mr. Ross Anderson in a vigorously written paper sees the States as ageing parents more and more dependent on the support of their lusty offspring, the Commonwealth. Whereas Mr. A. J. Hannan, dealing with the same problem in his paper "Finance and Taxation", considers that "at the end of the first fifty years the Government of Australia is being carried on

[5]p. 155. [6]p. 184. [7]p. 130-1.

much as the framers of the Constitution intended", while the powers of the States remain "substantially unimpaired".[8] Moreover, though he thinks the *Uniform Tax* case is not a binding authority for determining the validity of peace-time legislation, he is happy in the conviction that the fruits of the victory went to the States especially the more "sparsely populated" ones such as South Australia, and does not seem really anxious for a return to the States of their taxing powers. Incidentally, Mr. Anderson and Mr. Hannan reveal an amusing contrast in style. In describing the "formation" of the Commonwealth, both adopt the marriage metaphor. To Mr. Anderson, "the Commonwealth of Australia . . . was begotten of no great surge of political idealism; it was in fact the child of as hard-headed a *mariage de convenance* as was ever arranged in the salons of France. The eminently practical considerations responsible for the union which gave it birth are reflected in the early legislation of the Commonwealth Parliament . . ."[9] For Mr. Hannan, the Convention delegates "were carried away with an enthusiasm and idealism which made them blind to material considerations. They were like an infatuated bridegroom drawing up the marriage settlement in the determination to take literally the words of the marriage service, 'with all my worldly goods I thee endow' . . ."[10]

Writing on the "Commonwealth in International Affairs", Mr. J. G. Starke refuses to join in any chorus of praise. "This leads one to the final question whether the Constitution has proved an adequate instrument in the conduct of the Commonwealth's diplomacy, having regard to the changes which have taken place in the last decade. It must be apparent from this study that it is not."[11] For everything depends on the extent of the "external affairs" power. He considers this power is wide enough to enable the Commonwealth Parliament to "legislate with reference to independent treaty commitments properly entered into" but this of course begs a vital question. I would have preferred some more detailed analysis of pl. (xxix), for despite the general trend of opinion it has always seemed that *The King v. Burgess, ex parte Henry*[12] did not give "unlimited" legislative power to the Commonwealth in the implementation of treaties.[13] Latham C.J., Dixon and Starke JJ. all recognized the need for some qualification, though the exact extent of that qualification has never been explored. Certainly most of the State Crown Law offices would not subscribe to the wider view of the power.

[8]p. 282. [9]p. 94. [10]p. 264 [11]p. 313.
[12](1936) 55 C.L.R. 608.
[13]That is, apart altogether from the acknowledged fact that the power is subject, for example, to the various prohibitions contained in the Constitution.

In all, this is an interesting, provocative, and widely useful volume, excellently got up and printed. Among the very few typographical errors noticed was a misplaced line, pp. 231-2, and perhaps, "formula" where the plural was intended (p. 250).

In the course of discussion on Professor Sawer's paper "The Record of Judicial Review",[14] Professor Stone, speaking of the standard of juristic research in Australia, makes the following pertinent suggestion:

> "We are at a stage, in my view, when we need, not so much general surveys of the whole field of law in relation to society, as an adequate number of monographs on certain carefully delimited topics of law. We need particularly ten or twelve careful monographs describing in detail not the over-all functioning of the Constitution, but the precise working out of such matters as the defence, the commerce, and taxing powers, and so on . . ."

Perhaps it is this lack that is responsible for the reviewer adhering to his opinion that the ideal text-book on Australian Constitutional Law has yet to be written. This is said with no disrespect intended for the second edition of Nicholas on *The Australian Constitution.* It is the only current text-book on the subject – but that is not the only ground for its recommendation. The author, a former Chief Judge in Equity of the Supreme Court of New South Wales, has had a long and intimate association with the history of constitutional development, dating back at least to the Royal Commission on the Constitution 1927-8, which he assisted as Counsel.

Apart from some rearrangement in the order of chapters and the inclusion of a section on crimes, the general outline of the new edition follows that of the first. Such extra material as is incorporated relates to the changes introduced by the Nationality and Citizenship Act, decisions on s. 92, the limits of the defence power following the conclusion of active warfare, and the narrowing of the jurisdiction of the Privy Council in constitutional disputes. It is proposed to deal in the main with this new material.

Most of the inaccuracies referred to in reviews of the previous editions have been corrected, but some still persist. For example, in the discussion on the external affairs power, the author cites a statement by the Rt. Hon. R. G. Menzies, "then Minister for External Affairs". The reference given is *"Hansard,* vol. 48, p. 1865".[15] Not only are both volume and page numbers incorrect

[14] *Federalism—an Australian Jubilee Study,* p. 250, reviewed below.
[15] p. 106.

(correct reference is vol. 148, p. 1861), but Mr. Menzies was then Attorney-General and Minister for Industry, and only representing the Minister for External Affairs (Senator Sir George Pearce) in the House of Representatives.

So too on p. 385, in discussing the Full Faith and Credit Clause (s. 118) of the Constitution, the author refers to *Harris v. Harris*[16] and states that in that case Fullagar J. "distinguished a number of decisions of the Supreme Court of the United States in which it had been held that a decree pronounced in one State could not be challenged in another if in the first State jurisdiction had not been contested". Surely the effect of those decisions was that the decision could not be challenged if there *had* been a contest as to jurisdiction in the first case.[17]

Again, it is misleading to read (p. 181) that "Loans raised in New York are converted to sterling at 4.8665 dollars to the pound".

It must be confessed that to this reviewer at least, the general style of this book remains clumsy and awkward, a failing probably accentuated by the policy of including all references, etc., in the body of the text. This leads to a plethora of brackets, all of the same shape, so that it is often impossible to tell at first reading from where the following words continue, e.g. pp. 251, 336.

So far as s. 92 is concerned, it is always comparatively easy to criticize the attempt by another to give the subject "a higher degree of definition than it will admit". The main fault of this chapter (XXI) is its lack of organization. To some extent the cases are grouped under "functional" heads, e.g. Police Power, Expropriation, Dedications. Then comes a discussion on the "Scope of the Section" before returning to Transport, Health, and Impositions. "Later Decisions" then takes us up to 1939, to be followed by "Air Lines" (in which is included *Gratwick v. Johnson*).[18] There is a long but somewhat unsatisfactory analysis of the "Banking Legislation", a brief paragraph on "Cases since 1949", a separate section for "State Pools", and concluding with "Natural Monopolies", a description introduced by the author in the following ungraceful sentence:

> "The post office, they (sc. the Privy Council) might have held, like the gas main, may be regarded as a natural monopoly . . ." (p. 283).

With such a method of treatment, repetition is inevitable, but still that could hardly justify three references to the application for leave to appeal in *McCarter v. Brodie*.[19] At p. 262 this was

[16][1947] V.L.R. 44.
[17]Cf. "Full Faith and Credit—The Australian Experience", by Professor Z. Cowen, 6 *Res Judicatae* 43.
[18](1945) 70 C.L.R. 1.
[19](1950) 80 C.L.R. 432.

"refused after lengthy argument". At p. 268, "Special leave was refused by the Privy Council, but without reasons". At p. 279, the defeated lorry owner (once more) applied to the Privy Council. The argument occupied three days. "Their Lordships refused leave and gave no reasons. They referred to the possibility of giving reasons at a later date, but no reasons have been given." The whole discussion of s. 92 typifies the tendency of the author to rely on a quotation as providing the answer to a problem he has raised. All too seldom does he give his own views on the question. There is little real penetration beyond what has been *said* in the cases. This section is in striking contrast with the much more sophisticated, (if also occasionally much more obscure), discussion of the Trade and Commerce power by Mr. P. D. Phillips in *Essays on the Constitution (supra).*

The procedural points raised by s. 74 of the Constitution are well dealt with (p. 367 *et seq.*). But in the point of substance, what constitutes an *inter se* question, the author seems to accept the astonishing statement of Lord Normand in the *Banking* case,[20] that no *inter se* question can arise in relation to an exclusive power of the Commonwealth, a statement which, in Professor Sawer's opinion, "appears to rest on a complete misinterpretation of what Dixon J. said in *Ex parte Nelson*".[21]

It seems strange that the *Uniform Tax* case[22] is not mentioned in the discussion of the Defence Power. The Income Tax (War Time Arrangements) Act was based on the defence power and the Court divided sharply on its validity. Also, with the *Clothing Factory* case[23] might have been contrasted the *Shipping Board* case,[24] as to the extent of the Defence Power in time of peace. In fact, apart from the analysis of the *Communist Party* case,[25] there is practically no discussion of the extent of the power in time of peace – a problem highlighted again by the decision in *Marcus Clark & Co. Ltd. v. the Commonwealth.*[26] (Most of the cases dealt with by the author under this head refer to the immediate post-war period.)

The several detailed criticisms of this work are not meant to deny its general worth and value. It is an extremely useful book, with a wealth of extra-legal materials and information both of a historical and comparative nature which make it a necessary addition to the library of the practitioner or teacher.

One final (and it is hoped) constructive criticism is offered. Throughout the work there are very few references to the many

[20](1950) 81 C.L.R. 144 at 154-5.
[21]*Essays on the Constitution (supra)* p. 89, n. 66. See also pp. 91-3.
[22](1942) 65 C.L.R. 373.
[23](1935) 52 C.L.R. 533.
[24](1926) 39 C.L.R. 1.
[25](1951) 83 C.L.R. 1.
[26][1952] A.L.R. 821.

articles on various aspects of the Constitution. Doubtless the author has studied these and incorporated some of their results in his work, but it is suggested that references to them should appear in the work – but in footnotes!

Federalism—An Australian Jubilee Study will probably be of less immediate use to the student or practitioner, in the sense that it is not a narrowly legal work. But at the same time, and for the very reason of its wider scope, it is a work that they could well read with profit. In these talks, Federalism is discussed and evalued as a working institution by political scientists, economists, and top-level civil servants, as well as lawyers. A list of participants in the introduction shows that the National University had flung its net very widely and to good effect.[27] The foreword, by Professor Sir Douglas Copland, then Vice-Chancellor of National University, tells of the origin of the seminars and has a brief but interesting account of the development of that University to date. Mr. Justice Nicholas, author of the text-book reviewed above, took the chair at the second of the seminars.

Professor Montrose's opening paper on the Northern Ireland system of Devolution describes the relation between the United Kingdom and that Province as being substantially a federation – a statement more than startling at first glance, at least to one who like this reviewer admits to ancestral affiliations with the South! However, it was enlightening to see how similar problems, e.g. "pith and substance", "duties of excise", severability, etc., have equally plagued the Courts there. His opening paragraphs could serve as the justification for the inclusion of this book in the lawyer's library.

The discussion on Federal-State Financial Relations[28] revealed that the economists are not in agreement on these matters. Mr. Brown had advocated as a long term solution the development of some effective form of local government, i.e. administrative devolution. Professor Firth had no doubts that "basic decisions on development and stability have to be centralized whether we like it or not" (p. 71). Professor Karmel thought this view was based on a false assumption as to the flexible nature of government expenditure (p. 72). Mr. Colin Clark thought this proposition about the need for a centralized financial power was of minor importance since the

[27]Overseas contributors included Professor K. C. Wheare, Gladstone Professor of Government and Public Administration, Oxford; Professor W. A. Mackintosh, Vice-Principal of Queen's University, Kingston, Ontario; Professor J. L. Montrose, Dean of the Faculty of Law at the Queen's University, Belfast; and Dean E. N. Griswold of Harvard Law School.

[28]By H. P. Brown, Reader in Economic Statistics, Australian National University.

general acceptance of Keynes' ideas (p. 39). Perhaps the last and wisest word is with Professor Mackintosh. After dealing with some of the early attempts to solve the problem of allocation of revenue in Canada, he concludes ". . . almost the only lesson to be derived from them is that federations cannot make permanent financial arrangements among their component governments" (p. 88).

Professor Wheare's elegant paper "When Federal Government is Justifiable" forms a striking contrast to the other talks in this book. He is concerned to determine the basic principles of federal theory and to examine how these broad federal attributes have worked out in practice. But, as pointed out by Professor Greenwood,[29] the other speakers are not so much interested in these attributes – or "in exploring the more remote realms of the theory of federalism" as in the tougher, practical problems concerned with the working of an existing governmental structure, whether it is a "pure federation" or not. Moreover, Professor Wheare's contention that federalism forms a safeguard against the dangers of dictatorship and bureaucracy[30] found a sceptical response from other members of the seminar.[31]

Sir Douglas Copland, in dealing with "The Impact of Federalism on Public Administration" provided a most useful corrective to the "lawyer's picture of a federal structure as being a formal division of sovereign powers in which the federating governments are co-ordinate in rank and independent in function, and exist as equal jurisdictional entities" – a picture that is "very unreal in actual practice". "In plain fact, any federal state operates as a system of interlocking responsibilities to the same people, and inevitably issues in a large area of co-operation and agreement."[32] The extent of that co-operation, especially at the little-publicized departmental level, is not always appreciated, especially by lawyers.

There is a considerable unevenness in the standard of the discussions, though Professor Sawer has done an excellent job in pruning them down and preserving some continuity.[33] It seems to me (though perhaps this is lawyer's bias) that the best fare was reserved till the last. The discussion on Professor Wheare's paper and the remaining two talks, "The Politics of Federalism" (Professor

[29] p. 117. [30] pp. 115-16. [31] pp. 119-22, 123-4, 128-9, 208-9.
[32] p. 164 (Professor Bailey).
[33] Errors have crept into the record. For example at p. 201, Sir Douglas Copland refers to "page 10" of Professor Partridge's paper—obviously a reference to the original manuscript. On page 204, the reference to Professor Bailey's suggestion of a "refined Gallup Poll", should probably be to Professor Macmahon Ball. Then on p. 249, Dr. J. Fleming refers to a point made up by Professor Cowen in relation to getting the proper evidence before the High Court. From memory, Professor Cowen did make this point but it has been excised from his reported discussion (243-4).

P. H. Partridge), and "The Record of Judicial Review" (Professor Sawer) with the discussions they provoked, were most stimulating. Professor Partridge considers how the Constitution has adapted itself to the "felt necessities of the time" and has a very fine analysis of the referenda that have been put to the public. His conclusion (and a sound one) is that the public is "opportunistic and empirical" and public opinion "little influenced by considerations relating to unification or federation". "The intrinsic merits of constitutional issues, whether from the point of view of State rights or of Commonwealth expedience, seem to play a very small part indeed in the people's attitudes." The public in voting more often passes judgment on the *policy* that is behind the proposed amendment, i.e. the specific legislation that will be passed in pursuance of the new power. It is far from true to say that the consistent "No" votes represent any feeling against increasing the Commonwealth powers. For though the public has refused so many formal amendments, it has apparently acquiesced in practice in the steady growth in Commonwealth power—it has come to "accept and expect the preeminence, the overall direction and leadership of the Commonwealth".[34] That, of course, is not the whole story. Rejection of some constitutional amendments has meant the failure of some policies which the people might otherwise have come to accept as a matter of course.

Professor Sawer deals with the "Record of Judicial Review" in his characteristically brisk, vigorous, and fluent style,[35] that by its very ease sometimes tends to conceal the extensive "case-lore" and knowledge of legislative and political history that lies behind it. He refers to the conspiracy of silence between profession and judiciary, the object of which is to conceal from the public the constructive and quasi-legislative role of the Court in developing the Constitution. There is, as he says, undoubtedly room for a more critical analysis, particularly in Constitutional law, of the work of the High Court, both individually and collectively, and for a study of the "sort of value propositions which we can frankly recognise as appropriate in the development of the law".[36] His other two important suggestions relate to the possibility of ensuring that more of the relevant facts actually do come before the Court, and secondly to the advantages of adopting, with some modifications, the American practice of submitting "written briefs".

[34] p. 187.

[35] Save where the proof-reader allows him to perpetrate a real "howler" on p. 218, when he is made to refer to the "legislative exhaustive and judicial powers" of the Commonwealth.

[36] See comments provoked by this on pp. 238, 250, 251, 253.

Finally, the chronological summary of leading constitutional decisions which appears as an index is a very practical device and should be a great help to both teachers and students.

F. P. D.

Meagher's Licensing Law and Practice, fourth edition by J. X. O'Driscoll, B.A., LL.M., Q.C., and Kevin Anderson, LL.B., (The Law Book Co. of Australasia Pty. Ltd., 1952) pp. xxxiii, 503. £5 10s.

Victorian liquor control legislation contained in the Licensing Acts has many critics. Quite apart from the changes in matters of substance for which there is much clamour, the form of the legislation urgently needs attention for the main Act, the Licensing Act 1928, is the result of piecemeal legislation over a long period. Like most legislation developed in that way it lacks logical harmony as between many of its parts. This fault in the enacted law creates a need for exegetical case law and in due course there is required a text which will make the decisions readily accessible. *Meagher's Licensing Law and Practice* has been the standard work on Victorian liquor law since 1908 and this new edition is of such quality as to preserve the work's established good reputation.

The scheme of the work is the setting out of the legislation, section by section, each section being followed where necessary by comment mainly in the form of a treatment of the relevant case law. As well as Victorian cases, a number of interstate, New Zealand and English cases are referred to. In this new edition reference has also been made to a number of Victorian cases which have not been reported in the Law Reports. The case notes are well framed. Where something more than the bald statement of a proposition is required the facts and in some instances illuminating extracts from judgments have been set out.

There is one criticism on a matter of detail. On p. 215 in the discussion as to the meaning of "supplies" where it appears in the Licensing Act 1928, s. 175, there is a reference to *Symes v. Stewart*[1] in which the High Court held that the special object of provisions like s. 175 justified a construction being put upon "supplies" which went beyond its ordinary meaning. This recourse to a special object of the provision would seem to limit the authority of *Symes v. Stewart* in relation to the interpretation of "supplies" where it appears in other sections. Therefore, the cross-reference on p. 328 dealing with "supply" as it appears in s. 265 to the notes to s. 175 might be supplemented by a suitable warning.

[1](1920) 28 C.L.R. 386.