BOOK REVIEWS

The Australian Federal System with United States Analogues, by P. H. Lane. Sydney, Law Book Company Limited, 1972, xxx + 1076 pp. ($34.65).

Professor Lane has been a prolific writer on Australian Constitutional law. He has now produced this massive and learned text which runs to more than one thousand pages. He covers in great detail the Constitution of the Commonwealth examining its sections and paragraphs and their interpretation in sequence. He turns then to general issues: Commonwealth-State relations, remedies in constitutional law, the meaning of constitutional terms, severability clauses, judicial review and High Court attitudes. Then follow appendices which set out the proposals for a Commonwealth Superior Court, the texts of the Commonwealth of Australia Constitution Act, the Constitution of the United States, a comparative table of the Commonwealth and United States Constitutions, a comparison of the two Constitutions, and finally a text of the Commonwealth Judiciary Act.

In the preface he states his approach. He says—and it is true—that he has been criticized by earlier reviewers for being too much the "stirrer", too little the exponent, and he makes clear his purpose which is to expound the law so that unmistakeably we may know where we stand on doctrine and rule so far as that is possible. I say so far as possible because the divisions within courts in a significant number of cases make it clear that *lex lata* is at times obscure. I believe that he has performed an important and valuable task in expounding the present law of the Australian Constitution. Professor Lane also tells us what no one of us should dispute, that it is the responsibility of the writer to criticize on two grounds: that the law is wanting in scholarship because the case or rule seems not logical and is unsound in its legal reasoning, and that the law is defective on social grounds in that it reaches results which, viewed in social or practical terms, are unsatisfactory.

The thesis he announces in his introduction as an italicized proposition—surprisingly italicized because it seems a very obvious one—is that the Constitution means what the High Court currently says it is. What else, having regard to the role of constitutional courts in federal systems, could it mean? As I read the book, it seems that Professor Lane often does not admire the craft or the performance. There are comments interspersed through the book which I find troublesome in their looseness. He talks of "government by the High Court". I think that this is an unsatisfactory statement. By a decision or a body of decisions, the Court can ease or impede the work of government by legislatures, Federal or State; it can permit or deny power to do this or that by expansive or restrictive interpretations of constitutional provisions. That, as I understand the word "government", does not mean that the court is itself *governing* in a federal system. If he uses the word "government" to mean that the court unjustifiably gets in the way of the democratic process, that is a different and properly debatable matter, and it seems to me that there are many places in the book in which he says just that. For example he writes that "Each judicial declaration of invalidity of a Commonwealth Act

subjects the avowed sovereignty of Commonwealth Parliament to the High Court, a consequence which I suppose the community should not lightly suffer if elected government is considered better than a judicial oligarchy".[1] I have a great deal of trouble with this statement. I was never taught that the Commonwealth Parliament has "avowed sovereignty" for the good and sufficient reason that it simply is not so. For many years past I have heard and read complaints by politicians at threats to the "sovereign states". I have regarded that as part of the game of politics and not as a scientific exposition on sovereignty. As for judicial "oligarchy", that sounds to me like a dirty word, and the High Court answers that description only in the sense that it is not popularly elected, though it certainly does not perpetuate its own membership. That membership is established by an elected government. There is, however, a more fundamental point, if I understand Professor Lane correctly. He says that there is doubtful justification for entrusting a non-elected irremovable court with a power which may bring the legislation of Commonwealth or State elected parliaments and/or the acts of executive authority to grief. On this matter, there has been a good deal of writing, particularly in the context of United States constitutional law, in recent years. The Warren court has been criticized by some scholars for its intense activism, its decisions in a wide variety of fields which touch legislative representation, matters of race and colour, police conduct and others beside. In a brilliant review of Professor Alexander Bickel's Holmes Lectures on *The Supreme Court and the Idea of Progress* (1970), in which Bickel made a vigorous and sustained attack on the performance and role of the Warren Court, Judge Skelly Wright has this to say:

> Professor Bickel appears to believe that reliance on the political process for protection of most fundamental rights and liberties is somehow inherent in democratic theory. Government by consent of the governed is his frequent touchstone. Judicial decisions are made without the form of popular consent expressed, for example, in the casting of a vote and should therefore be relatively disfavoured. But in the theory of *constitutional* democracy, an act of consent such as voting is given in a constitutional context. A vote for a candidate does not give him a carte blanche. Implicit in the vote is an expectation that, if elected, the candidate will conform his actions to the Constitution. Also implicit, given judicial review, is the recognition that there are courts to ensure his obedience. This is particularly important since the individual voter actually participates in, and thus directly consents to, almost none of the governmental decisions that are made in his name. His power to challenge particular decisions in the courts is theoretically necessary to the claim that government officials act with his consent. The Constitution was not originally imposed on us by some court. Rather, it was adopted by the people, may be altered by the people, and must be considered by them in any authorization they give to elected officeholders. It is the people's independent check on popular democracy, and, as such, is best enforced by an independent body with power to check the actions of legislatures and executives. It is very much part of—indeed, it is at the core of—government by the consent of the governed".[2]

Professor Lane should reflect on this very thoughtful observation. I also question his handling of the case he takes immediately following to illustrate

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[1] At p. 920.

[2] Wright: *Professor Bickel, The Scholarly Tradition, and the Supreme Court* (1971) 84 Harvard L.R. 769 at pp. 787-8.

an overreach of judicial activism, *Chapman* v. *Suttie*[3] which involved a challenge to a Victorian State Act on Section 92 grounds. A Victorian vendor of firearms made a sale to an out-of-state purchaser, who had not obtained the permission which the Statute required him to secure from the Commissioner of Police who was vested with an absolute discretion to grant or withhold such permission. Having been convicted under the Statute, the vendor appealed to the High Court, alleging inter alia, that the Statute was bad by reason of Section 92. Professor Lane argues, following his strictures on judicial oligarchy, that this is an example of prematurity of judicial action in the constitutional context. What is the argument: that before a defence of Section 92 was sustainable, the vendor should have been required to go through the procedures of seeking a permit, and should be entitled to raise a constitutional defence only if refused it? Is that what sound constitutional principle dictates? Surely the point is, as Menzies J. said, that "the convictions cannot be allowed to stand because each one of them is for doing something which s. 92 protects".[4] The simple point was that the vendor said "I do not have to go through the rigmarole of seeking permission, because the Victorian legislation which requires it is unconstitutional" and he was entitled to be heard in any appropriate court precisely on that point.

Professor Lane repeats many times a criticism of the High Court's literalism and legalism in approaching the tasks of constitutional interpretation. This criticism has been made by other scholars and we know that the court has imposed restrictive rules on the sources it may investigate for material to guide it in its search for answers. Suffice it to say that when the court wants to do so, it will search in various places and hear useful practical argument to help it to a decision. There is no doubt as Professor Kadish[5] and others[6] have pointed out, that the Court has its distinctive style which differs markedly from the broad sweep of many decisions of the United States Supreme Court. Particularly in the context of Bill of Rights issues, the Courts pass on rather different matters, and it is largely because of long continuing judicial concern with such matters that Americans may look for statements of broad philosophical principle to the words of Holmes, Brandeis and latter day judges of the Supreme Court. The differing natures of the jurisdictions of the two constitutional courts, the differing dispositions of appointing authorities in selecting judges make for differences in style and attitude also. It is also true that on occasion Australian judgments on constitutional matters may not read very differently from technical decisions on wills and property.

What effect does this Australian style have on outcome? Professor Lane does not say that it necessarily makes for narrow interpretations: there are many broad interpretations. One might instance interpretations on such matters as defence, industrial arbitration, posts and telegraphs and section 96 as examples. Sometimes expansive interpretations have made for governmental frustrations, and one may ask, for example, whether the expansive interpretation of 'excise' in section 90 was warranted.[7] The difficulties of section 92 are well known: 'absolute' is a hard word and as Erwin Griswold once wrote, " 'Absolute' is in the dark". The struggle with that little bit of layman's language has inevitably given rise to many difficulties and frustrations.

There are various matters with which I have difficulty in Professor Lane's

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[3] (1963) 110 C.L.R. 321.

[4] *Id.* at p. 342.

[5] "Judicial Review in the High Court and the United States Supreme Court" (1959-60) 2 *M.U.L.R.* 127.

[6] See e.g. Sawer: *Australian Federalism in the Courts* (1967) and Sawer: *The Supreme Court and the High Court of Australia* (1957) 6 Jo. Pub. Law 482.

[7] As Fullagar J. argued in *Dennis Hotels Pty. Ltd.* v. *Victoria* (1960) 104 C.L.R. 529.

argument. When he tells us that the court is out of touch with *reality*, what are the realities of which he speaks? When he says that the court is concerned with 'the law' or 'the constitution' as something aloof and of a separate order, and follows this by quoting an exchange between counsel and the court in which counsel said "you must look at commercial realities", and the court responded "not in disregard of legal realities", are we to understand that the court is on on some unworldly, wrongheaded track? I think that the court has at times been wrongheaded: I think, as does Professor Lane, that the majority (a thin majority) were on a bad track in dealing with the recent cases on federal enclaves beginning with *Worthing*.[8] I wrote on this matter before the issue became a hot and practical one[9] and it seemed to me then, that I offered a result which was reasonably argued. The decisions of the court which produced the no-law situation which Professor Lane rightly assailed, seem to me to be unsatisfactory as a matter of law and good sense. In other areas, as, on occasion, in the interpretation of what constitutes an "industrial" dispute within the terms of section 51 (xxxv) it seems to me that some unnecessarily narrow decisions have been reached. Having said so much, it seems elementary to point out that courts and lawyers have to work within the limits of the law. To castigate the court for the reported answer to counsel seems to me somewhat surprising. It is not only courts which have to work within rules, as any one of us charged with decision-making responsibilities knows, and I am not very clear what Professor Lane is telling the court to do when he calls on it to face reality. If he wants to remake the constitution, he may properly address the argument to those who will soon assemble presumably to formulate proposals to the Commonwealth parliament and the people of Australia for constitutional amendment.[9a] In all the pages of stricture, he does not state in a way that I clearly understand, what the reality (as opposed to the formalism and legalism) is.

Let me take an example. I am not persuaded by his characterization of the High Court's performance in the *Ipec Case*[10] as an exercise in "conceptual distinction and legalism".[11] What the Court said there was that it was open to the Commonwealth to deny licences to import aircraft into Australia, even though once brought in, section 92 problems would have arisen had the Commonwealth sought to restrain their operation interstate. Professor Lane says that in "a Constit. s. 92 challenge the High Court refused to censure the Government's import tactics. For the Court took the notional distinction between the antecedent act of importation (struck at by the Government) and the act of inter-State transport (alone protected by section 92). True, the Commonwealth's prohibition of importation might have 'a very substantial consequence' on inter-State transport, but strictly that prohibition had no 'legal operation' on the inter-State transport itself".[12] If that decision exposes the court to a charge of unreasonable legalism and conceptualism, I must say quite simply that I disagree.

In other areas where Professor Lane might be expected to offer criticism of constitutional provisions and decisions he is quite reticent. In areas relating to the jurisdiction of the High Court and particularly its original jurisdiction I should have expected sharper criticism and analysis in various places in this curious area, though the problems there are often not of the court's making.

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[8] *Worthing* v. *Rowell and Muston Pty. Ltd.* (1970) 123 C.L.R. 89.

[9] "Alsatias for Jack Sheppards?: The Law in Federal Enclaves in Australia" in *Sir John Latham and Other Papers* (1965) at pp. 171-191.

[9a] This book review was written in 1973.—Ed.

[10] (1965) 113 C.L.R. 177.

[11] At p. 963.

[12] At p. 963.

In his discussion of section 118 and particularly *Harris* v. *Harris*[13] he provides what seems to me an uncertain commentary. If New South Wales, he says, had been an Australian Nevada, "maybe" the decision would have been different and section 118 read differently. "Maybe" is a very cautious word for a man who has some pretty strong things to say about the courts and their efforts. Of course we don't know the answer to the question, but why not tell us—as a number of us have tried to do in writing about such cases—what he thinks should be the law on these matters?

There is a very thin chapter on comparisons between the United States and Commonwealth Constitutions.[14] Professor Lane tells us that his incursions into American constitutional law and analogues are by no means exhaustive and it would be unreasonable to expect him to expand the book much more. The chapter is so thin, so elementary, however, that one wonders why in a major treatise and particularly in view of the literature already available, Professor Lane included it at all. It is sketchy and it allows of little explanation of very important aspects of constitutional working. For example, at page 1012, the author writes of the United States Senate that "It has a searching apparatus of investigative committees, more so than the Australian Senate". In recent years, Senate committees in Australia have come to assume a greater importance and have undertaken an extensive range of enquiries. By reason of its political complexion, the Australian Senate has been able to assert itself and has been less amenable to executive control. Overall, I would suppose that the explanation of the far greater importance of American *Congressional* committees (not only Senate committees) is to be found in the operation of the doctrine of the separation of powers which means that Congress is not amenable to executive control. I suspect that the reasons for the "more influential" role of the American Senate are more complex than we are told. I take issue with his last sentence in this chapter. "But, most of all," he writes, "the two Constitutions differ in their living records—the High Court of Australia and the Supreme Court of United States. The first is strict and formalistic; one may say, at times doctrinaire. The other had its days of formalism, pre-New Deal days. It is now liberal and active; one may say, at times overactive". That does not tell the true story. The fact was that the majority in the pre-new Deal Supreme Court was hyper-active; Mr. Justice Holmes was moved to protest against its Spencerian exuberance in applying *laissez faire* interpretations of the fourteenth Amendment. The pre-new Deal court was bitterly attacked by the liberals of its day for its activism; they said that the Court should cease and desist. Today's liberals praise the Warren Court for its intense activity; the court's critics say of it what yesteryear's liberals said of the old court. More than that, the technique of at least one of the liberal judges, the late Mr. Justice Black was in some respects extremely strict and literalistic. In Bill of Rights interpretations, he gave words the most literal, dictionary meaning. As Erwin Griswold reminded us in his recent Cardozo Lecture on *The Judicial Process*, "with characteristic simplicity he (Black) took the position that 'no law' means 'no law'." And that extreme position, as Griswold shows, cannot be right. May I also add that if it be said that the Warren Court showed a lively awareness of social realities and needs, there was a powerful criticism that in their decisions on police powers, the judges showed little sympathy for the appalling problems of law enforcement in very difficult situations. Whether they were right or wrong I do not stay to argue; I merely point out that Professor Lane deals too simply with complex issues. Of course, he has a real space problem in his use of American

[13] (1947) V.L.R. 44.
[14] Pp. 1009-1021.

analogues, but this must mean that if he uses them he should do so as effectively and accurately as possible to illumine the problems of the Australian constitution and its interpretation. That is what the book is about.

A review properly pays tribute to Professor Lane's learning and his great capacity for work. The book contains much that is of great value. What disappoints me is the generality and the lack of cogency of some of the major critical analyses. That is not to say that there is not a great deal of good and well justified critical work. It is simply not sustained and I believe that the author is not at his strongest when he is on very important general ground. He makes statements which, I believe, will not stand up to analysis and documentation. I do not think that this is a nit-picking criticism. It is partly a matter of style, but it is more than that. In this respect, I think that this book needs reworking.

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Conveyancing: Can you do it yourself? by M. A. G. Lidden, B.A., LL.B., and Ethel Bohnhoff. Pages: 1 to 63 (paperback) 1974 Angus & Robertson (Publishers) Pty. Limited. $1.50.

I have on my bookshelf at home a guide to the layman to understanding the modern motor car. This is a valuable little book although of course I would never use it as the basis for any repairs which I might be tempted to carry out to my car. Were I so foolish as to attempt such repairs I would no doubt buy a complex motor manual of the type used by professional mechanics and endeavour to follow it. I would recognize that no simple book written in layman's language would serve as a sufficient guide to carry out any but the most elementary repairs. So it is that there is certainly a place in conveyancing for a book setting out in layman's language the outline of a simple conveyancing transaction. Such a book would include matter such as steps to be taken when looking for finance, dangers to be avoided when inspecting homes for purchase and the like.

To an extent the book under review would fill the bill as a simple introductory guide to laymen to conveyancing, and the book is at its best when it is dealing with matters such as those I have mentioned.

However, as is indicated by the title, the primary function of the book is to encourage the layman to do his own conveyancing at least in simple transactions.

I say simple transactions, because the book advises that a lawyer should be consulted if:—

(a) The title to the land is Old System or the land is Crown Land.
(b) The property is a Home Unit.
(c) The Survey reveals "an inconsistency", (whatever that might be).
(d) A purchaser does not "understand the full legal effect of" . . . his rights under a contract (the danger is of course that he may only think he understands).
(e) A vendor wishes to draw up a contract for the sale of land.
(f) A dispute arises.

It must be said in fairness that apart from sending the layman to a professional in these cases the authors are somewhat ambivalent even in other circumstances since they are at pains to point out the risks which a layman takes if he acts on his own although they do set out to suggest that in the

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