Book Reviews

Selections from The Judgments of Sir Owen Dixon by Lawyers in Victoria (Ed. N.H. Dooley), Pages i–lv, 1–760, Index 761–825. (1973) Australia: Law Book Co., under the auspices of The Victoria Law Foundation. Price: Hardback $30.00.

This large volume of *ipsissima verba* was meant to be a contemporary tribute. Unfortunately it appears posthumously. Sir Owen Dixon died at Melbourne on 9th July 1972, eight years after his retirement as Chief Justice of the High Court of Australia. He was a Justice of that Court from 1929 to 1952, and Chief Justice from 1952–1964.

In effect, this work supplements the collection of Dixon's extra-judicial writings, which appeared in 1965: *Jesting Pilate and Other Papers and Addresses.*

This is by no means a "casebook". Its unifying principle is the personality and work of one remarkable Australian judge. It is essentially a set of Dixonian essays upon a wide variety of legal topics. However, this essayist did not choose his topics freely. They were dictated by the exigencies of an actual judicial career. Hence these essays are honed and pointed (if also narrowed) by the need to solve real and particular problems, and by the conscious power so to do: "There are few, if any questions of fact that courts cannot enquire into . . . For by their judgment they can reduce to legal certainty questions to which no other conclusive answer can be given." (*Bank Nationalisation Case* (1948) 76 C.L.R. at 340 per Dixon J.)

The selections in this volume are placed under four rubrics – (1) Contracts, (2) Commerce and Personal Property, (3) Real Estate, and (4) Equity. All four sections are subdivided: for example, "Contracts" has some eighteen sub-sections, including such "applied" areas as "Agency", "Insurance", and "Building Contracts".

A reviewer, be he ever so lowly, should at least give evidence of serious perusal of the subject work. It may serve that purpose, and others, if we give just a few examples of the matters on which Dixonian light here shines–

(i) On what basis may a literally almost unlimited power of attorney be read-down? (page 127)

(ii) How far does the duty of "utmost good faith" extend, when a person seeking life insurance is disclosing his medical history to the prospective insurer? (page 179)

(iii) When is a carrier not a common carrier? (page 228)

(iv) How far may a testator, by conditional gifts under his will, control the marital or religious affairs of his beneficiaries? (page 678)

From these few samples, it truly and sufficiently appears that the editors have not tried to cull only material for light reading by lawyers – let alone laymen. Rightly so. Nevertheless one may wonder why space was given to questions so highly particular, recondite or technical as:– Do the Admiralty Court's inherent powers extend to awarding interest on judgment moneys? (page 363) Can one get specific performance of an agreement to sell the goodwill of a business? (page 107) Is a Torrens system mortgage extinguished merely by its passing into the name of the mortgagor? (page 446). Of course Dixon, as judge, *had* to treat these points. Our only question is whether they are really suitable for inclusion in a dedicatory work of the present kind.

A more fundamental question of editorial policy arises from the fact that there is no section on constitutional law, as such. True, there is a hint of possible "further volumes", but one looks in vain for an adequate explanation for this omission. Even in "further volumes" do arrive some day, why omit Dixon's work

on the Commonwealth Constitution from the first volume? The most devoted disciple of this master must be aware that few judicial uses of governmental power are so significant as a leading judgment on powers in a federal system. Judicial tinkerings with parts of wills or contracts are relatively minor concerns, usually well enough handled by lesser lawyers than the one here commemorated. The wider world of lawyers – and of educated laymen – rightly senses that it is the constitutional side of the High Court's jurisdiction which is special and singular. From just after World War Two, until the end of the Dixon era, it was constitutional law, in the main, which highlighted the national importance of Dixon and his judicial colleagues, and which led those who most admired his kind of philosophy of law to be thankful for his influence as Chief Justice. This carefully professed era of "strict and complete legalism" (see below) began, perhaps, with the disastrous flexing of Commonwealth "muscle" in the *Bank Nationalisation Case* (1948). It ran through the line of "transport cases", in which tax-free interstate road hauliers – for a while, and in the popular press, at least – carried aloft the banner of Section 92 as shining knights of the Queen's pulverised highway.

Dixon himself would certainly not have subscribed to any notion that his constitutional judgments are in some way less purely "legal" than the material which in fact fills this book. We have his own challenging, albeit somewhat defensive profession of faith. Despite its legal absolutism, it is plainly addressed to a much wider audience than Bar and Bench:

> "... [I]t is not sufficiently recognised that the court's sole [constitutional] function is to ... say whether a given measure falls on one side of a line ... or on the other ... It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism".
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> [(1952) 85 C.L.R. at xiii–xiv]

It is a pity that we cannot find in the present volume instances of this philosophy in action. Self-evident or not, it commended itself to a generation of practising constitutional lawyers and successful clients. It served also as a satisfying *viaticum* for many others who depended for professional – and perhaps even personal security and self-esteem – upon the artificial certitudes of the positivist legal microcosm.

The constitutional section of this book, if it existed, could well show by apt and tactful choice of chapter and verse, how "strict and complete legalism" can sometimes become uninhabitable, even by devotees. It could note the broad, if delayed, hint in *Hughes and Vale* (No. 2) (1955) 93 C.L.R. at 177–8, and the subsequent discovery, in *Armstrong* v. *Victoria* (1957) 99 C.L.R. 28, that the exasperated States *could* make interstate hauliers pay for the roads, after all. It could record how quickly the magic attaching to the mere crossing of a State border in, say, *Beach* v. *Wagner* (1959) 101 C.L.R. 604 faded in *Harris* v. *Wagner* (1959) 103 C.L.R. 452. One could then see how the prudent legalist takes care not to be hoist upon his own legalism.

Surely such great affairs, touching the Queen and the common weal, should not entirely give way to such matters as partial failures of ulterior limitations (page 713)!

We have here selections from no fewer than 150 of Sir Owen's judgments in the High Court and in the Supreme Court of Victoria (where, for a short time to 1929, he was an acting-Justice). Of these 150 judgments, some 70 are, at least in form, joint judgments. In other words, it is at least possible that almost one-half

of the select judgments are not, after all, *ipsissima verba.* True, not all Justices of the High Court have been so diligent (or at any rate so productive) as Dixon: read Dixon himself on one predecessor in (1964) 110 C.L.R. at xiii. And so, without claiming any "in-club" knowledge of the Court, one might make a shrewd guess that certain "joint" judgments really are the sole work of Dixon. But not always, by any means. Therefore the number of joint judgments in this collection seems excessive. About 30 of the 150 extracts were delivered jointly with the late Sir Wilfred Fullagar. Sir Wilfred certainly did not relax in what some wags has called "the concurrent jurisdiction" of the Court. Sir Wilfred was highly regarded and freely consulted by Sir Owen.

Fullagar's judicial prose is characteristically crisper, shorter in periods, freer from obliquity, and generally more lucid than Dixon's. *Brady* v. *Stapleton* (page 606) for example, reads like vintage Fullagar. How many other selections in this book are, in the essential creative sense, of doubtful authenticity?

All in all, does this book itself exhibit a sufficient *raison d'etre?* Sir Owen's juristic distinction is unquestionable, and is not here in question. One's only doubt is whether the book supports its own weight (and price). There will be very few readers outside the ranks of the more scholarly lawyers. Such readers have ready access to the Commonwealth Law Reports. No doubt it is convenient to have this material collected in one place, and the editorial notes are of course helpful. On the other hand, there is the serious constitutional "gap". The substance is weighty, but the high legal mind here represented is inevitably cramped by the time, place and accidents of particular legal controversies, often narrowly based in principle.

Sheer literary style cannot "carry" this work. It is always tempting to toss one more compliment to a fine lawyer by lightly describing his writings as lucid. A true disciple of Dixon should securely base his tribute on learning and intellectual power, rather than upon literary verve or special lucidity. In this regard, Dixon was no Maitland, or Fullagar, or Sir Frederick Jordan (a great and graceful Australian lawyer, noticed as such by Dixon in (1964) 110 C.L.R. at xi, who richly deserves his own commemorative volume). Of course Dixon could, and often did, bestow enlightenment in plain words. But not infrequently he seems tortuous, unnecessarily complex in sentence-structure, or oblique. The following passage appears at page 14 of the book:

> "I would, therefore, have been disposed to think that there was no sufficient certainty in this part of the standard conditions had I not been of the opinion that ascertainment of the cost was made the province of the Director of Finance and his representatives. But as it is, I think the objection of uncertainty fails . . . ".

The reader might consider also a specimen sentence in the third paragraph on page 672, containing seven subordinate clauses, and two disjunctives.

This work cannot be offered as a repository of general human wisdom, tempting though it may be for the excessively pious of the legal world to see their microcosm as the human macrocosm. Strict and complete legalism is not necessarily the beginning or the end of wisdom. Consider the rather melancholy vain-show, *coram* law students, preserved in *Jesting Pilate* at pages 132–133.

A propos the Dixon legend, a prominent Sydney counsel once said: "Ah, but Melbourne is always true to its own." The speaker did not mean to trivialise that legend. However the Bars of those two places, the only serious rivals of each other in this country, do have somewhat different characters. Sydney's is less monolithic, perhaps a whit less self-satisfied. Melbourne's seems stronger and truer in the just remembrance of its great sons. With all due respect, this

particular volume may find its complete and ultimate justification as a work of piety.

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PRINCIPLES OF THE LAW OF DEATH DUTY by Professor H.A.J. Ford, Pages i–xxviii, 1–425, Index 427–450 (1971) Australia: Law Book Co. Price (Hardback $13.20).

One has come to expect that any writing of Professor H.A.J. Ford, Professor of Commercial Law and Dean of the Faculty of Law, University of Melbourne will be of a very high quality. His *Principles of the Law of Death Duty* published by the Law Book Company in 1971 lives up to expectation. It is a notable contribution to Australian legal texts.

Whilst the law relating to death duties draws heavily on the law of property, and the law relating to trusts, it does after all take its rise from an Act or Acts of Parliament. Therefore the obvious way to write a book on the subject is to annotate legislation. Whilst the value of this approach is not to be denied, Professor Ford has chosen the less obvious and more sophisticated and demanding task of giving "a narrative account of the law relating to death duties in three Australian jurisdictions: the Commonwealth and two States, New South Wales and Victoria" (Preface). One might be excused for fearing that any structure which such a work might have would become submerged beneath the weight of a minute comparison of the wording of comparable sections, and thus become too dull and technical. One might even wonder whether the Statutes of the three jurisdictions would have sufficient in common to support a schematic structure.

But Professor Ford's taxonomy succeeds. His book is divided into four parts: 1. Introduction; 2. National Estate; 3. Relief from Duty; 4. Valuation and Collection; 5. Burden of Duty. The book contains 18 chapters of which, predictably, a large number (nine) are comprised in Part 2. Within each chapter Professor Ford takes up significant topics, issues, statutory expressions or questions and examines each in the context of the three jurisdictions in turn. It is thus possible, through the General Index, Table of Legislation or Table of Cases, to locate the author's treatment of a particular point arising under say the New South Wales Act, and in close proximity to observe the similarities and dissimilarities of the Commonwealth and Victorian jurisdictions. The comparative analysis is not only of interest for its own sake, but also it aids understanding of the point which originally generated the reader's interest.

The treatment of any issue is rigorous and remarkably comprehensive. This results in part from the concise statements of the facts of decided cases. The format of the book contributes to its success. The printing of the statutory expressions in bold print; the use of explicit side-headings and their being printed similarly, and the indenting of statements of the facts of decided cases make the page more interesting to the reader, and facilitate both his understanding and the location of points of interest. The increasingly popular use of numbered paragraphs is of particular use in a work on a technical area such as this one.

Professor Ford's explicit yet succinct mode of expression is a key to the success of much of his work. Clarity of expression and clarity of legal analysis are symbiotic and both are much in evidence in *Principles of the Law of Death Duties.*

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OUTLAWED: Queensland Aborigines and Islanders and the Rule of Law by Garth Nettheim. Pages 1–114. Appendices 115–137. (1973) Australia: Australia and New Zealand Book Company. Price $4.95.

Professor Nettheim's book presents a fairly detailed study of the 1971 Queensland Aborigines and Torres Strait Islanders Acts, and the 1972 Regulations under those Acts. The introduction sounds the warning that this study attempts more than a narrowly legal analysis. That warning is justified by the text. The commonsense language, and the brevity of the study commend the work as a worthy layman's guide to the Acts and their rather confusing agglomeration of Regulations. But the criteria of the criticism levelled at the Acts by the author should be clearly understood from the outset.

Firstly there is an historical account of the passage of the 1971 Acts, and the reasons for thus updating the *Aborigines' and Torres Strait Islanders' Affairs Act* 1965–1967. Comparisons of old and new sections are freely made and the references to the new Acts are clearly identified.

The author then examines the political and factual background. It is mainly within these sections that the author departs from what he implies is the "narrow legalism" of sectional analysis and comparative explanation. He takes as the startling point for the 'political' consideration of the Acts, the "stated policies of governments and administrators", in both state and federal spheres. Both bodies have generally adopted assimilation as a general legislative and policy aim, but divergences between ministers and governments are noted. As a basic tool for comparing policies and legislation, the author uses a joint *communique* which was issued after a conference held on 8th April, 1971, between the then Prime Minister, Mr McMahon, and the Queensland Premier, Mr Bjelke-Petersen. This communique is constantly referred to, and even warrants an Appendix (6) to indicate the extent to which its clauses were implemented in the Acts. The factual situation is gathered from reports by Abschol and other independent bodies on the administration and effects of the previous Act within native communities. Several of these reports are contained in the Appendices.

The author then turns to the "Rule of Law" of the title. It should be clearly understood – and it is made plain in the introduction – that this concept is used by the author in a particular sense, based on the Universal Declaration of Human Rights, and the 'legal' approach embodied in the report to the I.C.J. Congress of Rio in 1962. The approach is that lawyers generally ought to be concerned not merely with what law is, but also with what law ought to be.

Taken on this basis, the criticism is partly a legal critique, and partly a sociological exercise in trying to devise how much influence lawyers ought to exercise over proposed legislation. Professor Nettheim criticizes the "rush and secrecy" surrounding the passing of the Bill. His criticism stems mainly from the lack of time available to the I.C.J. itself to consider the proposed Bill, and to forward its recommendations; the fact that Senator Bonner appeared not to have seen the proposed Act; and the fact that the Aboriginal Advisory Council was the sole ethnic body consulted about the Act. These are criticisms of the methods of government, to an extent, in that few Bills are readily available prior to first reading. The author also considers the time lapse of one week between first and second radings and the five and a quarter hours' debate to be inadequate consideration for the social ramifications of the Act.

This line of criticism if found again and again – in considerations of areas such as mining on reserves, the provision of beer, the management of trust accounts, and the foundation of native courts. Act such as those governing the lives and welfare of racial groups should, the author contends, be subject to wide-ranging group representation and consultation before presentation for House

debate. This consultation simply was not present (apart from a somewhat cursory consultation with the Advisory Council) as a basis for the new Queensland Acts.

The result of this communication failure, in Professor Nettheim's opinion, are Acts which delegate far too much responsibility in important areas (i.e. areas governed by the Declaration of Human Rights) to persons involved in the administration of the Acts – persons who are placed too far beyond effective Parliamentary review. He concludes that such oversight, and delegation can result only in further lack of adequate consultation, and in both "major and minor violations" of the Rights formulated in the declaration.

The solutions which Professor Nettheim offers to the problems as he sees them are two-fold. Primarily all legislation, and even, the reviewer suspects, regulations relevant to the indigenous groups in Queensland (and elsewhere), should result from thorough and prolonged consultation and discussion with the groups concerned, and any other person(s) who feel they have a legitimate offering to make. Second, says the author, lawyers should be far more active in the pre-presentation stages of legislative planning and drafting, and should come to such work equipped with more than "narrowly legal" sensibilities and knowledge. However, the question of *how* these substantial changes are to be wrought in their various fields is not touched upon by the author. This omission may be simply the result of trying to update, and effectively challenge "19th century philosophy"; alternatively it may be the genesis for further studies of legislation in a similar vein, and possibly, guidelines for action.

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Books Received

Credit and Security in Indonesia, by S. Gautama, David E. Allan, Mary E. Hiscock and Derek Roebuck. Pages i–viii, 1–129, Biblio 131–132, Index 133–155; (1973) St. Lucia Queensland: University of Queensland Press; New York: Crane Russak and Co. Price: Hardback A$6.00.

Credit and Security in Japan, by H. Tanikawa, David E. Allan, Mary E. Hiscock and Derek Roebuck. Pages i–viii, 1–148, Index 149–170; (1973), St. Lucia Queensland: University of Queensland Press; New York: Crane Russak and Co. Price: Hardback A$6.00.

Credit and Security in Singapore, by K.K. Lian, David E. Allan, Mary E. Hiscock and Derek Roebuck. Pages i–xxxiii, 1–339, Index 340–363 (1973) St. Lucia Queensland: University of Queensland Press; New York: Crane Russak and Co. Price A$9.00.

Patterns of Australian Federalism, by J.E. Richardson, (Research Monograph No. 1, Centre for Research on Federal Financial Relations). Pages i–vii, 1–106, Appendices 107–142 (1973) Canberra: Australian National University Press. Price: Paperback $4.00.

Reliability of Evidence by Arne Trankell. Pages 1–167; (1972), Stockholm: Beckmans. Price: Unavailable.

The Administration of Solvent Deceased Estates in Queensland, by W.A. Lee. Pages i–x, 1–22; (1973) St. Lucia Queensland: University of Queensland Press. Price: Paperback $1.75.

A Notice to Graduates of the University of Queensland.

The University is anxious to have up-to-date addresses of all graduates of this University, no matter how long or short the time since their graduation. If the reader knows of any Queensland graduate who has not received, within the last two years, any communication from the University would he or she please contact the Registrar's Office, J.D. Story Building, University of Queensland, St. Lucia, 4067.

Names of women graduates who have married since graduation may also need correction in the University's records.

Graduates, as members of the Convocation of the University, are entitled to vote in the election of certain members of the University Senate. The University wished them to receive, also, occasional news of the University, such as the Annual Report of the Vice-Chancellor.

Your assistance in re-establishing contact between the University, and as many of its alumni as possible will be greatly appreciated.