BOOK REVIEWS

Cases on the Constitution of the Commonwealth of Australia, by GEOFFREY SAWER, B.A., LL.M., of the Victorian Bar, Professor of Law in the Australian National University. 2nd ed. (Law Book Company of A/asia. Pty. Ltd., Sydney, 1957), pp. i-xxxi, 1-629. Price £2 10s.

Legislative, Executive and Judicial Powers in Australia, by W. ANSTEY WYNES, LL.D., of the South Australian Bar. 2nd ed. (Law Book Company of A/asia. Pty. Ltd., Sydney, 1956) pp. i-lxi, 1-768. Price £4 15s.

Each of these books is a second edition. Dr Wynes has made his new edition a complete treatise upon the law of the Commonwealth Constitution, having added an examination of federal judicial power to the subjects of legislative and executive power, to which his first edition was limited. Professor Sawer's book is a collection of leading constitutional cases brought up to date—he was just able to include the decision of the Privy Council in the *Boilermakers' Case.*[1] He gives useful reading references—in many instances to the full treatment of a subject by Dr Wynes. Thus, to a considerable extent, the books are complementary.

The approach of the two authors is markedly different. Dr Wynes emphasizes that he has written 'a legal textbook'. He deplores a discernible 'tendency to suggest that the duty of a court charged with the interpretation of a written constitution is to read the document in such a manner as to produce results which are said to accord with the prevailing notions of the day and age in which its interpretation or application to a given set of facts and circumstances falls to be considered rather than to perform the essentially legal task of applying principles'. (p. vi). The result of such reasoning, he says, is 'the abnegation of law'. He considers that 'political, economic, sociological, and other similar considerations have not been permitted to obtrude themselves' into the legal questions concerning the interpretation of the Constitution (p. 302).

Professor Sawer, on the other hand, likes to discover, or to uncover, in judicial reasoning what it is the fashion to describe as 'inarticulate premises' of political or sociological significance. 'Inarticulate' is a word used in a dyslogistic sense for 'unexpressed'. It suggests a judicial inability to state a proposition in clear language. If judges will argue in enthymemes instead of fully stated syllogisms they do leave themselves open to criticism, not of what they have actually said, but of what 'they must have meant'. Professor Sawer considers the approach of Dr Wynes to be 'excessively formal' and he looks at some judgments from a 'sociological' point of view.

Dr Wynes treats fully all the Australian constitutional cases. (He cites, from various sources, about 1000 cases. His book is a monument of industry.) Professor Sawer does not profess to do this—his book consists of a selection of judgments from leading cases. But in his crisply written notes he comments upon the cases and expresses his own opinions upon them. For example, he very justly calls pointed attention to some (but, I add, not all) of the ambiguities in *James v. Cowan.*[2] *Hughes v. Vale* (No. 1),[3] in the High Court, is described in the table of contents as the triumph of logical inference from Spencerian premises'.

[1] [1957] 2 W.L.R. 607. [2] [1932] A.C. 542. [3] (1954) 93 C.L.R. 1.

Dr Wynes is more benevolent in his critical comments than Professor Sawer. He does not deny that the interpretation and application of the Constitution have not been uniform, but is kind enough to say that 'the course of decision has been relatively consistent'. When one thinks of decisions before the *Engineers' Case,*[4] of the *Engineers' Case* itself, of some recent decisions upon the same subject, of many decisions upon the Conciliation and Arbitration Act, of decisions upon section 92 of the Constitution and of the *Boilermakers' Case,* the justification for the modifying word 'relatively' is reasonably apparent.

But Dr Wynes does not hesitate to express his own views and to give his reasons when he criticizes a decision or a particular judgment. So also Professor Sawer, whose short notes are often very acute. Many will appreciate his reference to the struggle which was conducted for many years (with ultimate success) in an endeavour to show that *James v. The Commonwealth*[5] did not really approve anything that mattered in the decision in *R. v. Vizzard.*[6] His comment is, 'It would have been surprisingly cynical for the Board to describe an opinion as "of great importance" if its importance lay in the actual decision to which the opinion led being wholly wrong' (p. 168).

Both of these books contain much informed criticism as well as exposition and are therefore to be commended, even if the reader does not always agree with the criticism.

The great experience of Dr Wynes in the Department of External Affairs is evident in the legal exposition contained in chapter IV on 'The Commonwealth and States of Australia in Relation to the British Commonwealth of Nations and International Law'. His treatment of this subject and of the legislative power with respect to external affairs presents a fair and useful consideration of the problems involved. The same may be said of chapter IX on 'The Crown and Executive Power', where he strongly adheres to the doctrine of the indivisibility of the Crown – one person, but with many separate treasury pockets. Like most lawyers, he accepts *Williams v. Howarth*[7] as conclusive. This was a one page decision which just laid down the law without arguing about it. This decision, given in 1905, before the Imperial Conference of 1926 and the Statute of Westminster in 1931 and other constitutional developments, at least is to be commended for dealing effectively with a scheme for getting two payments for one service.

The decision of the Privy Council in the *Boilermakers' Case*[8] came after Dr Wynes' book was in the press. Thus he was not able to record that in that case the Privy Council approved the decisions in the much canvassed cases of *The King v. Bernasconi*[9] and *Porter v. The King.*[10]

Dr Wynes makes a valiant attempt to understand and support the recent decisions upon section 74 of the Constitution. This section requires a certificate of the High Court to be given before there can be an appeal to the Privy Council from 'a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States . . .' The attempt is not completely successful. It has generally been thought – and so held by the High Court – that a question as to the exclusiveness of a constitutional power was the simplest *inter se* case. The Privy Council has

[4] (1920) 28 C.L.R. 129.
[5] [1936] A.C. 578.
[6] (1933) 50 C.L.R. 30.
[7] [1905] A.C. 551.
[8] [1957] 2 W.L.R. 607.
[9] (1915) 19 C.L.R. 629.
[10] (1926) 37 C.L.R. 432.

now held that such a question does not involve an *inter se* point. The Privy Council might have said that, in a case where the argument is that the Commonwealth power is exclusive, there is no question of determining a limit between Commonwealth and State powers because there simply is no relevant State power if the argument succeeds, and therefore there is no boundary between a Commonwealth power and a State power. But no easily discoverable reason for this decision of the Privy Council has been given. Section 74 might well be amended by omitting all reference to limits *inter se* and requiring a certificate from the High Court in all cases involving the interpretation of the Constitution. An alternative which many would favour would be to abolish any appeal to the Privy Council.

Professor Sawer has made a good selection of cases. I would question only the utility of including *Huddart Parker & Co. Pty. Ltd. v. Moorehead*[11] on the corporations power. It would have been sufficient to include a note that there is no authority upon the corporations power. As a constitutional authority the *Huddart Parker* case is no more useful than the first case upon the Constitution – *Webb v. Outtrim*[12] – decided by the Privy Council.

The distribution of the fifty-eight cases selected by Professor Sawer indicates the principal classes of constitutional problems. There are fourteen cases concerning relations between the Commonwealth and the States and the nature of Federal power, twelve cases on judicial power, eleven on section 92, six on industrial arbitration, five on defence – *i.e.* forty-eight on these subjects. The author generally quotes fully one judgment in a High Court case, referring shortly to other, possibly dissenting, judgments. Naturally the points of difference are made more apparent by the full treatment of Dr Wynes. Wynes is a book for the practitioner, Sawer is primarily a book for students, though his notes will repay study by others than students. For example, anyone who thinks that all about section 92 is now clear sailing may be referred to his notes upon the *Margarine Case*[13] (pp. 327-328).

The history of section 92 is one of almost continuous legislative and judicial confusion and almost anguish. It is a politico-economic slogan which, in its actual form, should never have been put into a constitution. But it is there, and parliaments and courts have had to make the best of it. They have not been conspicuously successful. In the *Bank Nationalization Case*[14] (Sawer p. 234), Lord Porter said, 'Forty years of controversy have left one thing at least clear. It is no longer arguable that freedom from customs or other monetary charges alone is secured by the section.' But, during the drafting of the Constitution by the Conventions and at the time of its adoption it was generally, if not universally, believed that section 92 did, and was intended to do, just one thing – to establish inter-state free trade as soon as the Commonwealth Parliament had enacted a uniform tariff.

Section 92 provides that 'On the imposition of uniform duties of customs, trade, commerce and intercourse among the several States, whether by means of internal carriage or ocean navigation, shall be absolutely free'. 'On the imposition of uniform duties of customs' is the same phrase as is used in section 90 to put an end to State customs laws. The words 'whether by internal carriage or ocean navigation' (plainly

[11] (1908) 8 C.L.R. 330.
[12] [1907] A.C. 81.
[13] (1953) 93 C.L.R. 55.
[14] [1950] A.C. 235.

limited to movement of persons and transportable goods) have been deprived of significance by *ex cathedra* statements that they are 'words of extension, not of limitation'. No indication has been given to show how they 'extend' the meaning of 'trade, commerce and intercourse among the States'. There is a second paragraph in section 92 relating to 'goods passing into another State'. At least it is clear that every word in section 92 is apt for the purpose of dealing with customs laws, and not particularly apt for doing anything more.

Section 117 provides that 'A subject of the Queen, resident in any State. shall not be subject in any other state to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen in such other State'. (See the full discussion of this section in Wynes, pp. 142 ff.) Section 117 binds both the Commonwealth and the States. It is a provision which, it may fairly be supposed, was intended to prevent either the Commonwealth or a State discriminating against persons because they belonged to other than some particular State. If section 92 established interstate free trade – and nothing more – and if section 117 had carried out the suggested intention, a sensible result would have been achieved. Problems would doubtless have arisen but, with the overriding power of the Commonwealth Parliament to make laws with respect to interstate trade and commerce and so, in that field, to override State laws which did not fall precisely within the prohibitions of section 92 and section 117 so interpreted, there would not have been the political and legal confusion under which, by reason of section 92, Australia has suffered for many years. But section 117 is one of the failures of the Constitution. It prohibits only discrimination or disability based upon residence. It is easy to draft a discriminatory law based upon some other characteristic than residence – *e.g.* domicile. (See *Davies and Jones v. Western Australia.*[15])

I venture to say that the source of the almost insuperable difficulties associated with section 92 can be found in a passage in *James v. The Commonwealth.* After stating that 'Free trade means in ordinary parlance freedom from tariff', the judgment proceeds to state why 'ordinary parlance', *i.e.* the natural meaning of words, is to be disregarded in interpreting section 92. The judgment proceeds:

> Free in s. 92 cannot be limited to freedom in the last-mentioned sense. There may at first sight appear to be some plausibility in that idea because of the starting point in time specified by the section, because of the sections which surround s. 92 and because the proviso to s. 92 relates to customs duties. But it is clear that much more is included in the term; customs duties and other like matters constitute a merely pecuniary burden; there may be different and perhaps more drastic ways of interfering with freedom, as by restriction or partial or complete prohibition of passing into or out of the state.[16]

This is a good example of what Professor Sawer might describe as a political or sociological approach. The idea in this pronouncement is that section 92 was intended to prevent governmental interference with interstate trade and commerce (this is assumed); that customs laws are only one form of such interference, and that in order to achieve what is *assumed* to be the object of the section, it should not be interpreted

[15] (1904) 2 C.L.R. 29. [16] (1936) 55 C.L.R. 1, 56; Sawer, 164; *per* Lord Wright M.R.

according to its terms by accepting the simple proposition that a provision that trade among the States shall be free means that there shall be 'free trade'—and not 'protection'—among the States. It is by a similar kind of reasoning that after it had been stated in *James v. The Commonwealth* that 'the true criterion seems to be that what is meant is freedom at the frontier' it is explained that 'freedom at the frontier' must be understood as including freedom before reaching the frontier and freedom after passing the frontier.

I am forcibly reminded of the manner in which the Supreme Court of the United States has 'interpreted' the provision in the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself'. The court held that the provision must be given a broad construction in favour of 'the right which it was intended to secure'—'the object being to ensure a witness in any investigation in proceedings against being compelled to give testimony against himself'. It was accordingly held that this provision, limited in express terms to criminal cases, applied to civil proceedings and even to investigations which are not legal proceedings in any litigious sense.[17]

Section 92 began rather badly in the Privy Council in *James v. Cowan*.[18] Before that case there had been differences of opinion in the High Court upon section 92. *James v. Cowan* and *James v. The Commonwealth*,[19] were binding upon the High Court and that court had to do its best to interpret and apply those decisions—by no means an easy task—and there were more differences of opinion. After the explanation of *James v. Cowan* given in the *Bank Nationalization Case*,[20] the former case has little authority left. But it has left a legacy. It simply stated that there were exceptions to section 92 in the case of laws with respect to defence, prevention of famine, disease and the like. Later decisions added 'persons deemed to be unfit to engage in trade and commerce, creatures or things calculated to injure its citizens', dangerous drivers *et alia*. (One is inevitably reminded of 'police powers' in the United States.) The promulgation of these exceptions—sensible as they are from a legislative and practical point of view—was not supported by any reasoning except the reasoning based upon an opinion as to what a law was 'directed against' or 'aimed at'—*i.e.* the reasoning in *James v. Cowan* which was explained out of existence in the *Bank Nationalization Case*. In the latter case these and other similar exceptions are stated to be 'obvious'.

Section 51 (ix) of the Constitution gives power to the Commonwealth Parliament to make laws with respect to quarantine, a concurrent power. Quarantine laws operate by preventing movement, including interstate movement of persons or goods. Section 112 recognizes that State inspection laws may be applied to 'goods passing into or out of the State'. Inspection laws operate by delaying the entry of goods so that they may be inspected, and by preventing entry of goods which do not measure up to a standard prescribed by law. Thus both quarantine laws and inspection laws necessarily interfere with, and possibly completely prevent, interstate movement of goods or persons. Such movement has been held to be an 'essential characteristic' of interstate trade and commerce, and as such to be protected 'absolutely' against any legislative interference. Dogmatic statements about what is 'obvious' do not solve the problem which has been created by the now accepted interpretation of section 92.

[17] *Counselman v. Hitchcock* (1892) 142 U.S. 547; *McCarthy v. Arndstein* (1923) 266 U.S. 34. [18] [1932] A.C. 542. [19] [1936] A.C. 578. [20] [1950] A.C. 235.

Emphasis has recently been placed upon the 'central or essential attributes of an interstate transaction' in trade or commerce.[21] It is these and these only which (it is held) obtain protection from section 92. But in *James v. The Commonwealth* it was twice said that 'no help is to be got from the formula "trade and commerce as such" '.[22]

If section 92 does more than establish interstate free trade and intercourse the section cannot mean what it says because it is self-contradictory to say that trade and commerce is to be free from all law. Trade and commerce cannot exist without law. The simplest sale of goods necessarily depends for its effect in transferring title upon some applicable law. If, then, trade and commerce cannot be free from all law, the inquiry begins 'from what laws is interstate trade and commerce to be free?' The present final result appears to be that *prima facie* there must be no restriction upon the essential, as distinct from what are decided by the court to be only incidental, elements or characteristics of an interstate trading or commercial activity—but that some restrictions are not 'real' because they are sensible, and that 'reasonable' or 'not unreasonable' restrictions are allowable, and that a court, and not any parliament, has the right and the power to decide whether any particular restriction is 'real' or 'reasonable' or 'not unreasonable'. As to tolls or other charges for the use of roads and bridges, only maintenance costs are to be taken into account, not capital costs. (*Hughes and Vale Pty. Ltd. v. N.S.W.* (No. 2)) If the tolls on the Sydney bridge are such as to provide over a period for amortization of the original cost of erection, their validity would appear to be doubtful.

One final comment may be allowed upon the prevailing view of section 92. That section is not, as many think, an absolute protection against nationalization and the creation of government monopolies in trade and commerce. In the *Bank Nationalization Case* a distinction was drawn between regulation of interstate trade and prohibition of such trade. The former might be good; the latter was bad. But it was also said that in some cases 'it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation and that *interstate trade, commerce and intercourse thus prohibited and thus monopolized remained absolutely free*'. I have italicized the final words to show how far 'interpretation' of section 92 has gone. I add only that much not very necessary rhetoric has been expended in proving that 'section 92 confers rights upon individuals'—*i.e.* a right to engage in interstate trade without illegal interference. It is really no more than the right to ignore an invalid statute which is relied upon as an authority for an otherwise wrongful interference with person or property. But it is not easy to reconcile any idea of 'individual right' with the doctrine that all individuals may be excluded from interstate trade and commerce in favour of a government monopoly.

Lord Wright, who delivered the opinion of the Board in *James v. The Commonwealth* has courageously given his reasons for changing his mind. He is now satisfied that the decision was wrong and that section 92 means 'free trade' among the States.[23] I admit that I regard section 92 as the curse of the Constitution. It has been a boon to lawyers and to road-hauliers and to people who want to sell skins of protected animals or to

[21] *Hughes and Vale Pty. Ltd. v. N.S.W.* (No. 2) (1955) 93 C.L.R. 127.
[22] (1936) 55 C.L.R. 1, 57.
[23] (1954) 1 *Sydney Law Review*, 145.

trade in possibly diseased potatoes, and to some others. But surely it should be amended.

I use section 92 for the purpose of emphasizing what these two books make very clear—that there should be a revision of the Constitution. As to section 92, confusion and uncertainty will continue indefinitely unless it is amended. An endeavour should be made to state clearly what it is desired that a provision of this kind should accomplish. Section 117 could be improved. The industrial power of the Commonwealth, limited to conciliation and arbitration in interstate disputes is in an absurd form. The legislative control of aviation and navigation is irrationally divided between the Commonwealth and the States. Divided control of what should be one railway system makes little sense, though I suppose that the States will insist upon keeping control of their railways with their deficits. The provision (section 80) about trial by jury is useless, and provisions with respect to New States (sections 121-124) are unworkable.

Many of the differences of judicial and other opinion which are made so apparent by these two books are the consequences of constitutional provisions which common sense, in some cases without political controversy, could put in an intelligible and practical form.

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The Law of Torts, by J. G. FLEMING. (The Law Book Co. of A/asia. Pty. Ltd., Sydney, 1957), pp. i-xxxix, 1-779. Price £4 4s.

'What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms, or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.'

So spoke the great Mr Justice Holmes in 1897. But though Professor Fleming calls his new book 'The Law of Torts' he does not use the word 'law' in the unpretentious sense which appealed to Holmes. Indeed both the bad man and his lawyer will run grave risks if they look to it to tell them what the Supreme Court of any of the Australian States is likely to do in a given situation.

The puzzling thing about this book is the difficulty of discovering what it sets out to do. In his preface the author says—'I have seen my task in undertaking an altogether fresh approach, both in point of substance and arrangement, with a view to presenting as realistic a description of the modern mid-twentieth century operation of tort law as seems to me both possible and desirable in the interest of both student and practitioner alike.' Perhaps the key word in this sentence is 'realistic'. It quite clearly does not mean for Professor Fleming what it meant for Mr Justice Holmes. If one may judge from internal evidence, 'realistic' refers rather to the social philosophy which Professor Fleming thinks he can discover behind a decided case than to anything to be found in the law reports.

Accordingly the book follows the arrangement of the American Restate-

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