

later edition. The decision of the Privy Council in *Attorney-General for South Australia v. Brown*<sup>5</sup> and the decision of the High Court in *Thomas v. The Queen*<sup>6</sup> have only recently been reported, but one finds that there is no reference at all to the equally important and far-reaching decision of the High Court of Australia in the case of *Stapleton v. The Queen*.<sup>7</sup> Undoubtedly in a subsequent edition the learned authors will be obliged to expand considerably the case notes appended to the crime of murder, and to include references to these important authorities.

In conclusion, I congratulate the learned authors who have accomplished a tremendous undertaking in publishing this book. It is a credit to their zeal and industriousness and it is to be hoped that in a subsequent edition of this book the scope of this work will be enlarged so that some day soon it may take its place on our shelves as a Victorian textbook on the criminal law.

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*The Life of Chief Justice Way*, by A. J. HANNAN, C.M.G., Q.C. (Angus & Robertson Pty Ltd, Australia, 1960), pp. i-ix, 1-253. Price £2 2s.

Unlike the situation in the United States, legal scholars and political scientists in Australia have almost completely neglected the field of judicial biography.

As far as the High Court is concerned only two of its members, Sir Edmund Barton and Henry Bournes Higgins, have been the subjects of published studies. Both of these works, however, do not even pretend serious evaluation of the judges' work on the High Court bench. John Reynolds' study of Sir Edmund Barton is more concerned with his work in New South Wales politics and in the movement for Federation than with his legal career.<sup>1</sup> This is not surprising as Reynolds is not a lawyer but a historian. The 'memoir' of Henry Bournes Higgins written by one of his nieces, Nettie Palmer, is an affectionate literary remembrance rather than a biographical study.<sup>2</sup> Sir Samuel Griffith has been the subject of a series of lectures<sup>3</sup> and an unpublished thesis<sup>4</sup>, but both works are unsatisfactory. The first is little more than a series of disjointed headings like, 'Griffith as a friend to the working man', 'Griffith as a Conversationalist', 'His loyalty to the Crown', and so on. The second is merely a three hundred page calendar of most of the things Griffith said and did during his lifetime.

These are the only studies that have as yet appeared of judges of the High Court. There has not been one serious attempt to evaluate the contribution of any of the judges to Australian law, apart from the mortuary estimates that appear when one of them dies. Obituaries are hardly the place for critical estimates. This is more than surprising when the important creative function of the High Court in its interpretation of the Australian Constitution is taken into account.

<sup>5</sup> [1960] 2 W.L.R. 588; [1960] 1 All E.R. 734.

<sup>6</sup> (1960) 33 A.L.J.R. 413. <sup>7</sup> (1952) 86 C.L.R. 358.

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<sup>1</sup> Reynolds, *Edmund Barton* (1948).

<sup>2</sup> Palmer, *Henry Bournes Higgins: A Memoir* (1931).

<sup>3</sup> A. D. Graham, *Sir Samuel Griffith*, Queensland University's Macrossan Lectures 1938.

<sup>4</sup> J. C. Vockler, *Sir Samuel Walker Griffith* (1952). Unpublished thesis presented to the University of Queensland for the B.A. (Hons.) degree.

George Higinbotham, the Victorian Chief Justice at the end of the last century, is the only State Supreme Court judge to have been the subject of a published biography. This is a rather rhapsodic work written by one of his close friends, Edward Morris.<sup>5</sup>

Mr Hannan's study of Sir Samuel Way, who was the Chief Justice of South Australia from 1876 until his death in 1916, represents a continuation of the worst features of the four Australian judicial biographies that had been published before it. This could hardly have been otherwise as Mr Hannan set himself the task, not of evaluating the impact made by Way on the development of law in South Australia, but merely of 'perpetuating the memory of a man who was a learned lawyer and a very distinguished judge' (page vii).

This Mr Hannan does over 253 pages of the dullest and most fatuously eulogistic piece of writing that can be imagined. Sir Samuel Way's progress from the penniless youth who arrived in the colony in 1852 to the man who held almost every important office the South Australian Government could offer is traced with a loving attention which cares for nothing other than the religious cataloguing of each step along the glorious path. His associations with an obscure Methodist sect and his family life are treated at great length and his various overseas trips are traced with great detail. Happily we are spared a too graphic account of his death although the onset of cancer, an amputation and fits of racking coughing are put in for the benefit of those who are interested in such things.

Before reading the book my impression of Way was of a ruthless and supremely egotistical man who would stop at nothing to achieve his many ambitions. He was a man who had acted very selfishly in appointing himself Chief Justice instead of Randolph Stow, who was far better qualified for the position. This certainly was the view taken by his fellow judges who would not even speak to him for a long period after his appointment. I had always been amazed at the remarkable lengths to which he went in order to obtain Charles Cameron Kingston's support for his appointment to the Privy Council. He hated Kingston but was always willing to sacrifice his pride to achieve great offices. I was also under the impression that Way, in concert with Sir Samuel Griffith, the Chief Justice of Queensland, acted in a very underhand manner in secretly attempting to persuade the Imperial authorities to retain the right of appeal to the Privy Council in the face of the will of a majority of the Australian people expressed in a referendum that it be abolished. From a cursory reading of his judgments I had even ventured to question his greatness as a judge and to think that the quality of his judgments only improved with the creation of the High Court which vigorously revised so many of them.

I am sure, however, that these impressions of Sir Samuel Way were quite wrong, but when one reads a biography of such a controversial figure it is not too much to expect that some of these criticisms which have often been made will at least be discussed. None of this unsettling material, however, gets into the rose tinted pages of Mr Hannan's book. Way, we are assured, was a selfless, open and generous man who never was responsible for a nasty thing in his life. The closest the book ever comes to presenting any of the other side of the picture is Mr Hannan's rather grudging admission that many Adelaide University students

<sup>5</sup> Morris, *George Higinbotham* (1895).

thought Way, who was their Chancellor, 'garrulous and pompous' (page 106).

Three fundamental criticisms can be made of this book.

In the first place, there is a lot of material which provides valuable insights into Sir Samuel Way of which the author has not seen fit to make use. For example, in the Dixson Collection of the Public Library of New South Wales there are many interesting letters in the Griffith Papers written by Way and by Sir James Penn Boucart to Griffith. Boucart was a fellow judge with Way on the South Australian Supreme Court. This correspondence reveals the hatred felt by a judicial colleague towards Way and the reasons for it. It also contains valuable evidence of the activities of Way and Griffith in regard to the dispute over appeals to the Privy Council and the draft Constitution Bill.

Again although Mr Hannan in his discussion of Way's attitude towards Federation has discovered and set out at great length a memorandum written by Way entitled *Some Observations on the Draft Bill*, he completely neglects a far more important later article on the same subject. This is Way's *Observations on the Proposed New Clause*.<sup>6</sup>

The significance of this is that in the later article Way's narrow State's rights attitude is startlingly apparent, and this is contrary to Mr Hannan's theme and chapter heading 'Interest in Australian Federation'.

I do not mean for one moment to suggest that Mr Hannan has deliberately left this material out in order to show Sir Samuel in a better light; the point I make is that the research that has gone into the book is far too inadequate for it to be considered as a serious work of scholarship. This, for example, is certainly true of the chapter dealing with the intriguing career of Mr Justice Boothby (chapter 4).

Secondly, the style in which the book is written adds very little to its attractiveness. A good deal of it is taken up with long extracts from letters or speeches with very little or no comment bringing out the importance of the content. Its treatment of the trivial is quite remarkable. Fifty-one pages or approximately one-fifth of the book is taken up with details of Way's world tours. These pages are full of the opening of bazaars and conferences, impressions of foreign countries and meeting with famous people.

The final and fundamental fault with the book is, however, that it is a completely uncritical evaluation of the impact Way had on the history of South Australia. Apart from recounting the facts of a few of the more important cases Way decided, Mr Hannan makes no attempt to assess his subject's worth as a lawyer or to examine his attitude to the judicial process. The tacit assumption is that these considerations are not a proper subject for judicial biography. Not one note of criticism appears of any one of Way's judgments, although I doubt whether Mr Hannan would relish arguing the validity of many of them in such a body as the High Court. Sir Samuel Way's true character is completely missed by surrounding him with a halo of such dimensions that surely must have caused his statue on North Terrace to blush.

To sum up, the book is satisfactory for one purpose and for that only—to help remind the citizens of Adelaide of the virtues of a man they all want to believe was great and blemishless. Such books are, however, completely useless. They read like funeral orations and only serve to per-

<sup>6</sup> Ch. 12. This later article was published in all the Australian daily newspapers on 10 June 1900.

petuate false impressions about a man who, at least, led a fascinating life full of interest but whose character becomes, in the hands of a biographer like Mr Hannan, saintly, instead of machiavellian.

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*Comparative Law: Cases—Text—Materials*, by RUDOLF B. SCHLESINGER, Professor of International and Comparative Law, Cornell University, 2nd ed. (The Foundation Press, Brooklyn, 1959. Stevens and Sons Ltd, 1959/1960), pp. i-xliv, 1-635. Price £5 17s. 6d.

Professor Schlesinger of Cornell Law School was the first teacher of Comparative Law to make his teaching material available to the outside world in book form. That was in 1950 when his *Comparative Law—Cases and Materials*—as the book was then called—was brought out in its first edition, a bare two years after the author had introduced Comparative Law as a teaching subject at his Law School. Much of the material used then was secondary, much required more connecting text and background information. These shortcomings of the first edition have now been overcome; most of the extracts from articles and books by other authors on special questions in the field of Comparative Law have been replaced by text written by the author himself. Furthermore there are many new notes, illustrations, problems and questions. All contribute to an added liveliness and general usefulness of the book.

The basic arrangement of the book has not been changed in the new edition. It is decisively influenced by what the author considers as most important for the practitioner's needs. Thus the first chapter, after a stimulating introduction showing the wide use of the comparative method, is devoted to 'Foreign law in our courts: pleading and proof of foreign law' (pages 31-143): a topic which an English or Australian law teacher would expect to see covered in the final year's Private International Law course.

The most valuable part of the book is the second and main chapter. It is devoted to 'Common Law and Civil Law—Comparison of Methods and Sources' (pages 152-393). Compared with the first edition, the second edition shows a number of valuable additions and changes in this chapter. There is a new section now giving a fine historical comparison of the forces influencing the development of the common law and the civil law (pages 179-189). This is followed by a new, up-to-date survey of the expansion of the common law and the civil law (pages 190-198). This note brings out very clearly something which modern comparative law treatises have generally failed to realize: the spreading of mixed systems.

The second chapter contains also a greatly enlarged section devoted to Continental civil procedure (pages 201-252). The reviewer agrees with the author that procedure is in the end result often much more important for the proper assessment of a Comparative Law problem than substantive law. In the new edition the material is presented in the form of a highly entertaining imaginary consultation about an American company's interest in a civil law country. There are also now greatly enlarged notes, with a number of new and interesting ideas, on the system and organization of codes (page 262 and following pages).

The third chapter is, as in the first edition, devoted to the study of a few selected topics (pages 393-476). The topics selected are again Agency,

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