

BOOK REVIEWS

PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW

By D. G. Benjafield and H. Whitmore (Third edition, 1966. The Law Book Company Limited.) pp. xxxi and 368. Price: \$7.50

When Professor Friedmann produced the first edition of 'Principles of Australian Administrative Law' in 1950 it was the first work of its kind in Australia. This was surprising, for in a sense Australia began to develop a body of administrative law impinging on the activities of ordinary members of the community some time before Great Britain, notably in the field of industrial relations.

Professor Friedmann's book, very naturally perhaps, tended to stick closely to the English model. One reviewer at the time described it as little more than an Australian gloss on the English law. The second edition, however, by Professors Friedmann and Benjafield, was a greatly enlarged and substantially revised edition, and was a highly successful attempt to come to grips with the problems of administrative law in the Australian context. In this, the third edition, by Professors Benjafield and Whitmore, still further new material has been introduced and, as the authors tell us, more emphasis has been placed on the substantive principles of judicial review, and on administrative tribunals and statutory corporations in operation in Australia.

The reviewer who criticizes a work on administrative law for the choice of content and the relative emphasis on particular topics lays himself open to the obvious retort that there is no one definition of the subject, and that in this field, more than in any other field of law, the writer has the widest possible discretion as to what he will include. Nevertheless it seems disproportionate that very nearly one third of the book (pp. 1-101) should be occupied by a general survey of the British and Australian constitutional systems, and of certain fundamental constitutional concepts—the sovereignty of parliament, the rule of law and the separation of powers—which belong more properly to a book on constitutional law. The authors justify this in the Preface as done 'in order to give the student, in the one volume, a complete picture of the operation of administrative law.' Certainly the student needs this preliminary material, and the account given here is succinct, clear and interesting. But it is not full enough for the constitutional lawyer; and at the same time it inevitably curtails the space left to deal with the heterogeneous mass of material to which the writer on administrative law must try to give some coherent form.

The view that law is primarily if not wholly concerned with the sort of rights which are the subject matter of litigation between citizens, and that this is so even if the state or a public body should happen to be involved, is one which persists to the present-day, and which ignores the utterly different character of the discretionary powers conferred on administrative authorities or tribunals. It is a merit of this book that the authors are constantly aware of the dangers of such a view. They point out, for example, that 'classification of powers on a conceptional basis is probably impossible, and in any event, futile.' (p. 102) Whatever the courts may say, the classification of a power as judicial, quasi-judicial or administrative depends on a question of policy, namely, to what extent the courts ought to interfere—a question of policy, incidentally, which the courts are probably not very well equipped to handle. Again, the doctrine of *ultra vires* allows of a fairly strict, purely 'legal' interpretation; but as the authors point out the doctrine 'has in this century been extended far beyond the original conception in order to permit judicial control of powers which are not limited by statutory standards and, above all, of powers which are deliberately conferred so as to allow the administrator a wide discretion.' (p. 175). Indeed, as they say, (p. 172) the claim that an exercise of statutory power is *ultra vires* generally 'gives no real indication of the ground of challenge.'

The last chapter, on Corporations and Tribunals, is particularly valuable, with its critical evaluation of the recommendations of the Franks Committee, and its insistence that some similar investigation is long overdue in Australia in order to produce some coherent system in this field of the law.

Michael Scott

CASES ON TRUSTS

By H. A. J. Ford (Law Book Company, Ltd.) xviii + 816 pp.

This second edition of a case-book which was well received on its first publication in 1959 conforms substantially to the pattern of the first. *Norman v. Commissioner of Taxation* (1963) 109 C.L.R. 9 has been added, which with *Anning v. Anning* (1907) 4 C.L.R. 1049 gives the student a very full treatment of the subject of voluntary assignment of choses in action. *In re Cook's Settlement* [1965] 2 W.L.R. 179 joins *In re Kay's Settlement* [1939] Ch. 329 as an authority on covenants in favour of volunteers. Both are highly unsatisfactory first instance decisions which have met with considerable criticism, but doubtless they represent the law until some higher court sees the light, so that their inclusion was inevitable. Other additions are *Re Armstrong* [1960] V.R. 202 (intention to establish a trust); *Scott v. Scott* (1963) 109 C.L.R. 649 (trustee's liability to account for profits); *Leahy v. Attorney-General (N.S.W.)* [1959] A.C. 457 (gifts to unincorporated associations); *Beggs v. Kirkpatrick* [1961] V.R. 764 (public subscription trusts);

Gascoigne v. Gascoigne [1918] 1 K.B. 223 (illegal trusts). Professor Ford has also included the recent English legislation reforming the law of perpetuities and the law of charities. Of the seven cases omitted in this edition, the most surprising omission, perhaps, is that of *Saunders v. Vautier* (1841) 4 Beav. 115.

I shall not here attempt any general appraisal of this volume as a teaching instrument; that has been carried out in reviews in this and other periodicals of the first edition, notably the sympathetic yet critical review by Professor Sheridan in the *University of Melbourne Law Review* (Vol. 2, p. 259). One or two criticisms on points of detail may however be ventured.

1. Professor Ford's inclusion of statutory material from England and New Zealand as pointing the way towards reform within Australia is most valuable. Yet in the section on Investment there is no mention at all of the Trustee Investment Act 1961 except in a footnote which gives no indication of its content; and this despite the fact that the later section on Compliance with the Trust Instrument includes the decision of the High Court in *Riddle v. Riddle* (1952) 85 C.L.R. 202, which has directly to do with the investment difficulties of trustees in this inflationary age.

2. Although this edition, unlike its predecessor, contains an index of statutes, the index does not include statutory provisions cited in the footnotes.

3. The report of *Sambach v. Dalston* given here is taken from Tothill 188. This report is quite unintelligible. The report at Nelson 30 is better. Still more useful, perhaps, would have been a summary of J. E. Strathdene's findings (74 L.Q.R. 550).

4. Why is the version given of the Statute of Uses (p. 3) given in its appalling antiquated spelling? ('Nor ought to be transferrid frome one to an other but by solemn lyvery and season,' etc.) After all, it does not appear like this in the Statutes at Large.

5. *In re Baker* [1924] 2 Ch. 271 is chosen to exemplify the rule in *Re Chesterfield's Trusts* (1883) 24 Ch. D. 643. The decision repeats the wording of the rule, and is notable otherwise only in altering the rate of interest to 4%. The judgment of Shott, J., in the later Australian case, *Re Lewin* [1961] V.R. 528 is a good deal fuller. Further, it recognizes 5% as an appropriate rate at the present day, and points out that there should be no deduction of a notional income-tax.

Michael Scott

THE CONSTITUTIONS OF THE AUSTRALIAN STATES

2nd edition by R. D. Lumb (University of Qld. Press 1965). pp. 133. Price: \$3.50.

This is the second edition of Dr. Lumb's extremely useful book on Australian State Constitutional law. It has been slightly expanded from the first edition and a number of sections have been enlarged.

It is divided into two parts, the formation of the Constitutions and the present structure of the Constitutions. All the various aspects of a State Constitution have been dealt with and, in a number of appendices, relevant statutes and documents are set out.

There are some areas of State Constitutional law, admittedly, speculative areas, that Dr. Lumb has not dealt with. This is not a criticism of the book as conceived by Dr. Lumb. It is a matter of personal preference that one topic is discussed in place of another. But there can be no doubt, for instance, that future editions will have to discuss the question put forward by S. A. de Smith, whether separation of powers is applicable to the States, and the consequences of the decision in *Clyne v. East*, the recent N.S.W. case.

This book is quite short and strictly limited to the legal aspects of State Constitutional law. This is, I feel, the main fault. In a field such as this, there is surely scope for a book which draws together not just the legal aspects of the subject, but the historical and political ones as well. In this way, the student of State Constitutional law would be able to see the way in which this law operates in its context and the various factors which are brought into play in the modification and development of the law. Although this is a basic disagreement with the nature of Dr. Lumb's book, it does not detract from what he has done. The law on this area has been set out; it can only be hoped that the next step in the task will ultimately be taken.

N. Reaburn.

BOOKS RECEIVED

- R. J. Davern Wright: *Testator's Family Maintenance*, 2nd ed., Law Book Co.
- W. B. Leach: *Property Law Indicted*, University of Kansas Press.
- R. E. Megarry & P. V. Baker: *Snell's Principles of Equity*, 26th ed., Sweet & Maxwell.
- C. L. Pannam: *The Law of Moneylenders in Australia & New Zealand*, Law Book Co.
- P. E. Joske: *Australian Federal Government*, Butterworth's.
- P. H. Lane: *Australian Constitutional Law*, Law Book Co.
- H. H. Glass & M. H. McHugh: *The Liability of Employers*, Law Book Co.
- A. Avins: *The Reconstruction Amendments' Debates*, Riverside Press.
- P. E. Joske: *Law of Marriage and Divorce*, 4th ed., Butterworth's.
- E. J. Hayek: *Principles of Bankruptcy in Australia*, 2nd ed., University of Queensland Press.
- A. Avins: *Open Occupancy vs. Forced Housing*, Bookmailer.
- P. H. Lane: *An Introduction to Australian Constitutional Law*, Law Book Co.
- A. Mann: *Medical Assessment of Injuries for Legal Purposes*, Butterworth's.