BOOK REVIEWS.

Constitutional Problems in Pakistan. By Sir IVOR JENNINGS, K.B.E., Q.C., Litt. D., LL.D., F.B.A. 1957. Cambridge University Press. xvi and 370 and (index) 8pp. 42s. od. stg.

The Indian Independence Act 1947 provided for the creation of Constituent Assemblies in the two new Asian States and for the exercise of legislative power by them pending the adoption of new constitutions. The interim period was expected to cause, in both of them, political rather than legal problems; but the duration and nature of the problems would depend upon the success of Indian and Pakistani efforts to give themselves new and appropriate constitutions. India set about the task with zeal, and by the end of 1949 had produced a constitution (of 250 pages in the official print—surely one of the longest and most elaborate that the world has ever seen) which, but for a few sections which were immediately effective, came into operation on 26th January, 1950. In Pakistan, however, the Assembly spent nearly eight years in *failing* to reach an agreement on constitutional issues until (in sheer desperation, one imagines) the Governor-General dissolved it. His action gave rise to constitutional issues of the first importance, relating not only to the very existence of such a power of dissolution, but to the alleged invalidity of a number of Acts which the now defunct Assembly, in its legislative capacity, had passed.

But for the work of Sir Ivor Jennings the precise nature of these problems would remain unknown to most constitutional lawyers simply because there must be large numbers of law libraries which either do not or cannot obtain the reports of decisions of the courts of Pakistan. What Sir Ivor has done has been to arrange, with the co-operation of the Ministry of Law in Pakistan, to reprint either in full or in substance the four very important decisions handed down since the dissolution of the Constituent Assembly and arising out of it. But he has prefaced this reprinting with his own summary of the issues involved, a summary written in his usual lucid and cogent style; the summary alone is almost sufficient to tell the whole story—but constitutional lawyers everywhere will be grateful to him, not only for the summary, but for the decisions themselves.

Two major issues came before the Supreme Court of Pakistan. The first, (in significance, though not in time) was of course the validity of the action of the Governor-General in dismissing the Constituent Assembly; and this largely turned on the very technical issue

as to whether the royal prerogative to summon, prorogue, and dismiss the legislature had, by virtue of the Indian Independence Act in its application to Pakistan, been completely transformed in to a statutory power exerciseable only in the manner and under the conditions prescribed by the Act itself. This involved a difficult task of interpretation; the Act had set no term to the enactment of a constitution, and had given to the Constituent Assembly wide legislative powers exerciseable by it until such time as it should surrender them to a new legislature brought into existence by its own act. Since the Act does not contemplate an inordinate delay in the creation of a new constitution, the draftsmen may be excused for their lack of foresight in making no provision for the contingency time the onerous responsibility imposed on it. Since the Act does provide for the filling of vacancies that might occur in the ranks of the Constituent Assembly, the latter's continued failure to perform its primary task meant, if there were no legal basis for the action of the Governor-General, that Pakistan might well find itself saddled with a self-perpetuating body unable or unwilling to provide for the transfer of its legislative powers to a new legislature and incapable of replacement by a new Assembly more willing to undertake the constitution-making task. Though this was not the first of the very important issues to come before the Supreme Court, it seems to the outsider to be the most significant of them all; for a decision adverse to the claims of the Governor-General might well have produced a revolutionary situation in Pakistan. In the *Special Reference,* No. 1 of 1955, the Court boldly faced this crisis; it examined the Indian Independence Act with the utmost care, considered the historical development of the prerogative in general and then with particular relevance to its application to the overseas dominions of the Crown (which is what both India and Pakistan became on the passing of the Act), and concluded that there remained in the Governor-General a residuary power which authorised and justified his action; the emergency which had arisen called for the exercise of emergency powers, though those powers—particularly in relation to the government of Pakistan until such time as a new Constituent Assembly could be summoned—must be limited to such as were necessary to enable government to be carried on.

What is intituled the *Constitutional Civil Appeal,* No. 1 of 1955, was the first case to come before the Supreme Court (on appeal from the Chief Court of Sind) and raised other issues though here, too, the extent and nature of the prerogative had to be considered. Very early in its existence the Constituent Assembly had formed the opinion

that its acts (i.e., the measures passed by it in its alternative, *legislative* capacity) did not require even the formal assent of the Governor-General but became effective on promulgation by order of its President. Some forty Acts had been passed by it without being assented to by the Governor-General; if such assent were in fact necessary, all of these measures, on which the courts had in the past acted and many of which were of substantial importance in both public and private law, were ab initio invalid. Here too the Supreme Court had to consider the nature of the prerogative and whether or not it had been circumscribed or abolished by the Indian Independence Act; it found it necessary, as Sir Ivor puts it in his preface, "to examine the fundamental principles of democratic government as understood in the Commonwealth (of nations), the nature of Dominion status and the meaning of 'independent Dominion', the royal prerogative in the Commonwealth and especially in territories acquired by cession or conquest, and the relations between statutory and prerogative powers." With a full appreciation of the momentous consequences of a decision adverse to the claim of the Constituent Assembly the Court nevertheless found that measures of that body which had not been submitted to the Governor-General for assent, formal though that assent might be, were completely devoid of legal effect. This decision called for emergency action on the part of the Governor-General, since there was not in existence a Constituent Assembly to re-enact the invalidated measures and submit them for assent as required by the judgment of the Court, and by the Emergency Powers Ordinance 1955 he declared—his action being challenged but being upheld by the Court—that all the laws declared invalid from lack of consent were to be deemed valid and enforceable until such time as a new Constituent Assembly could decide whether all or any should be validated by it in the proper manner.

The historical exegesis performed by the Pakistani Supreme Court in the decision of the four cases contained in Sir Ivor Jenning's work is of extreme importance to all constitutional lawyers in every part of the Commonwealth—who owe a heavy debt of gratitude to the author for making them available and for guiding them, in his preface, through the labyrinth of some very difficult problems of constitutional and legal interpretation.

F.R.B.

Legislative, Executive and Judicial Powers in Australia By W. ANSTEY WYNES, LL.D. Second edition; 1956. lxi and 730 and (index) 58 pp. (The Law Book Co. of Australasia Pty. Ltd.; Sydney, Melbourne, and Brisbane £A4. 15s.).

For many years Australian teachers of the constitutional law of constitutional law. More than one of those students has given at least the Commonwealth, most of them far too occupied with their class assignments and the steadily increasing burden of administrative work to find the time to attempt to write a really good textbook on Australia's federal constitution, have hoped that someone outside the academic world would do the job for them. What they wanted, of course, was something which it is very difficult to write; a book which would be limited in length and yet would cover in a broad and *critical* survey all the salient points of our very complicated constitution. No federal constitution has yet been written in such terms that he who runs may read—and understand; our own is, superficially, straightforward, but in many fields (notably in relation to section 92) has, through the process of judicial interpretation by the High Court, sometimes aided and abetted by the judicial Committee of the Privy Council, become more and more difficult to explain intelligently and tersely to the fledgling student who is quite ignorant of the niceties of judicial exegesis.

Whether or not we use the casebook method in teaching Australian constitutional law, as some of our law schools are beginning to do, I still cling to the opinion that a study of the leading cases (increasing in number and complexity with almost terrifying rapidity) is not by itself enough. The broad survey already referred to is required to enable the student to see the wood for the trees, to collate into a coherent whole the principles which he has learned (or which we hope he has learned) from the cases. The question is—assuming for the moment the validity of the assertion of the need for such a survey—has the need yet been satisfied?

Shortly after the Second World War the late Mr. Justice Nicholas of New South Wales, on his retirement from judicial office, set himself the task of writing a textbook on the constitution. Those who knew Nicholas's lifelong interest in constitutional problems had high hopes; but unhappily they were not realised. His work, though it went into a second edition before his death, showed all too many signs of hasty preparation; the material was unsystematically presented, and the style had little of the lightness and verve much more characteristic of the Nicholas whom some of us knew so well through long friendship and

many talks with him. It was a book which appeared to puzzle most students instead of helping them; the need for clarity and reasonable brevity was still there.

Now Dr. Anstey Wynes has stepped into the breach with a revised and very much enlarged second edition of a work entitled *Legislative and Executive Powers in Australia* on its first publication some twenty years ago. Since that time the Second World War took place, with its flood of decisions on the ambit of the defence power—a flood which slowly diminished to a trickle as the High Court considered the problems arising out of the transition from war to peace (*sic*). Moreover, the legislative policy of the post-war Labour governments was frequently, and for the most part successfully, being challenged in the courts; and a resolute attempt was made by the powerful road transport interests to get a new interpretation of section 92 which they hoped would free them from most if not from all of the restraints imposed on them by State governments obsessed by the perennial problem of mounting railway deficits for which the activities of those road transport interests were at least partially responsible. All in all the last decade has seen a large number of momentous decisions by the High Court, so many in fact that every potential author of a work on the constitution had to face the fact that his work migh be partly out of date before it could be printed.

So Dr. Wynes was more than justified in writing a new and necessarily enlarged edition of his work; but was it necessary for him to write more than twice as much as on the first occasion? No one is entitled—least of all the writer of a review—to tell an author his own business, to assert that he ought to have been able to condense what he had to say into so many pages and no more. The length of the new edition would matter much less if Dr. Wynes had a more attractive style of writing, if he were a little more critical and a little less expository. Nothing is left out which ought to have been included; but I cannot help feeling that much is included that might have been expressed more tersely and provocatively, and some that might without great loss have been omitted altogether. I have been teaching constitutional law, probably quite inadequately, for nearly thirty years; but I must confess that to read Dr. Wynes requires great concentration. It may well be that many of my students have more alert and adaptable minds than I have; I still have an uneasy feeling that if I were to urge them to read and digest thoroughly what Dr. Wynes has to say the great majority would find themselves floundering before they had got very far and would leave many of the pages unread. On

the other hand, the select and virtuous few who took my advice would undoubtedly achieve, under the author's guidance, an unusual mastery of a very difficult subject.

The quest for the perfect textbook has still to be made. What Dr. Wynes has done—and I hasten to pay this tribute to him in spite of some of my earlier comments—is to write a reference book that I am sure will be of the utmost value to all teachers of constitutional law and to the slowly increasing number of Australian lawyers who are really expert in the argument of constitutional issues. I shall use it myself on many occasions, even though I do not always share the author's view that the collective judgment of the High Court is the quintessence of judicial wisdom; but I am very sorry indeed that I cannot regard it as an appropriate means of enlightening young and usually very immature students concerning the constiution of the Commonwealth of Australia.

F.R.B.

Cases on the Constitution of the Commonwealth of Australia. By GEOFFREY SAWER, B.A., LL.M. Second edition; 1957. xxxi and 615 and (index) 13 pp. (The Law Book Co. of Australasia Pty. Ltd.; Sydney, Melbourne, and Brisbane. £A3. 10s.).

When in 1946 Professor Geoffrey Sawer told the members of the newly formed Australian Universities Law Schools Association that he had started work on a constitutional law casebook, the Association did not hesitate to give it is blessing—and its *imprimatur* for what that might be worth. Being a new and impecunious body it could do little more; it could not offer any monetary support in the event of prospective publishers being somewhat dubious about undertaking the financial responsibility for the new venture; nor, in its infancy, did it feel justified in asking those of its members who were engaged in teaching the law of the constitution of the Commonwealth of Australia to make the new casebook "prescribed reading"—which would have gone a long way towards relieving the natural fears of a publisher who knows that the market is very limited. But, knowing the author, the members were all confident that he would produce a casebook manageable in size and yet comprising all the essential material; and their confidence was fully justified when the first edition appeared in 1947.

In some of the Australian law schools, where the number of students is very large and library resources not always adequate, the

casebook may have been welcomed at first—and rather unflatteringly —merely as a means of lessening the demand for, and the wear and tear of, the few sets of Commonwealth Law Reports in the library; but, judging from the fact that a new edition has now appeared, it is reasonable to think that the first casebook must have appealed to a very large number of Australian law students everywhere. In Western Australia, where the pressure on library resources is not so great because the number of students is so much smaller and no one has to wait very long before getting hold of a particular volume in one of the three available sets of Commonwealth Law Reports, "Sawer" was nevertheless to be found in the possession of practically all students of four reasons for buying a copy for himself: (1) he had all the authorities, other than the very latest, at his side when working on the subject; (2) he often felt that he got a better understanding of a particular judgment from reading the author's skilfully extracted passages than from trying to assimilate the whole; or, if he started off by reading the whole case in the Reports, as some rather shyly confessed to having done, he subsequently found the Sawer excerpts a more than adequate *aide mémoire*; (3) he found the author's notes exceedingly helpful despite their brevity—or perhaps because of it; and (4) he could take the volume home to read in the week-ends or the vacations, confident that with the addition of his own précis of post-1946 judgments the whole field was covered.

The new edition has all the merits of the old (and the advantage of being printed in clearer type and on a better paper[1]). Some cases that appeared in the first edition have been omitted; but many more have been included. Judgments have been necessarily condensed, but condensed with the same skill as before; inevitably the new edition is larger than the first. But it is still a very manageable collection of leading cases. It deserves, and I am sure will achieve, the same popularity as its predecessor.

F.R.B.

American-Australian Private International Law. By ZELMAN COWEN. Parker School of Foreign and Comparative Law, Bilateral Studies in Private International Law No. 8. (Oceana Publications, New York. 1957. 108 pp. including index $3.50. Our copy from the publishers).

Professor Cowen commences a short foreword to his study by referring to "Australian Private International Law."

[1] This is not a reflection on the publishers. It was extraordinarily difficult, at the time of publication of the first edition, to buy new type faces or even paper of good quality.

That Australia is developing a Conflict system of its own and, in doing so, would be advised to give more attention to the special requirements of a federal system and the express dictates of the Constitution, drawing where appropriate upon the examples of her federal cousin over the Pacific, is the theme of the work.

This is an invaluable commentary upon the Australian scene touching upon, as the Table of Contents shows, most aspects of the Conflict of Laws in Australia; and pointed up by relevant comparisons with doctrines developing in the United States.

The section on "Full Faith and Credit" read with those on jurisdiction, marriage and divorce, and foreign judgments, suggests that the hub around which turn many inter-State conflicts is the constitutional provision for "full faith and credit" fortified by section 18 of the State and Territorial Laws and Records Recognition Act.

Professor Cowen mentions a number of Australian judgments where English authority has been doubted or not followed but, on the other hand, he points out that in some of the Australian cases preoccupation with the law of England has resulted in full faith and credit either being overlooked or not squarely faced. There may, however, be room for disagreement with the author's preference for American doctrine in relation to one case (*Harris v. Harris,* [1947] Victorian L.R. 44) where the "credit" provisions were fearlessly wrestled with by Fullagar J.

The American trend is not to afford recognition to the judgment of another State of the Union where the case is heard *ex parte* and the tribunal lacks jurisdiction in the international sense either because it has made an erroneous finding of jurisdictional fact (as in *Harris*) or is acting under a jurisdiction "assumed", e.g. by local statute.

Fullagar J. rejected the distinction between *ex parte* and contested proceedings (there is no "due process" clause in Australia) and went further, holding that, providing the judgment was final and conclusive in the forum of judgment then it must be recognised by force of section 18 of the Recognition Act. Although the words of the section are plain, the author is of the opinion that this was not the result intended by Parliament and that section 118 of the Constitution itself was directed to matters of proof and procedure and not to substantive law. It is, however, difficult to see what good would come from applying American doctrine in this instance. The author points out that, if the view taken by Fullagar J. of the effect of the Recognition Act is carried to its conclusion, there is no "scope left within the

full faith and credit area for many of the traditional rules of the conflict of laws." In what is, essentially, one civilisation area this might not be a bad thing.

The problem of applying full faith and credit literally to State laws as distinct from judgments is not perhaps as difficult as Professor Cowen suggests. Is it not a matter of finding the "proper law" of the obligation or other legal circumstance, and applying it? This process itself is, of course, not easy but it is endemic in conflict problems and is made no worse by giving substantive "credit" e.g. in cases of tort. Such a view would enable the court of the forum to ignore the first requirement of *Phillips v. Eyre,* (1870) L.R. 6 Q.B. 1 (actionability in the forum) and reach a result not unlike that reached by McTiernan J. (in the minority on this point) in *Koop v. Bebb,* (1951) 84 Commonwealth L.R. 629. It would also, in respect to judgments, make it unnecessary as between the States to toy with the "reciprocal recognition" doctrine popularised by the controversial decision in *Travers v. Holley,* [1953] P. 246.

Under the heading "Diversity Problems in Jurisdiction" Professor Cowen draws attention to the original jurisdiction of the High Court in matters arising between residents of different States and refers to section 79 of the Judiciary Act which provides in effect that, in exercising federal jurisdiction, a State Court must, in the absence of other provisions, apply the law of the forum. He then asks "may a resident wife bring action for divorce under this federal jurisdiction although no existing Commonwealth or State legislation permits her to petition at all?" Such a question indicates what a fascinating little book this is.

It is indispensable to teachers in Australia. It should be relished in the United States. A practitioner would be wise to look at it before embarking on a case involving an inter-State element.

J. L. C. W.

The Sale of Goods. By P. S. ATIYAH, B.A., B.C.L. (Oxon.). (Sir Isaac Pitman & Sons, Ltd., London. 1957. xxv and 206 pp. including index. 25s. Stg.).

In this book the author sets out to state within a moderate compass the modern English law of sale of goods. This object in itself may sound prosaic enough, and the reader might expect to find little more than a superficial and uncritical review. The result is quite the reverse: an excellent book which provides a penetrating and thought-provoking treatment of the subject and which is written in a lucid and

attractive style. It is not merely a commentary on the Sale of Goods Act but a narrative text book in which the author provides his own arrangement of the material; his attention is not confined narrowly to the topic but ranges into some fields of the general law of contract such as, for example, frustration, and mistake. At many points there is evidence of meticulous and original research, as for example the postulation (on p. 16) of a new interpretation of the decision of the House of Lords in *Couturier v. Hastie,* (1856) 5 H.L.C. 673 despite the fact that a differing view has obtained for the past century. Balancing this scrutiny of familiar land-marks from the past the author discusses freely the modern trends as they are reflected in recent decisions, referring to more than fifty cases decided in England during the past decade.

Although the book may well be useful to the general practitioner in suggesting to him "novel lines of argument" as Professor L. C. B. Gower said in the Foreword, it is essentially a student's book, one which can be relied upon to stimulate thought and argument as well as to instruct.

R. D. W.

An Englishman Looks at the Torrens System. By THEODORE B. F. RUOFF. (The Law Book Co. of Australasia Pty. Ltd. 1957. iii and 106 pp. including index. £A1. 5s. Our copy from the publishers).

This small volume is a collection of essays on the operation of the Torrens system written by an English solicitor who, as assistant land registrar at H.M. Land Registry in London, visited Australia in 1952. The essays have appeared before in one form or another in various periodicals, and some at least will be familiar to readers of the Australian Law Journal.

It would be idle to pretend that the book is indispensable to the practitioner, but for those interested in the working of the Torrens system as distinct from the detailed study of statutes to be found in the standard texts, it can be wholeheartedly recommended. The constant theme of Ruoff's writings is that a system of land registration must keep pace with the demands of an increasingly commercialised and urbanised society, continually giving rise to new problems of land dealing which Torrens could not have contemplated. Perhaps the most topical illustration of this is the horizontal division of land which has become so important to the ever-growing race of flat-dwellers who

like other people wish to be able to say: "This is mine" and not just "I am the tenant." In what is one of the best chapters in the book, "Modern Problems—A Businesslike Approach," the author discusses this, and without actually drafting a precedent offers valuable advice to the conveyancer. It is Ruoff's contention that the value of any system of land registration must be judged by the way in which it can cope with problems such as this. "That is only another way of saying that the customer is always right."

Another theme which recurs in several of the essays is the extent to which the Torrens system would survive "if it had to compete with a competent rival business run by a private enterprise." In Australia there is no competing system of registration of title and the trend of legislation has been compulsorily to subsume land under the operation of the Torrens system. This, among other factors, has ensured that nothing comparable say to title assurance as exists in the United States has arisen to offer an alternative guarantee of title. The result has been a tendency in some respects to accept the legislation in virtually its original form rather than alter it to mend weaknesses which have appeared from time to time in the structure. For instance the insecurity of the registered proprietor following *Clements v. Ellis,* (1934) 51 Commonwealth L.R. 217 was not remedied in Western Australia until 1950; and the immunity given to the Assurance Fund in the case of a forged transfer by *Gibbs. v. Messer,* [1891] A.C. 248 still remains.

The essays run the gamut of several jurisdictions, glancing at the working of Torrens system legislation in Australia, New Zealand and Canada (the latter prompted by the *Turta Case,* [1954] S.C.R. 427; [1954] 3 D.L.R. 1), filled out for good measure by an examination of the English Insurance Fund which offers some enlightening administrative comparisons with Assurance Funds in this country. Ruoff's comments on the administration and procedure of Land Titles Offices generally are both interesting and provocative, including the suggestion that "registration should be carried on economically as an insurance business upon the basis of probable risk."

I hope I am correct in saying that Ruoff did not spend any time in Western Australia during his travels. Perhaps because of this there is scarcely any reference to the Transfer of Land Act 1893-1950 (W.A.) in those essays which relate to Australia and contain frequent reference to the legislation of other States. But this is after all a very small criticism of a book which is not in any sense a reference work but which instead paints on a broad canvas.

J.L.T.

PUBLICATIONS RECEIVED

(Inclusion in this list neither guarantees nor precludes subsequent review.)

The Creative Role of the Supreme Court. By N. RAMASWAMY. (Stanford University Press: Stanford, California. 1956. xiii and 134 and (index) 4 pp. Our copy from the publishers. $3.00.).

The Law of AWOL. By ALFRED AVINS. (Oceana Publications: New York. 1957. xxxi and 282 and (index) 6 pp. Our copy from the publishers. $4.95.).

Public Law Problems in India. Edited by LAWRENCE F. EBB. (School of Law, Stanford University: Stanford, California. 1957. xi and 194 pp. Our copy from the publishers. $2.50.).

Aggression and World Order. By JULIUS STONE, S.J.D., D.C.L. (Maitland Publications Pty. Ltd.: Sydney. 1958. xiv and 217 and (index) 8 pp. Our copy from the publishers.).

No Moaning of the Bar. By GEOFFREY LINCOLN. (Geoffrey Bles: London. 1957. 153 pp. 11s. 6d. stg. Our copy from the publishers.).