BOOK REVIEWS

A MULTITUDE OF COUNSELLORS: A HISTORY OF THE BAR OF VICTORIA. By Arthur Dean. F. W. Cheshire 1968. Pp. 332. Frontispiece and eight other plates. $10.50.

A HISTORY OF THE NEW SOUTH WALES BAR. Edited by J. M. Bennett. The Law Book Co. Ltd. 1969. Pp. 282 (with sixteen plates). $10.25.

The present strength of the practising Victorian Bar is nearly four hundred. When the Colony of Victoria was founded in 1851 it boasted a bare half dozen legal practitioners. That the Bar has flourished in Victoria has been the result of a unique series of circumstances—economic, professional and educational. It is the principal merit of Sir Arthur Dean's book that the dough of these facts and their documentation is so uniformly leavened with the yeast of style and wit.

It was a singularly fortunate consequence of the gold rush of the 1850s that the Colony of Victoria attracted, in the decade following its foundation, over a hundred barristers from overseas, most notably from the Middle Temple and King's Inn, Dublin. Fortunate, because they were men of quality. Work in Victoria was plentiful: in 1856, for example, the number of cases set down for trial was 607 and the number actually tried was 320. No wonder the Bar flourished.

Two vital points emerge from Sir Arthur Dean's account: first, the very high quality of the early Victorian Bar; second, the great debt owed by the colony to Ireland, indeed to one institution—Trinity College, Dublin—as the source of many of its best lawyers. That the former was in no small measure due to the latter is clear enough when one considers the figures who dominated legal and public life in Victoria before the turn of the century.

Of the first five Chief Justices of the Supreme Court four were Irishmen and three, Stawell, Higinbotham and Irvine, had been trained at Trinity College. This was only the tip of the Irish iceberg. The great puisne judges Redmond Barry (probably the greatest public man Victoria has ever possessed[1]) and Robert Molesworth were both

[1] Sir Redmond Barry (1813-1880) had been a prominent member of the Separation Movement in the Port Phillip district. After the Colony of Vic-

Trinity College men; bar and bench alike were for decades dominated by Irishmen of energy and ability—Brewster, Croke, Ireland, McDermott and the Gavan Duffys at the Bar, Jeffcott, Therry and Madden on the Supreme Court bench, to say nothing of the inferior courts.

There can be no doubt that the great influx of barristers from England and Ireland, brought up in the traditions of an independent Bar, provided a climate of professional feeling that was against the Act amalgamating the two branches of the profession in 1891. Nor can it be doubted that their influence was an important factor in its continuing *de facto* separation. These questions, of course, are central to any understanding of the legal history of the State of Victoria. In particular, the fact of continuing *de facto* separation of the two branches of the profession, despite the Amalgamation Act, must be accounted for in terms other than those merely of imported tradition.

The author deals with the questions both of the passing of the Amalgamation Act and its consequences in the profession effectively, if not as fully as a social historian might demand. Of course the book is not a work of social history, and within the limits of its subject the treatment of these questions is adequate and well documented. Clearly the conditions of colonial life had produced before 1891 a "chaotic" situation in the practice of the law. The profession was legally divided but with no clear division of functions, and no professional bodies on either side to offer guidance as to what the proper division was. In country districts those admitted as barristers found it more profitable to employ their legal knowledge in other directions. Amalgamation seemed to solve these problems and to provide a single method of qualification for practise. The virtue of the Act was surely that it cured the defects of the existing situation and did not—as it turned out—preclude the continued existence of a *de facto* independent Bar. The demand for a separate Bar continued beyond 1891, despite the decline in litigation after 1890 due to the economic depression, and the barristers were at hand to meet it.

This book is the "official" account of the subject with which it deals. It is at once thorough, authoritative, well documented and

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toria was established in 1851, he became its first Solicitor General and, in 1852, a justice of its Supreme Court. Among other things, he was active in the Melbourne Hospital, the Philharmonic Society, the Philosophical Society and the Royal Society of Victoria; he founded both the University of Melbourne (and was its first Chancellor) and the Melbourne Public Library and its then Art Gallery. He was in other ways a considerable philanthropist. He openly kept a mistress, by whom he had four children, and was once engaged in a duel. (Details from the Australian Dictionary of Biography.)

eminently readable. The Bar Council of Victoria has been fortunate in securing the services of an author so well equipped as Sir Arthur Dean, who for sixteen years was an ornament to the bench of the Supreme Court of Victoria before his retirement in 1965. The narrative proceeds by sections, including vignettes of most of the leading figures, with the exception of those still living, who have practised at the Victorian Bar. The exception has fortunately been waived by the author in the three obvious cases without which no treatment of the subject could be complete—those of Sir Owen Dixon, Sir Robert Menzies and Sir Charles Lowe. Chapters on the history of legal education in Victoria, the Law Courts and Library and the Homes of the Bar have been contributed by the able pens, respectively, of Sir Philip Phillips, Mr. R. de B. Griffith and Mr. Maxwell Bradshaw, all of counsel. The book is enlivened by a variety of photographs (including the Bar cricket teams of 1900, 1905 and 1935: of the latter no less than eight members subsequently became judges) and numerous pieces of splendid light verse, some of which have become legendary in Owen Dixon Chambers. Not only the Victorian Bar but the legal profession throughout Australia must be grateful for what Sir Arthur Dean and his fellow workers have produced.

The Bar of Victoria, as an institution, is nothing if not proud (notwithstanding the Amalgamation Act) of its identity, its independence and its ethical and collegiate traditions. To the layman, of course, the existence of this and other independent bars appears frequently to be an expensive anachronism if not an indefensible archaism. Even to the lawyer practising in a jurisdiction of *de facto* amalgamation it tends to be seen as a curiosity and a luxury. The arguments against a separate bar, so often put by both layman and lawyer are, of course, familiar: a solicitor should be able to take his client's case from start to finish; a solicitor is more familiar with the case than a barrister who takes it only when litigation is pending; a separate bar tends to increase the cost of litigation.

It is an important aspect of this book that it not only confirms, by history, vignette and anecdote, one's understanding of the professional ethos of the Victorian Bar; but it also provides, by implication, the complete and irrefutable answer to those who oppose its existence, or for that matter, the existence of any independent bar. The answer which emerges is valid for every Australian jurisdiction: a separate and independent bar is the best guarantee of the highest ethical standards not only in the province of advocacy but, more importantly, in that of the judiciary.

The more concrete arguments in favour of a separate bar are usually put on the ground that the functions of solicitor and advocate are fundamentally different. Or, more simply, they are put on grounds of specialization and expertise. But the unavoidable inference to be drawn from this book is that where a bar exists the administration of justice is in safe hands for three important additional reasons. First, because of the essentially group or collegiate nature of the bar, group ethical standards are brought to bear immediately on the professional conduct of the individual barrister. These standards are in fact very high. Second, where the bench is recruited exclusively from the ranks of the bar those ethical standards are carried over into the professional conduct of the judge. Third, the bar is an important watchdog over the work of all the courts and, less directly, of the legislature.

Sir Arthur Dean takes as the motto for his book: 'Where no Counsel is the people fall; but in the multitude of Counsellors there is safety'.[2] Nowhere does he explicity develop this theme: its intrinsic truth emerges from almost every page.

It emerges equally from "A History of the New South Wales Bar" which sets out to be the exact equivalent in that State of what Sir Arthur Dean's book is to Victoria: in the words of the Preface 'a record of the [New South Wales] Bar's forgotten past and . . . a reminder of its privileges and traditions'. The obvious parity of the two books inevitably invites comparison. Whilst the present work undoubtedly succeeds in its aim as a work of scholarship, it lacks something of the light touch, the humour and the physical attractiveness of its Victorian counterpart. Whereas Sir Arthur Dean elected to enliven his narrative of the Bar as an institution with anecdotes and pen sketches of its more illustrious and colourful personalities, this book is the work of numerous authors who have tended to deal more with the institutionally historical, at the expense of the interestingly human.

The book is divided into three parts dealing with The Growth and Development of the Bar, Corporate Organizations of the Bar and Aspects of Bar Life. The contributing authors include the Right Hon. Sir Victor Windeyer, of the High Court of Australia, the Hon. Mr Justice Kerr, of the Commonwealth Industrial Court, the Hon. Mr Justice Meares, of the Supreme Court of New South Wales, and several local barristers and solicitors. The treatment of the various topics is scholarly and comprehensive.

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2 Proverbs 11, 14.

Clearly the principal interest of this book, as with "A Multitude of Counsellors", will be to members of the Bar whose history it records. Its claim to the attention of other readers lies mainly in the detailed history of the practise of advocacy in New South Wales from 1788 to 1856 (the year of responsible government in the Colony), of which Sir Victor Windeyer is the principal author. These chapters occupy almost a third of the book. They contain original and significant research material, impressed with the stamp of historical learning for which His Honour has long been noted.

Like "A Multitude of Counsellors" this book avoids being smug, self-congratulatory or didactic in relation to a subject the nature of which could have produced those vices. The narrative is sensibly unencumbered with footnotes but nevertheless fully documented by twenty-odd pages of detailed notes contained in an appendix.

Books about the history of localized institutions must inevitably have a limited appeal. Both of the present books are also scholarly enough to be of use as serious works of reference.

NEVILLE CRAGO

CHESHIRE AND FIFOOT: LAW OF CONTRACT (2nd Australian ed. by Starke and Higgins). Butterworths, 1969. Pp. 900. $9.75.

Having for five years lectured in the law of contract to English students and used Cheshire and Fifoot with little reservation, I commenced reading the Australian edition with a sense of anticipation and interest to discover in what respects Australian contract law differed from English contract law. The approach of the editors came as a disappointment. Clearly they have regarded the Australian cases as a mere gloss or appurtenance to be tacked onto the true word which is to be found in the English decisions.

Australian case law has been developing over a century and a half. The courts have frequently had to resolve questions of law on the law of contract. Surely the point of time has come when the Australian cases must be regarded as the root cases and primary sources of law. The impression given by the editors is that the historical sources, namely the English cases, are really the true sources.

Presumably the editors have relegated the question of the relative authority of English and Australian cases to the field of jurisprudence. It seems to be taken for granted that the English cases apply in

Australia. Since Dixon C.J.'s celebrated dissent in *Parker*[1] on *Smith's* case[2] and other various dicta in the High Court[3] I would question whether any such assumption is valid for the 1970s. Pruning few of the English cases, the editors have squeezed in reference to the Australian cases resulting in 756 pages of text compared with 610 for the English student (7th English edition).

The English authors of textbooks on the law of contract have paid only moderate heed to Australian case law. The 7th English edition ignores, for example, *Coulls v. Bagot's Executor and Trustee Co. Ltd.*[4] in relation to the doctrine of privity. As the Australian editors point out, *Coulls* preceded *Beswick v. Beswick,*[5] 'of whose judgment specific cognisance was taken in *Beswick v. Beswick* itself' (page 553). Smith and Thomas[6] include only three Australian cases in their selection of about 220 cases. These are *R. v. Clarke,*[7] *McRae v. The Commonwealth Disposals Commission,*[8] and *Dunton v. Dunton.*[9] The last named is perhaps an unexpected inclusion and in the textbook under review is relegated to footnotes at pages 162 and 171. Perhaps because the English authors have given scant regard to Australian case-law, the editors have tended to think that greater credence should be paid to the English authorities. Thus in their treatment of the doctrine of privity the editors give the impression that *Coulls* and *Beswick* are of equal authority (pages 549-554). *Coulls* is binding whilst *Beswick* is merely persuasive. A substantial amount of space is devoted to *Smith and Snipes Hall Farm Ltd. v. River Douglas Catchment Board*[10] (page 547); the reader then learns in a footnote that the decision was not followed in Victoria.[11] The editors do not tell us why and we are left to seek out the actual report. The judge in the Victorian case was Gavan Duffy J.; one of the judges in the English case was Denning L.J. The editors may well have views as to the quality of the judgments of the respective judges, but it seems to me that the English case should have been relegated to the footnotes and the

1 (1962-63) 111 C.L.R. 611, 632.
2 Director of Public Prosecutions v. Smith, [1961] A.C. 290.
3 E.g. Skelton v. Collins, (1965-66) 115 C.L.R. 94 and Jacob v. Utah Construction and Engineering Pty. Ltd., (1966-67) 116 C.L.R. 200.
4 [1967] A.L.R. 385.
5 [1968] A.C. 58.
6 SMITH AND THOMAS, A CASEBOOK ON CONTRACT (4th ed., 1969).
7 (1927) 40 C.L.R. 227.
8 (1951) 84 C.L.R. 377.
9 (1892) 18 V.L.R. 114.
10 [1949] 2 K.B. 500.
11 Bird v. Trustees, Executors and Agency Co. Ltd., [1957] V.R. 619.

Victorian case included in the main text. These are not isolated instances: it is the pattern of the book throughout.

Contract is usually taught at an early stage in law courses. It is often the first subject of substance which law students encounter. Given an Australian environment I question whether Cheshire and Fifoot's "Historical Introduction" (pages 87-100) is an ideal start. Could not the chapter have been abbreviated and a short summary of the growth of the law of contract in Australia have been included?

I confess to a feeling of mild irritation at some of the advice given in the footnotes. The footnotes have served four purposes: first, to provide the reference for the cases cited in the text (some authors include these in the text); secondly, to provide reference to the authority for the statement in the text; thirdly, to qualify statements made in the text, sometimes by reference to other cases; and fourthly, to encourage (?) the reader to delve further into other relevant material. The editors seem to me to have been liberal in their advice. Are Australian students of contract seriously expected to read Pollock's Revised Reports on the subject of common mistake (page 322)? Are these reports generally available in Australian law libraries? Regrettably volume 101 is not to be found in the University of Western Australia law library. If Professor Lücke's article on common mistake (page 322) in the University of Tasmania Law Review is essential or desirable reading, could not some indication of its contents have been given in the footnote? Although no mention is made in the preface for whom this textbook is specifically intended, it is assumed that it is intended for both students and practitioners. In a course lasting nine months is it reasonable to expect the diligent student to follow all the advice given and 'see' or 'cf.' so many different cases, articles, other textbooks and the like? The busy practitioner wants to make sure that he overlooks no case of consequence. I doubt if he has time to examine the contents of the articles scattered throughout so many law reviews and journals. He would probably prefer references to a greater number of Australian decisions at the expense of references to the law reviews and journals.

Faced with the major task of which cases to omit and which to include, the editors have exercised a brave ruthlessness in not including a considerable body of Australian case-law. They have preferred to use the original English illustrations at the expense of Australian cases. It could be argued that *Barry v. Skuthorpe*[12] provides as good

12 (1876) 4 Q.S.C.R. 157; 1 Q.L.R. (Pt. 1) 33.

an example of a condition precedent as one or two of the cases included (pages 219-220). This is unimportant; but when such interesting cases as *Australian Blue Metal Ltd. v. Hughes*[13] on the duration of a contract, *Marriott v. General Election Co. Ltd.*[14] on repudiation and ratification of a contract, and *British Empire Films Pty. Ltd. v. Oxford Theatres Pty. Ltd.*[15] on consideration, are not even mentioned in the footnotes, one begins to suspect that the editors have rejected too much Australian material.

Unlike the English edition, the editors have generally adopted a policy of referring to one, occasionally two, case references in respect of the Australian cases. For example, *Neal v. Ayers* (page 441—contained of course in a footnote) is also to be found in four other reports.[16] Admittedly only one of these four reports is published by Butterworths, but then the report of the case in the book which is cited is not published by Butterworths. Practitioners might have preferred to have references of cases to all the reports where they can be found.

I personally prefer the practice in the English edition of summaries of paragraphs in the form of marginal notes. In the Australian edition they have been treated as paragraph headings. I did not find the change an advantage.

If I were lecturing to Australian students in the law of contract I would recommend this textbook; I would have little alternative. But leaving that fact aside, given the premise that English and Australian contract law are one and the same thing, with occasional, minor variation, then the editors have achieved what they intended, namely, converted an English textbook into one suitable for use by Australian students and lawyers. The editors are entitled to say that they were not writing a book on the Australian law of contract; they were editing an established English work for use in Australia and thus their freedom of action in eliminating English material was strictly limited. There is room for a textbook on the Australian law of contract.

D.B.

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13 [1963] A.L.R. 113; [1963] A.C. 74; discussed at 36 A.L.J. 250.
14 (1935) 53 C.L.R. 409.
15 [1943] V.L.R. 163; [1943] A.L.R. 383; discussed at 17 A.L.J. 307.
16 (1941) 63 C.L.R. 524; [1940] A.L.R. 288; 14 A.L.J. 198; 57 W.N. (N.S.W.) 194; 40 S.R. (N.S.W.) 498.