exercise their powers to send people to gaol for 'immoral' conduct they will at least be aware of the issues involved.[27] If they do read more widely they are unlikely to come across many books in which so many objectionable ideas are presented with so much confusion as in Lord Devlin's lectures.

D. J. ROSE*

Jesting Pilate and other papers and addresses, by the RIGHT HONOURABLE SIR OWEN DIXON, O.M., G.C.M.G., D.C.L., (Hon.) Oxon., LL.D. (Hon.) Harv., LL.D. (Hon.) Melb., LL.D. (Hon.) A.N.U. A Justice of the High Court of Australia 1929-1952 and Chief Justice 1952-1963, collected by JUDGE WOINARSKI, M.A., LL.D. (Melb.). (The Law Book Company of Australasia Pty Ltd, 1965), pp. 1-250.

There are seventy five prepared papers and addresses 'off the bench' and four addresses 'in court' in this volume. It is difficult to believe that any lawyer interested in the processes of the legal mind will not find the whole utterly fascinating. It is, if I may coin a phrase for the occasion, a book 'you cannot put down'. Whether you experience violent disagreement or humiliating inability to comprehend, the attraction accumulates. You experience the unwavering if ignoble concentration of the rabbit caught in the glare. You are surprised to find it is a more pleasurable intoxication than that resulting from alcohol or (I suppose) opium. And perhaps, if reviews are intended as a guide for other readers, this is as much as needs be said.

It is comforting to think that the rabbit, if he escapes from the glare, feels some interest in analysing his experience, albeit with a deal of self-centred head shaking and occasionally an all over reconstruction from nose to tail. But it must be confessed that an accurate estimation of the glare is not the easiest task for a rabbit.

In this particular case my chief impression is of the intense concentration of the writing. This also was frequently true of the judgments of Dixon J. and Dixon C.J. It is rather surprising to find the same character repeated in papers designed for oral exposition to laymen. No doubt some general impact was felt by those listeners who could concentrate for the whole period. But many must have consoled themselves with the reflection that they would understand much more when they saw it all in print. I can recall a mild personal complaint of

[27] It is interesting to note that s. 81A of the *Crimes Act*, 1900 (N.S.W.) was enacted as recently as 1955. The Attorney-General stated that it had been approved by the District Court judges, the Commissioner of Police and the Bar Council (*N.S.W.*) *Parliamentary Debates* (*Third Series*) *Session* 1954-5, 3230) and it was enacted with scarcely any debate except some vigorous dissent from Dr. L. J. A. Parr, M.L.A. This new section was designed *inter alia* to make N.S.W. law coincide fully with s. 11 of the *Criminal Law Amendment Act* 1885 in England where, in 1957, the Wolfenden Committee recommended the substantial abolition of that very offence.

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Higgins J. as to the difficulty of following the oral arguments in court of Mr. Dixon (as he then was). Fairly regular interruption from the bench mitigated the hardships, however distinguished, under which the Court laboured.

Broadly the substance of this volume may be divided into three sections—the law itself, Australian constitutional law, and items derived from other experiences of the author or passed to his mind by the exigencies of the particular occasion. In general terms it might be expected that the forays into constitutional law would be the most valuable and the most stimulating. I think time will show this is not the case.

The audiences to which the constitutional commentaries were directed inevitably limited their substance. Of the seven essays three were delivered to audiences outside Australia and yet another to a non-legal Austral-American audience in Melbourne.

Three others were delivered to Australian audiences, two composed of technicians and one to an academic audience which may or may not have lived up to the unspoken assumption that it equalled in legal subtlety a quorum of the judges.

The three last mentioned papers deal with constitutional law outside the certainties which help to ease the interpretation of a written constitution. They constitute a *tour-de-force* in an area where metaphysics can poison all but the most rigorous of intellects. Some lawyers will say that the analysis, branching as it does into conceptions of sovereignty, the 'fundamental norm', and the authority of law 'as such', represents the spare time interest of a scholar but is not likely to affect political activity or vitiate its expression in legal form. Such indeed seem to be the lessons from South Africa, Scotland and Eire. Perhaps also such appeared to be the unannounced but effective doctrine of the Privy Council.

In relation to the Australian Commonwealth Constitution much of the comment is directed to non-Australian ears. The writing is never commonplace or indeed other than penetrating. The needs of the occasions limit the degree to which the text might at this date challenge examination and debate at a specialist level. It is noticeable for instance that, in writing a tribute to Frankfurter in 1957, there could be a fleeting reference to *West's* Case[1] and a certain underlying similarity of wave length with Frankfurter's opinion in *New York v. U.S.*[2] but the *Yale Law Review* was no place for a detailed investigation of the opinion, then only a dissent, in *Uther's* Case[3] which had followed *New York v. U.S.* by one year. Not only was the dissent ultimately to prevail but to demonstrate a vital constitutional principle, much doubted still and often expressly rejected by very learned authorities.

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1 *West v. Commissioner of Taxation (N.S.W.)* (1937) 56 C.L.R. 657.

2 (1946) 326 U.S. 572.

3 *In re Foreman and Sons Pty. Ltd.*; *Uther v. Federal Commissioner of Taxation* (1947) 74 C.L.R. 508.

One general view is found more than once in these constitutional papers—a regret over the creation of 'federal jurisdiction' in the Commonwealth Constitution. Though sixty five years have not demonstrated any value in the pattern woven by the Founding Fathers, this is not a subject matter which is likely to be refashioned nearer to a rational plan in any constitutional amendment. Indeed that part of the Constitution is so inelegantly constructed that the best judges can do is to disregard doctrine that would seem inescapable in an effort to achieve practical results. It is clear that the author would willingly refashion this part of the Constitution nearer to his heart's desire. Another iteration, not without interest in view of many and fiercely waged contests. is the admission that 'interstate trade and commerce' is an artificial concept in this day and age. However the 'unreality' must be retained in order that freedom may have her darling to fondle, and perhaps because the Federal Parliament will not be readily granted a more extensive legislative authority in the whole area of commerce and manifestly cannot be granted less.

Whilst the author recognises the artificiality of the constitutional division of the field of commerce he gives no indication of his readiness to find a solution of the consequential difficulties by some method similar to that followed by the Supreme Court of the United States particularly in its conception of what 'affects' interstate commerce. It is perhaps a conspicuous instance of the position which the author adopts in constitutional questions, and which by his own choice he describes as 'excessively legalistic' (page 247) that he looked with some suspicion upon any development in this direction in Australia. Maybe the economic 'factual situation' here is very different from that in the United States. Maybe the Federal Parliament had not thrown down this particular gage of battle. One cannot say more than that the atmosphere of the Court which he influenced so profoundly and finally over which he presided with such effect was not encouraging in this respect. (But see the solo but undeterred contribution of Fullagar J. in *O'Sullivan v. Noarlunga Meat Ltd.*[4]).

The reference to 'excessive legalism' or, perhaps less distractingly, 'strict and complete legalism' invites attention to the underlying and fundamental 'doctrine' in those of the collected papers which deal with technical legal problems and issues outside the field of constitutional law. It is to these that scholars will hereafter have recourse in seeking to understand the purpose and method of one of the greatest of working lawyers and judges of his day and age. Perhaps it is well to remember, at the outset of any such enquiry, his own assertion that 'the [High] Court has always administered the law as a living instrument and not as an abstract study' (page 251).

At bottom discussion of this elusive subject of purposes and methods involves an analysis of the conception of 'legalism' itself. This in turn calls for a more far reaching and teasing series of investigations

[4] (1955) C.L.R. 565, 597-598.

than most working lawyers care to undertake. A very short journey brings one face to face with semantic problems, with definitions and distinctions which cannot avoid aridity and yet cannot be by-passed. But these particular debates, though essential, are but the beginning of further and even more difficult analyses of the psychological presuppositions, and even the emotional equipment, of the individual lawyer or judge oncerned, who is also, however little he relishes the thought, the creature of his age, his background, his beliefs, his individual preferences and his human experiences.

It has been said, and the reflection for all its apparent simplicity is very significant, that for ' legalists ' the law is always conceived as something which is ' there '. It seems true enough that lawyers and judges, as distinct from legal philosophers, are content to start in this way. Indeed this habit of mind can be elevated into a juristic or sociological ' fundamental '. There are various indications that Sir Owen Dixon found this proceeding not only acceptable but profitable. He has much of great significance to say as to the priority of the common law to the constitutional order in English communities. It is a conspicuously fruitful analysis. But in the field of law in general it may be that empiricism of this order is not quite so satisfying.

In a number of the papers a citation is made of a conclusion of Maitland's—and always with approval. It is a characterisation of the common law as ' not vulgar common sense and the reflection of the layman's unanalysed instincts ; rather . . . strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries '.

It may well be that the ' high technique ' produced certain historical consequences in resisting ' in the 16th century a reception of the civil law in England ' (page 153). It is a different matter to continue to assert in the 20th century that it is a ' good-in-itself ' and that because of its nature and essence it provides a solution to questions which laymen will ask lawyers, if the lawyers do not interrogate themselves. From this point of view it is not uninteresting to scrutinize two of the ' points ' which are canvassed among the papers in the volume being examined.

In 1935 Sir Owen delivered a paper to a Law Convention in Melbourne on the legal problems arising in Sir Roger Scatchard's will in Anthony Trollope's novel ' Doctor Thorne '. The whole discussion is a fascinating example of the working of what may be described as the ' Chancery mind '. Certainly there is a clear display of ' high technique ', masterly in the ease with which the given situation is handled. It is not quite so clear that the parallel process of ' logic ' is strict or is indeed necessarily rational. It is at this point that doubt undermines the edifice of ingenuity and learning. What happens when ' high technique ' runs counter to ' logic ' ? Why do the two necessarily run side by side ? Central to the legal reasoning in this particular paper is the ' rule ' that ' child ' and ' children ' in a will mean issue whose relationship to its or their parents is legitimate. This had been so decided and was said

to be unquestionable. It had hardened into a rule before it was asserted in the House of Lords. But the conclusion is a matter not of strict logic but of high technique. Or is it simply an error, inconsistent with the business of the lawyers in deciding upon the meaning of a man's last will ?

In 1965 the Master of the Rolls, Lord Denning had to deal with this precise question. In *Re Jebb deceased*[5] he said :

> It was said that the Court should restrict the word ' child ' and ' children ' to a legitimate child or children except in cases where there is an actual impossibility of there being a legitimate child . . . . That was said to be the result of *Hill v. Crook*.[6] I do not think it right to look at previous cases in this way. The only legitimate purpose is to use them as a guide towards the meaning of words, so as to search for the testator's intention.

It is true that by a masterly elaboration of high technique, though the logic may be doubtful, it was possible to demonstrate that Mary Thorne's illegitimate daughter could enjoy the Scatchard's estate and yet observe the law. The soundness of this conclusion was recognised as dubious at the least. No doubt some would say that the attitude of the Court of Appeal in 1965 shows a debasement of legal method. Yet neither in the case of Sir Roger Scatchard nor Mr. Jebb can there be any room for doubt as to the intention of the testator. These are not instances of hard cases making bad law. These seem rather to demonstrate that ' high technique ' may or may not produce the kind of result at which the law is by common consent aiming. It is difficult to believe that technique can ever be anything more than a means to an end.

By a curious coincidence this same issue arises again in connection with another essay in the volume. In 1955 at Yale the author expounded how ' strict logic and high technique ' might be used to achieve an appropriate end, even though the existing law seemed to deny this possibility. The point at issue was enshrined, though by no means first announced, in the decision of the House of Lords in *Foakes v. Beer*[7] where it was reiterated that payment and acceptance of a smaller sum in respect of a debt for a larger one was not satisfaction notwithstanding apparent accord. If it be conceded that this result is unsatisfactory how, the address asks, may an appropriate result be reached by a development of the law which maintains its continuity and preserves its coherence ? The solution of this problem is indicated by resort to the conception of estoppel, though this recourse rests upon a widely based conception of estoppel itself. The whole example is exhibited as satisfactory because it breaches neither high technique nor strict logic. But what has actuated the effort of the technician ? Is he not spurred on by ' vulgar common sense ' in Maitland's expression ? And indeed,

[5] [1965] 3 W.L.R. 810, 814.
[6] (1873) L.R. 6 H.L. 265, *per* Lord Cairns.
[7] (1884) L.R. 9 A.C. 605.

when practical issues arise, may not both strict logic and high technique have to be qualified by a sense of justice, an ' unanalysed instinct ' ?

Again in 1965 the English Court of Appeal presided over by Lord Denning faced this issue in *D. & C. Builders Ltd. v. Rees.*[8] Lord Denning had in *Central London Property Trust Ltd. v. High Trees House Ltd.*[9] resorted to equitable conceptions of estoppel, as was proposed in the lecture at Yale. Indeed he had found seventy year old authority for this step, thus maintaining continuity and preserving coherence. But in 1966 it was seen that to hold the creditor estopped from demanding payment in full after his having received payment in part upon the basis of satisfaction would be unsatisfactory notwithstanding the appearance of estoppel because it would have been ' inequitable ' for the creditor not to have obtained the balance. In the actual case it was said that the debtor had ' held the creditor to ransom '. Once this point of view is wholeheartedly accepted, and it is not clear that the whole Court was of one mind, it is obvious that the ' rule ' in *Foakes v. Beer*[10] has not merely been ' developed ' by a logical application of a technical rule preserving coherence and continuity. On the contrary though in form there has been recourse to a technical method a broad concept based upon fair play has been allowed to dominate the final resolution of the problem. The technique is subdued to the perceived purpose. The example is of curious interest because it happens that the Yale lecture and Lord Denning's decision relate to the same situation and resort to comparable technical considerations in dealing with it. But this is mere coincidence, and the coincidence is the more remarkable because, beneath it may be discerned a conspicuous contrast. Is it permissible to deduce from the comparison the conclusion that strict logic and high technique are themselves never ' ends ' but only means.

This is not to suggest that the author of *Jesting Pilate* was the servant and not the master of his own learning. There are too many practical examples in the law reports to prove the contrary. As time passes much in this volume will tend to delude the unwary into supposing that the author was only a very learned judge. In truth he was a great one.

P. D. PHILLIPS, Q.C.

[8] [1966] 2 W.L.R. 288.
[9] [1947] K.B. 130.
[10] (1884) L.R. 9 A.C. 605.