BOOK REVIEWS

Sir John Latham and other Papers, by ZELMAN COWEN. (Oxford University Press, Melbourne, 1965), pp. vii-x, 3-191. Price $7.75.

The four essays in this volume comprise the title piece; an examination of the law of criminal contempt; the story of a century of the constitutional history of Victoria, and an account of federal enclaves, a curious aspect of that legalistic political phenomenon, the Federal System. The description and interpretation of the life and work of Sir John Latham were given in 1965 as the John Murtagh Macrossan Lectures in the University of Queensland. Of the other three papers, two were printed in volumes 1 and 2 of this Law Review, and the third, on criminal contempt, was given in 1965 at the Law Summer School at the University of Western Australia.

It was a happy thought that Professor Cowen should have been asked to provide an assessment of Sir John Latham while so many of us have fresh and agreeable memories of that very distinguished man. He lived to a great age, a month off 87, and he was active almost to the end. Not long before he died on 25th July, 1964, he had to submit to surgery for the removal of his appendix, but within a few weeks of his discharge from hospital he attended a testimonial dinner to the late Brian Fitzpatrick, at which he made a short and complimentary speech. His attendance at that dinner was not without significance, for Brian Fitzpatrick's radical political opinions and utterances would have been abhorrent to Latham when he was Attorney-General. Indeed, it is possible that the only politically contentious subject on which he and the guest of honour agreed was rationalism. The explanation of his attendance is to be found in his liberal development in the twelve years between his retirement from the Chief Justiceship of the High Court of Australia, in April 1952, and his death. Freed of the burdens of office and the spur of ambition, he revealed a different and attractive side of his personality. In politics and on the Bench Latham was considered to be aloof and without warmth, but in his long and active retirement his tall, spare figure and gleaming pince-nez became a familiar sight at social gatherings of the most diverse kind, and he was welcomed as a genial and affable companion, ever ready with a quip or pun, an eager conversationalist and an occasional listener.

The frugal circumstances of his childhood and adolescence could have disposed Latham to a radical outlook, but only in his rejection of dogmatic religion and his firm adherence to rationalism was there any failure to conform to conventional standards. Temperamentally he was authoritarian, finding the solution of problems, political and legal, by a rather arid logical method that took too little account of the frailties and inconsistencies of human nature. He was vain and intensely ambitious, and one wonders whether his stepping aside to enable J. A. Lyons to become leader of the Tory forces was a surrender to the inevitable rather than a genuine act of self-abnegation. When he became Chief Justice he came, with full knowledge, to a court with an unhappy history of public clashes between some of its members. Because his personality was pertinacious rather than forceful, he lacked the rugged strength to dominate the court, though for the most part under his presidency proceedings moved decorously, and it was an agreeable experience to appear there as counsel.

It is not easy to describe or define what are the qualities of a great judge, and the reputations of supposed judicial giants of the past often do not bear close examination. Latham had a sound knowledge of the law; he was immensely industrious; his judgments were closely reasoned and clearly expressed, and he presided over his court with dignity and courtesy. But though his mind was keen and orderly it was not creative, and Professor Cowen's judgment, that Latham was 'a very capable judge and Chief Justice, though not to be reckoned one of the great', is just.

In the light of the views he expressed after his retirement, and of his vigorous dissents in the *Communist Party Case*[1] and the *Bank Case*[2] it would not have been surprising if, at least towards the end of his sixteen and a half years' tenure of the Chief Justiceship, he had grown a little sceptical about the social utility of the device of judicial review, at any rate as it operates in Australia. Judicial review in a federal constitution has now an air of inevitable rightness, and presumably it was so accepted by the framers of the Australian constitution. When the notion was formulated by Alexander Hamilton in No. 78 of the Federalist, and Chief Justice Marshall later adopted it in *Marbury v. Madison*,[3] its inevitability was by no means obvious. Indeed, one American commentator observes that 'Marshall's role . . . was to give judicial review a foothold, use it for the immediate interests of the capitalism of his day, tie it up with the powerful appeal to nationalism, and entrench it where a later stage of capitalism could take it up and carry it further for its own purposes.'[4] Latham insisted that the High Court has 'nothing to do with the wisdom and expediency of legislation. Such questions are for Parliaments and the people.'[5] But unquestionably the Constitution is a political instrument, and in essence every challenge to legislation on the ground it is unconstitutional must also be political. The stress on legalism in Australian constitutional law may mean no more than that a judge may give effect to a dislike for a measure, deriving from his political views (or what Professor Sawer calls, delicately, his 'instinctive value preference') only if he can express it in appropriate terminology. When there is a division of four to three judges on a constitutional question, or an established interpretation ceases to be accepted as the personnel of the High Court changes, it is difficult not to feel that there are other factors operating besides 'a close adherence to legal reasoning', as Sir Owen Dixon phrased it.[6] Probably because of his long experience in the political arena and as Minister of the Crown, Latham was less distrustful of Parliament and the Executive than some of his judicial colleagues, and on the whole his approach to constitutional questions was realistic and constructive. But, as Professor Cowen establishes, there were blemishes.

This account of Sir John Latham's life and work is a sympathetic, perceptive, and penetrating study of such excellence that is not likely to be readily surpassed. It sets a standard of mature and urbanely critical presentation that should exercise a significant influence on Australian legal writing. Another may write upon Sir John Latham at greater length, but certainly not with greater insight.

1 (1951) 83 C.L.R. 1. 2 (1948) 76 C.L.R. 1.
3 (1803) 1 Cranch 137.
4 Max Lerner, 'John Marshall and the Campaign of History' 1939) 39 *Columbia Law Review* 396.
5 Uniform Tax Case (1942) 65 C.L.R. 373, 409.
6 (1952) 85 C.L.R. xiv.

The paper on the law of criminal contempt is a comprehensive and balanced examination of a subject that bristles with difficulties. Freedom of speech is an essential social value, and so is fair trial. In the nature of things the power of the courts to punish for contempt has anomalous aspects, and with changes in the social climate the process of shaping a more rational and symmetrical body of law goes on hesitantly. The justification for the continuance of the power, so far as the media of mass communication are concerned, is the irresponsibility of the press and like agencies. Sometimes courts may have misused their powers,[7] but it must surely be admitted that judges are restrained more by the tradition of responsible behaviour than are newspaper editors in search of startling scoops and stories. When an individual is involved in sensational events, and becomes an object of execration, as was Stephen Ward in the Profumo-Keeler scandal, sometimes the law fails. As state trials attest, it often does in other ways when passions run high. But, as Professor Cowen recognizes, it is desirable to retain the contempt power, though no sensible person would dissent from his contention that it should be severely scrutinized with a view to putting it in better order.

With the rapid and enormous growth of Commonwealth power, the States have receded in importance as political entities, and there is little popular interest in their constitutional problems, and even less understanding. Professor Cowen's fascinating account brings back vividly the occasions of crisis during Victoria's first century of responsible government. That very remarkable man, George Higinbotham, figures prominently in the story. He was head and shoulders above his contemporaries in politics, and is genuinely entitled to be ranked as a statesman. His inflexible integrity of mind and his refusal to temporize meant that he was regarded by the class then dominant in Victoria as difficult and even contrary. Indeed, the greatness of his stature as parliamentarian, Minister and judge, has never been adequately recognized in Victoria. Ahead of his time, in *Toy v. Musgrove*[8] he expounded in terms of legal doctrine his conception of what was the proper relationship between the Imperial authorities and the colony of Victoria, having regard to the grant of responsible government in 1855. He failed to persuade his legalistically-minded colleagues, but in the course of time, as Professor Cowen points out, Higinbotham's notions triumphed and were translated into the conventions that control the relations of the Governor and the Cabinet in Victoria. This essay is essential reading for students of the history of Victoria.

Professor Cowen's exploration of the problem of determining what law applies in federal enclaves is a masterly attempt to reduce to simplicity a question obscured by judicial and juristic discussion. Perhaps the most entertaining exposition of the way in which the problem has been dealt with in the U.S.A. is to be found in the story, 'Mr. Tutt Plays It Both Ways'.[9] It is a curious commentary on the gaps in Australian constitutional law that over sixty years after the establishment of the Commonwealth the question should still be an open one. Incidentally, there is an error on p. 187; the Comptroller-General of Customs in *Wollaston's Case*[10] sought to escape payment of state, not federal, income tax.

[7] An instance is Rex v. Editor of New Statesman (1928) 44 T.L.R. 301. See also, H. J. Laski, 'Procedure for Constructive Contempt' [1932] Studies in Law and Politics 223.

[8] (1884) 14 V.L.R. 349.

[9] Arthur Train, *Mr. Tutt's Case Book* (1948) 413.

[10] (1902) 28 V.L.R. 357.

These four papers exhibit the industry and the erudition, and the lucid and urbane style that we expect of Professor Cowen. It is good to have them collected in the one volume, even if it does lack an index and a table of cases.

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The Law of Trusts in Victoria, by GRAHAM FRICKE, LL.B. (Melb.), LL.M. (Penns.), Barrister-at-Law, and OTTO K. STRAUSS, LL.B. (Melb.), Dr. Jur. (Bonn.), Barrister-at-Law. (Butterworth & Company (Australia) Ltd., Sydney, 1964), pp. 1-575. Price $12.00.

In the preface to this new treatise on the law of trusts the learned authors state '. . . . we are indebted to Garrow's New Zealand text which, with the publishers' permission, has provided a convenient framework for our book, and Mr. Justice Jacobs, of the Supreme Court of New South Wales'. Their work, indeed, could almost be described as a Victorian edition of Jacobs *The Law of Trusts in New South Wales*. However, such a description would not be completely accurate and would do less than justice to Messrs Fricke and Strauss. For, although arranged and constructed in much the same way, with similar chapter headings and with some identical passages, there is in the work under review much new material and a certain amount of re-writing.

The merits of the book are obvious. It is for the most part comprehensive and lucidly written and because of its detailed analysis of Victorian statutory provisions it seems likely to achieve wide circulation amongst practitioners in this state. Nevertheless, in the reviewer's opinion, it has not the merits of its New South Wales counterpart and it is not in the same class as Garrow and Henderson's *Law of Trusts and Trustees* which was the progenitor of the series.

In fact, quite apart from its ancestry and the slight possibility of misleading the prospective purchaser, the book cannot be welcomed without reservations. Much of the re-writing seems pointless and in the new passages there are too many ambiguities, obscurities and careless statements. There are, moreover, signs of insufficient scrutiny and, perhaps, some unwise haste in the final stages of its preparation.

Instances appear in most chapters. They begin with the loosely-worded definition of the trust relationship in chapter two. In chapter three a general power seems to be distinguished from a special power on the ground that only the former, if exercised, 'generates ownership'. In chapter five there is the puzzling statement: 'In the sense that a trust must be irrevocable an infant is generally unable to create a trust'. Perplexity is increased by a footnote reference to chapter three which contains, *inter alia*, a dictum of Fullagar J. to the effect that a revocable trust is always enforceable in equity while it subsists. In chapter six the section devoted to certainty of objects makes no mention of charitable and anomalous non-charitable purpose trusts and ignores completely the problems discussed in such cases as *I.R.C. v. Broadway Cottages*,[1] *Tatham v. Huxtable*[2] *and Re Hain's Settlement*.[3] Chapter seven left the reviewer completely baffled. On page 138 it is said: 'Where it is the intention of

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1 (1955) Ch. 20.

2 (1950) 81 C.L.R. 639.

3 (1961) 1 W.L.R. 440.