

be concerned that judges, legislators, and the moulders of public opinion realise this, as they approach these questions.⁸

The writing of a book which is a *monumentum perennius aere* to its author, may also be a *monumentum paene perennius aere* for him in whose honour it is written. And the family of the late Edward G. Donley, lawyer and public man of West Virginia, whose memory is commemorated by these lectures at the College of Law, University of West Virginia, can be content that the purpose of the Foundation was fully achieved in 1958.

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Federal Jurisdiction in Australia, by Zelman Cowen, Professor of Public Law and Dean of the Faculty of Law in the University of Melbourne. Melbourne, The Oxford University Press, 1959. xv and 195 pp. with Table of Cases and Index. (£2/0/0 in Australia.)

This book is a specialised work not only in its over-all topic but also in each of its five chapters: accordingly, an analysis of its chapters will give some idea of the material to be found in the book.

The first chapter is concerned with the Original Jurisdiction of the High Court (seventy-three pages). After some preliminary criticism of the extent and the inter-relationship of subject matter in the Constitution ss.75, 76, there are a few pages on the High Court's concurrent original jurisdiction implemented under the Judiciary Act 1903-1959 (Cwlth.), s.30(c), and on its exclusive original jurisdiction under that Act, ss.38, 38A, 40A. Removal of causes, Judiciary Act, s.40, advisory opinions and sundry matters are dealt with before each of the nine sub-sections in the Constitution ss. 75, 76 are examined in turn. The chapter concludes with a discussion of the doctrine of *forum non conveniens*.

The second chapter considers Jurisdiction between Residents of Different States (twenty pages), namely, that part of the High Court's original jurisdiction conferred by the Constitution s.75(iv) which directly translates the United States Constitution Art. III, s.2. Again, the jurisdictional grant is criticised and contrasted with its American counterpart. The State courts' concurrent federal jurisdiction under the Judiciary Act, s.39(2), is noted; then, the bulk of the chapter is given over to an examination of the terms in s.75(iv) of the Constitution, *scl.*, "matters", "between", and "residents".

The third chapter is entitled "The Federal Courts" (twenty-three pages). The introductory remarks disclose the implied constitutional source of these courts (ss.71, 77(i), 77(ii)), the United States system of federal courts, the creation of the Federal Court of Bankruptcy (1930) by the Bankruptcy Act 1924-1959 (Cwlth.), s.18A, and the creation of the Commonwealth Industrial Court (1956) by the Conciliation and Arbitration Act 1904-1959 (Cwlth.), s.98, and the stillborn Federal Court of Claims (1947). The restrictions on the two extant federal courts are discussed: the requirement of life tenure under the Constitution s.72; the need for a separation of judicial from non-judicial powers; and the limited subject-matter under the Constitution ss.75, 76. Finally, the appellate jurisdiction of the two courts is considered.

The fourth chapter unravels the Territorial Courts and Jurisdiction with respect to the Territories (thirty-two pages). A possible source of authority for these courts is sought in the Constitution ss.71 and 77(i) along with s.76(ii)—the "law made by Parliament" being a law under s.122; the territories are meaningfully classified as internal and external; then, the whole problem underlying these courts is exposed: if such courts are not included in

⁸ Pp. 104-105.

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the phrase "federal courts", these courts must be unnaturally divorced from the judicial structure established by Chapter III of the Constitution, including ss.73, 75. The progress towards this conclusion is shown from the cases. The (possibly) special position of courts in the Capital Territory is singled out.

The fifth chapter gives material on the Investment of State Courts with Federal Jurisdiction (forty-seven pages). Some of the sub-headings in the chapter include: constitutional sources, meaning of "federal jurisdiction", character, limits and constitution of State courts acting under the Constitution s.77(iii); the Judiciary Act s.39, in its divesting (ss.(1)) and its investing (ss.(2)) parts; the concurrency of State and federal jurisdiction of State courts, for example, in some matters under the Constitution s.76(ii); the blocking of appeals to the Privy Council from State Supreme Courts exercising federal jurisdiction under the Judiciary Act s.39(2); criminal federal jurisdiction; and, the possibility and incidents of grants of federal jurisdiction by special statutes other than the general grant in the Judiciary Act, s.39(2).

It can be seen from the foregoing exposition that there is a fair amount of material in a small compass; and that material can be followed up by looking at the sources liberally displayed in footnotes—sources drawn not only from Australian texts, journals and cases (for example, Quick and Garran, Wynes, Nicholas, Else-Mitchell; *Australian Law Journal* and University reviews; High Court and State cases), but also from American texts, journals and cases. On the latter head, much of the book, except, of course, Chapter Five, consists of a comparative study of the Commonwealth and United States federal system of courts and jurisdiction. Apart from finding the American material more accurate and concise than some of the American texts which I happened to have been reading at the time, I also found Professor Cowen's American comparisons an aid in realizing the details and working of the Commonwealth Judicature System. In fact, this aspect of the work—its United States comparisons and contrasts—is its most original and helpful side, helpful for the reason already assigned, namely, the significance of the provisions and omissions in Chapter III of the Constitution and in the Judiciary Act are strikingly pointed by bringing alongside Article III of the United States Constitution and Title 28 U.S.C. (Judicial Code and Judiciary).

Another virtue of the work is its close textual analysis of the Constitution and the Judiciary Act: an instance can be seen at pages 24-31, where the meaningless and redundant insertion of s.75(I) of the Constitution is shown, and explained, incidentally, by comparing the United States Constitution Art. II, s.2, together with Art. VI and Art. III, s.2.

Putting aside some half-dozen slight errors and omissions throughout the work,¹ and the absence of *Pioneer Express Pty. Ltd. v. Hotchkiss*² from Part VIII of Chapter Four, the main defect with the work is its irksome jeremiad of "the folly of the Founding Fathers". Present hindsight makes easy criticism of absent foresight; and, pragmatically *à quoi bon?* Finally, if the legislators really wish to discover what is wrong with the Commonwealth Judicature System they can turn up Sir Owen Dixon's criticisms before the Royal Commission on the Constitution in 1927.

But these are by-products. The main product is an excellently condensed treatise on federal jurisdiction in the Commonwealth.

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¹ The ambiguity at the top of p. 3 and in n. 11: the Constitution expressly authorized the investment of State courts with federal jurisdiction in s.77(iii). Pp. 65-68 (on Constitution s.76(i) and Judiciary Act ss.40, 40A) would be better placed with pp. 54-57. N. 3 on p. 74 should read "s.72". The then current Bankruptcy Act given in the text and in n. 17 on p. 97 bears a different date in each instance. Nn. 56 and 57 on p. 109 should be reversed. And n. 152 on p. 190 should refer to "p. 155 ante".

² (1958) 32 A.L.J.R. 256, 258, 263.

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