BOOK REVIEWS

PARLIAMENTARY PRIVILEGE IN AUSTRALIA, *by Enid Campbell.* Melbourne University Press, 1966, pp. i-vii, 1-218.

This book is the first systematic exposition of contemporary Australian law and practice of Australian parliamentary privilege. It is a lucid and erudite work, deriving its chief merits from the immense research which has so obviously gone into its writing, and the economical collation, analysis and use made of these diversified materials by the author. It will undoubtedly be relied on heavily by teachers and students of law and politics alike. Legal practitioners who have a problem involving some aspect of parliamentary privilege, and parliamentarians themselves will also find it a most satisfactory source of information. In this reviewer's opinion Professor Campbell has more than adequately repaired the undoubted deficiency in this area of Australian public law to which she adverts in her Preface.

The substantive part of the book comprises an Introduction and ten Chapters which effectively cover the field of privilege. As a necessary background to an understanding of the issues raised, Chapter 1 ("Privileges of Colonial Legislatures") contains a significant treatment of parliamentary privilege in the American colonies. In this Professor Campbell exposes the conflict between the American colonial legislatures and the Privy Council over the assumption of penal jurisdiction by the American provincial legislatures. In 1759 this assumption of authority led to the petition of William Smith[1] who had been committed for contempt by the Pennsylvania Legislative Assembly. In its decision the Privy Council took the view that it could go behind the decision of the colonial legislature and examine the facts alleged to constitute a contempt. Professor Campbell makes the apt observation that a similar fear of abuse of power by colonial legislatures was the inarticulate major premise of the Privy Council's opinion in *Kielley* v. *Carson*[2] which affirmed that colonial assemblies had no inherent right to the *general* contempt power exercised by the Imperial Parliament. The point is made in the Introduction that the subsequent adoption of the privileges of the Imperial Parliament *in toto* by Australian colonial statesmen, once the legislative power to do this was recognized, was seemingly the result of an uncritical acceptance of the suitability of English rules to the working of the local legislatures. But inferentially and perhaps cynically it might well be that this uncritical acceptance of English rules was in fact a discerning arrogation of power, designed to ensure the minimum of interference from the Imperial Parliament. As a matter of detail, it is not correct to say, as Professor Campbell does at p.24 of this Chapter, that the original South Australian Constitution Act 1855-56 omitted to define its privileges by reference to those of the House of Commons. In fact section 35 (now section 9) of the original Act did so

1. 4 A.P.C. (C.S.), 375-385.
2. (1842) 1 Moo.P.C. 63.

restrict the privileges of the local legislature. Other Chapters which are particularly noteworthy deal with Freedom of Speech and Debate, Immunity of Members of Parliament from Legal Process, Disputes over Membership of Parliament, Penal Jurisdiction, Political Malpractices and Parliamentary Investigations.

Although Professor Campbell has written a book which is primarily concerned with the law and practice of parliamentary privilege in operation, she has, nevertheless, at various points, inevitably trenched upon the field of law reform. This is particularly so in her Introduction and in Chapters 7 and 10 which deal respectively with Penal Jurisdiction and Parliamentary Investigations. It is when Professor Campbell turns to suggesting reforms on the law of privilege that the book, to some extent, loses the impetus and conviction which is elsewhere so apparent. In her Introduction, Professor Campbell makes the observation that it "is very much open to question" whether Houses of Parliament should retain their penal jurisdiction to determine matters of contempt and breach of privilege, and whether a legislative assembly is an appropriate forum in which to exercise what is in essence a judicial function. The analysis of these important questions is dealt with in the tantalizingly short space of twenty-seven lines. These are pregnant with ideas and in this reviewer's opinion certainly merit substantially more discussion and development than they are given in this book.

The problem of redefining the penal jurisdiction is again raised in Chapter 7 under the concluding heading of "Proposals for Reform". The more obnoxious features of the power are isolated, which include the possibility of a denial of one or more of the rules of natural justice (with the exception of Queensland—*vide* Rules 317 and 318 of Queensland Legislative Assembly), the "nebulous quality of the offence", and the absence of any effective supervisory jurisdiction in the courts. Then follows a discussion of the various unsuccessful attempts at federal and state level to assign the trial of contempts to the jurisdiction of State Supreme Courts and the High Court once Parliament has declared that specified acts have occurred. Professor Campbell's conclusion is that Houses should be divested of all power to commit except where members or other persons in a direct physical way disturb or prevent the conduct of parliamentary business. Houses should in these circumstances, she suggests, have the power "to deal summarily" with offenders, and the authority should be retained on "grounds of expediency and convenience".

Two points seem worth considering with respect to these proposals. First, the use of the phrase "deal summarily" appears to suggest that the exercise of the power of committal in the limited situation postulated would not be subject to judicial scrutiny. If this is so, it is apparent that while the scope of potential abuse has been reduced, the actuality of the threat of potential abuse within that limited situation remains undiminished. On the other hand, however, it might be thought that *any* committal by a House ought to be subject to the ultimate investigation of a superior court. Secondly, the power to commit for physical disturbance of legislative proceedings might more properly be viewed as a necessary element of the legislative process, rather than being regarded as a judicial power enjoyed as a matter of "expediency and convenience". This in fact is the view which has been taken by the

United States Supreme Court in considering the contempt power of Congress. It is regrettable that Professor Campbell's proposals for reform of the penal jurisdiction do not draw on the richness of American materials. It may well be argued that a more detailed consideration of these would have made a relevant and useful contribution to this discussion. It is of some interest to note that Congress has been held to have an inherent contempt power, which differs from that of the Parliaments of the U.K., Commonwealth and States in two vital respects and would appear to meet Professor Campbell's objections. First, the power of committal is limited to contemptuous conduct occurring in proceedings of a *legislative* character or in the prosecution of an inquiry within the legitimate scope of the legislative functions of Congress which has the effect of obstructing, deterring, or preventing it from exercising its legitimate functions. Secondly, an assertion of a valid exercise of the contempt power, whether pleaded generally or on the basis of factual allegations, and whether or not it occurs in an area of legitimate cognizance, is subject to the court's residual powers of inquiry and characterization[3].

In dealing with the penal jurisdiction of Houses, Professor Campbell's exposition of the various postulated bases of the U.K. Parliament's contempt power might usefully have been extended. Certainly the topic deserves more than the footnote treatment it receives[4]. Moreover some discussion of the origins of section 49 of the Federal Constitution, which represented a radical departure from the American model, and constitutes to this day an anomalous exception to the separation of the legislative and judicial organs of government, would have been a useful addition to a book on privilege in Australia[5]. Finally it is disappointing that the leading High Court decision on section 49 and the contempt power in *R.* v. *Richards; ex parte Fitzpatrick and Browne*[6] receives somewhat cursory analysis, especially by omitting any reference to Sir Owen Dixon's apparent equation in that case of privilege and contempt wherever they are pleaded generally in habeas corpus proceedings.

In Chapter 10 Professor Campbell examines the penal jurisdiction of Australian Houses in the context of Parliamentary Investigations, and deals briefly with various unsuccessful legislative attempts to formulate a jurisdiction for the High Court to deal with contumacious witnesses summoned to give evidence before Federal Parliamentary Committees. In conclusion she draws attention to the 1857 Act of the U.S. Congress, which empowers courts to punish contumacious witnesses summoned by authority of either House to give evidence or produce documents before either House or any committee thereof. In referring to this statute Professor Campbell suggests that it was passed because neither House of Congress had any inherent power to deal with recalcitrant witnesses, and cites *Kilbourn* v. *Thompson*[7] as authority for this proposition. In fact that case decided, *inter alia,* that where the House of Representatives by resolution authorized an investigation which pertained to

3. The cases are conveniently digested in Vol. 5 U.S.S.C. Annotation, 711-713, §30-31; 17 Am. Jn. 2d. 106-114, §125-141.

4. Ch.7, n.12.

5. See Professor Reid's comment in (1966) 7 University of Western Australia Law Review 615 at 617.

6. (1955) 92 C.L.R. 157.

7. 26 L. Ed. 377 (1880); 103 U.S. 168.

a power which could only be legitimately exercised by the judicial branch of government and was thus beyond its constitutional legislative authority, there was equally no lawful authority to compel a witness to testify beyond what he voluntarily chose to tell, and to treat him as contumacious for a refusal to answer questions put to him in the course of such inquiry. Insofar as the case deals with the question of an inherent power to commit for contempt contumacious witnesses summoned to testify before a Congressional committee properly seised of power, it supports its existence where such committal is *essential* to the proper performance of a legitimate constitutional function[8]. Later cases have made it clear beyond doubt that the conduct proscribed by the Act of 1857 created no new offence, but merely specified a punishment for a previously existing offence, and facilitated and supplemented the exercise of the power by introducing a more streamlined procedure[9]. This error serves to highlight what may be thought to be the major deficiency of an otherwise excellent book, and that is the minimal and even misleading examination of American materials in the formulation of what are, in any event, somewhat austere proposals for reform.

In conclusion it should be noted that the publishers have unfortunately not included the copious footnotes with the text, but have collected them *en bloc* at the end of the book. This present separation of text from footnotes makes systematic reading both difficult and frustrating, particularly with so detailed a book. It is to be hoped that in any subsequent edition this deficiency will be rectified. However, none of the criticisms in this review is, of course, intended to detract from the intrinsic merit of Professor Campbell's book. She has undertaken a formidable and long-needed investigation, and has completed it generally with her usual meticulous scholarship and relevance to the topic.

M. C. HARRIS*

AUSTRALIAN TRADE PRACTICES LAW, *by George C. Masterman and Ezekiel Solomon.* Butterworth & Co. Ltd., 1967, pp. 1-524.

AUSTRALIAN MONOPOLY LAW, *by Geoffrey DeQ. Walker* Cheshire, 1967, pp. i-xii, 1-391.

These books are the first major treatises on Australian restrictive trade practices law and the reviewer acknowledges his debt to them.

They cannot really be regarded as alternatives. *Walker* often shows more concern with the philosophy of restrictive trade practices law than with a close examination of the provisions of the Act. *Masterman and Solomon* is a

8. 26 L. Ed. 377 at 387, 390.

9. *Vide: Re Chapman,* 166 U.S. 661 (1896); *Marshall* v. *Gordon,* 243 U.S. 521 (1916); *Jurney* v. *MacCracken,* 294 U.S. 125 (1934) especially per Brandeis J. at 149-151; *Quinn* v. *U.S.,* 349 U.S. 155 (1954).

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little more pedestrian, but, on the other hand, sometimes a more accurate exposition of the Act.

As an illustration of this we may take the respective treatments of reasonable fixed prices as a claimed advantage. Dr. Walker goes very close to suggesting that the question whether fixed prices are reasonable should be disregarded entirely.

His reasons are twofold. First, it is difficult to prove whether prices are reasonable; and second, no matter if they are reasonable, they carry with them, because they are fixed, many detrimental consequences. Each of these may be conceded without justifying disregarding the issue. If the proof is insufficient *cadit quaestio;* but if it is sufficient how can it be ignored? For section 50 requires the balancing of a possible multitude of advantages against a similar array of disadvantages. The fact that certain disadvantages follow fixed reasonable prices merely suggests that these go into the balancing process as well. It does not suggest that a reasonable price, which few would argue is not within the terms of section 50(2)(a), can be ignored.

In contrast, Masterman and Solomon, although alive to the difficulties of the question, accept the place of a reasonable price in section 50.

Similarly Masterman and Solomon's analysis of the examinable practice of obtaining discrimination under section 36(1)(a), in relation to the ill-fated Clayton Act section, is more accurate than Walker's. Walker concludes (p.243)—

> "It seems likely that the practice of inducing discrimination will be examinable only where a buyer obtains preferential treatment for the same quantity of goods as is purchased by its competitor. As with the pre-1936 Clayton Act this weakness will be sufficient 'to render it inadequate if not a nullity' "

This seems to this reviewer quite unjustified, although he would also take issue with one or two of the steps in Masterman and Solomon's reasoning to advance the contrary opinion. For instance, their proposition (p.116) that the relevant time for determining the terms on which the supplier is willing to supply others is prior to the inducement being effective, seems clearly wrong; although the terms at that particular time will usually be the basis of inference as to what the terms are at the relevant time, which must be immediately after the inducement has effect.

The difference in character of the two books is rather nicely demonstrated by a comparison of the respective titles. The material covered in each book is approximately the same. Walker's book, although called "Australian Monopoly Law", is not, of course, limited to what would usually be regarded as the monopoly provisions of the Act. "Australian Trade Practices Law" as a title, is as accurate as it is dull. "Australian Monopoly Law", on the other hand, is a title that shows a certain imaginative insight into the subject although its ultimate accuracy is to a small degree questionable.

As has been said, the books cannot be regarded as alternatives. The lawyer, anxious to attain an understanding of the field, will need both. Probably

Masterman and Solomon will at first better satisfy the requirements of day to day practice. But the more challenging and stimulating *Walker* will ultimately, in the opinion of this reviewer, prove to be the more important book.

Both works are attractively presented. *Walker* is probably the more so, but *Masterman and Solomon* the easier to use since it is more extensively indexed and makes greater use of sub-headings. *Walker* is advantaged by the lack of a foreword. Both have useful appendices; *Masterman and Solomon* is the more extensive in this respect, although the coverage of at least South Australian provisions, cannot claim to be comprehensive in view of the omission of the 1963 amendment to the Prices Act.

The major defect, common to both books, is a failure accurately to expound the adjudication process of section 50. This, it is thought, stems largely from a failure to perceive that section 50 contemplates two balancing processes. The effects of a restriction as regards sub-section (2) are only to be weighed against the constituted detriment if they survive another balancing process; ("*if* that effect tends to establish that *on balance* . . . "). The requirement of two balancing processes separates the theoretical disadvantage of a restriction (loss of competition), which is constituted as a detriment by the section and thus necessarily present, from the *actual* disadvantages of a restriction (high prices, difficulty of entry, lack of innovation and so forth) which are not necessarily present.

This separation is essential for a clear and precise application of section 50. But it is overlooked by Walker; see in particular the passage at page 73 which is at best obscure. Masterman and Solomon (at page 218) are led to the error, which appears to this reviewer to be fundamental, that the "burden of proof or persuasion that the agreement or practice is on balance contrary to the public interest, lies upon the Commissioner". If the separation of balancing processes is observed this cannot be so, for unless the respondents outweigh the Commissioner on the second balance they will not even get back to the first balance which lies weighted in the Commissioner's favour by virtue of the presumed theoretical detriment.

There are other places in both books in which this reviewer regards the authors as being in error, but this is hardly surprising. For it would be quite impossible for the first books on a new, complex and unlitigated Act to be entirely satisfactory to the opinion of any reviewer. The authors are rather to be complimented, firstly for having the courage to venture into the virgin field, and secondly for producing what are, when all is boiled down, contributions of distinct value.

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THE LAW OF SALE OF GOODS IN AUSTRALIA AND NEW ZEALAND, *by K. C. T. Sutton.* The Law Book Co. Ltd., 1967, pp. i-xlvii, 1-405.

There can be no doubt about the "Australian flavour" of this welcome publication: the reader encounters cases concerned with the "docking" of lambs, with Australasian counterparts to the English motor-car log-book and such Australian specialities as the sale of spark arrestors fitted to motor-tractors for the prevention of bush fires. In fact, Sutton can claim credit for having produced the first comprehensive analysis in textbook form of the Australasian cases concerned with the Sale of Goods legislation. The leading English authorities, too, are carefully noted and analysed, but references to these are heavily outnumbered by references to Australasian materials. Sutton's declared aim is to make the cases decided here better known and one cannot doubt that he will succeed in doing this. Although the book is not intended primarily as a comparative treatise, the reader will find frequent useful references to American and Canadian authorities for comparison and elucidation of difficult points of principle. Reference is made to some 1,600 cases which places Sutton's work well ahead of English student texts in comprehensiveness. Atiyah's book, for example, is based on no more than 600 cases.

The treatise is concerned with the existing law and mentions the need for reform only where the present law is palpably deficient. This conservative feature will appeal to practitioners and has the undoubted virtue of preventing confusion between the law as it is and the law as it ought to be. Sutton's conservative outlook also shows itself in the conventional exposition he has adopted. The first five parts of the book coincide with the first five parts of the Sale of Goods Act (formation, terms, effects, performance of the contract and remedies). Incorporated into part III the reader will find an account of the various Factors Acts in force in the Australian jurisdictions and in New Zealand. Part VI deals with Auction Sales, and with the whole problem of exemption from liability (including the effect of the *Suisse Atlantique Case*[1]); there is also a fairly extensive account of the special problems associated with export sales together with an appendix devoted to the 12th report of the Law Reform Committee (U.K.) concerned with the transfer of title to chattels.

Sutton's thoroughness and his determination to cover every aspect of a problem which the Australian and New Zealand cases have presented, is of undoubted benefit to the practitioner who is looking for arguments with which to win his client's case. On the other hand, there could be a danger that it might occasionally prove a handicap to the beginner. Some students find their way with a simplified map but become confused with one which shows every detail. The point can be illustrated by comparing Atiyah's discussion of "merchantable quality" with Sutton's. Atiyah quotes two judicial definitions of "merchantable" (at p. 65) and indicates his preference for one of these, viz. Lord Wright's statement in *Grant* v. *Australian Knitting Mills*[2] that a thing is not merchantable "if it has defects unfitting it for its only proper use

1. *Suisse Atlantique Société D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* (1966) 2 All E.R. 61 (H.L.)
2. [1936] A.C. 85 (P.C.)

but not apparent on ordinary examination." This and the following very brief elaboration (taking up no more than three brief paragraphs) give the pass student something to remember and the better student something to think about. Sutton commences his discussion of the same topic with an enumeration of six possible definitions of "merchantable", for all of which there is substantial judicial support, and follows this up with an immensely elaborate discussion which takes up eleven pages and 84 footnotes. Sutton is anything but a mere compiler, his own preferences and conclusions are always clearly stated, but to the average student it might have been helpful if these conclusions had been given special emphasis by black print or had been separated from the narrative text in some other way.

The legal fragmentation produced in Australia by the co-existence of so many separate jurisdictions is such that even a writer of Sutton's thoroughness found himself compelled occasionally to cite statutory enactments by way of exemplification rather than in a comprehensive list (see the enumeration of statutory powers of sale at p. 285). Some rather interesting problems have been omitted because Sutton considered them more appropriate to a general text book on the Law of Contract. In the case of the problems created by mistake of identity (see p. 201), this is perhaps regrettable, since almost all the important cases in this category are concerned with the sale of goods and since the legal solution to these problems cannot be divorced from the wider problems of the protection of bona fide purchasers.

Sutton's style is businesslike and the book makes easy reading from this point of view. Infelicities of style are rare (". . . is a question of more or less . . ." at page 130, n. 6 might be one example) and the book is fairly free of printing errors. An unconventional abbreviation used by Sutton is "L." for "Lord." This might have been avoided since the space gained by it is negligible.

The comprehensive survey of Australasian decisions presented by this book has its value, not only as a statement of the existing law, but also as an important preparatory survey for the task of law reform. Australia and New Zealand should neither blindly take over new British Sale of Goods legislation nor slavishly enact the American Uniform Commercial Code. Some of the heritage of judicial wisdom which is found in the local cases must surely find its way into Australasian reform legislation. Sutton's book ensures that this heritage is readily accessible.

Sutton on the Sale of Goods will be of great value to law teachers and students in Australia and New Zealand. It should also prove indispensable to practitioners.

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THE TREATY-MAKING POWER IN THE COMMONWEALTH OF AUSTRALIA, *by Gunther Doeker.* Martinus Nijhoff, 1966, pp. 1-256.

In Australia the distribution of competence in treaty matters between federal and state organs of government has added complications and controversy to traditional issues related to the negotiation, conclusion and ratification of treaties. Despite the complexities and the need for clarification in this field, the various aspects of Australia's treaty-making power, until the appearance of this book have been discussed in disparate fashion. It has long been recognized that there would be great advantage in a book drawing all the relevant strands of the topic together. Unfortunately, although Dr. Doeker's study does contain some valuable material, it falls short of what could be considered a definitive treatment of the subject. No clear and accurate understanding of the Australian treaty-making power can be gained from this book without reference to the standard works on Australian constitutional law, and to two important essays which appeared after Dr. Doeker completed his present study in August 1964[1].

The author begins with an account of the evolution of Australia's international personality and treaty-making competence. Nothing new emerges from his description of the evolution of Dominion status generally (Chapter I) and of Australia's treaty-making competence in particular (Chapter II), but this background certainly forms part of any full-scale treatment of the subject. The author does not explain how Australia came to be regarded as a separate contracting party to treaties territorially applied by Great Britain to all the dominions, so that, for example, Swedish denunciation in 1950 of the extradition treaty of 1873 was ineffective with respect to Australia and had to be followed by separate notice of termination. In this connection a reference to the Canadian case of *Ex parte O'Dell and Griffen*[2] would have been illuminating. He also fails to note the inconsistent stands taken by the Crown in the different Dominions with respect to recognition of the Chinese People's Republic.

In Chapter III ("Constitutional Framework") the author makes a preliminary survey of the relevant provisions of the Australian Constitution. A good deal of the chapter consists of summaries of the Royal Commission on the Constitution of 1927 and of the Joint Committee on Constitutional Review of 1959, with unfortunate results for the consistency of Dr. Doeker's tenses. Also unfortunate is the haphazard use of the terms "Commonwealth", "Federal" and "National" to describe the Australian Parliament, all three terms being used at one point on the same page (p. 78). A preliminary explanation of the currency of these terms ought to have been offered for the benefit of non-Australian readers. The explanation of the recurrent failures of proposals for constitutional amendment (p. 28) will strike Australian readers as being too facile especially in the light of the 1967 referenda.

A detailed description of the processes of negotiation, conclusion, ratification

1. G. Sawer: "Australian Constitutional Law in Relation to International Relations and International Law", and A. H. Body: "Australian Treaty Making Practice and Procedure", both in O'Connell (ed.): *International Law in Australia* (1965).
2. [1953] 3 D.L.R. 207.

and the entry into force of treaties occupies Chapters V and VI. The author has assembled here much valuable information which has not previously been published or which has been described in part only. There are, however, several obscure passages and some slips. On p. 139, for example, the necessity of appropriating funds is omitted as a cause for implementing legislation by the Australian Parliament, while unaccountably "because the subject-matter of the treaty does not conflict with legislative powers within the residue of the States" is given as a ground for legislative inaction on the part of the Australian Parliament.

The longest chapter in the book is Chapter VII, dealing with the constitutional limitations upon treaty implementation. Here the reader is invited to comprehend the unique Australian experience which differs in important respects from that of other federal systems such as the United States. Unfortunately it is the least successful part of the book. The account of judicial interpretations of the external affairs power is preceded and followed by quite inconsistent statements of their effect. On p. 183 the author states that it is not possible for the federal government, by concluding a treaty, to obtain legislative powers over matters otherwise beyond federal competence; at pp. 188-189, however, he advances with approval the contrary proposition. Finally, at pp. 208-209 appear the following inconsistent assertions:

> "There are no cases which addressed themselves to the fundamental question of the validity of legislation passed to implement a treaty which is not otherwise declared by the Constitution to be within the competence of the federal legislature. The High Court first faced this problem in the case of *Rex* v. *Burgess ex parte Henry*[3] . . . the power has been held to be validly exercised in respect to matters which would not otherwise fall within Federal powers—*Burgess'* case and *Rex* v. *Poole ex parte Henry*"[4].

This confusion is carried over into Chapter VIII ("The Competence of the States in External Affairs") where the author reverts in many places to the theory that the Australian Parliament is incompetent to implement treaties save those dealing with subjects as to which it would otherwise have legislative power under section 51 of the Constitution; see especially pp. 219, 224, 229. At p. 241, however, we are led back to orthodoxy once more. Nowhere in this chapter are any reasons advanced for the refusal of successive governments to test the clear implications of *Henry's Case*[3]. These reasons, curtly suggested in a single sentence on the last page of the book, deserve considerable elaboration especially in view of the fact that the topic would appear to have become an issue between the major political parties in Australia[5].

The same fundamental confusion recurs yet again in Chapter IX ("Federalism, Constitutionalism and Internationalism"), where after an apposite discussion of the concept of constitutional good faith (known in Germany as *Bundestreue)* Dr. Doeker writes:

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3. (1936) 55 C.L.R. 608.
4. (1939) 61 C.L.R. 634.
5. Whitlam: "The Constitution versus Labour", Chifley Memorial Lecture, (1957) p. 17.

> "Hence the assent or concurrence of the State with respect to the implementation of the treaty falls not within the legislative sphere of matter of prudence and propriety, though not *ex hypotheses* [sic] required as a matter of law, for the State Parliament is the only legislature which can constitutionally make the required law in case the implementation of the treaty falls not within the legislative sphere of the Federal Parliament and it can abstain from exercising its power in case it wants to do so." (p. 245).

Excessive transcription and paraphrasing from the work of other writers adds to the confusion in several parts of this book and greatly detracts from its value. The description of the evolution of the treaty-making powers of the Dominions up to the First World War (pp. 2-9) is substantially a paraphrase of M. M. Lewis[6]; the reader may compare these pages with pp. 21-26 of Lewis. In Chapter IV one encounters direct transcription from an article by Professor D. P. O'Connell[7]; Dr. Doeker's passage beginning: "The Austinian concept of sovereignty . . ." on p. 83 and continuing with a few minor insertions and transpositions to p. 88, should be compared with the text of O'Connell, p. 104, para. 2 *et seq.* Extended summaries of Australian judicial decisions in Chapters VI and VII are transcribed from the standard work of Dr. W. A. Wynes[8]; pp. 156-158, 172-176, 183-188, 190-192 and 196 of Doeker are in part literal and in part slightly paraphrased transcriptions from Wynes, pp. 116-117, 107-111, 390-395, 389-390 and 590-591 respectively. The indented passages on pp. 169, 170 and 171 are similarly taken from J. G. Starke[9], pp. 74 and 78, 79, 78 respectively. While there are references to all these sources in the footnotes, it is not always made clear that extended passages are being reproduced verbatim or very nearly verbatim.

In this reviewer's opinion Dr. Doeker's study wears the appearance of a largely undigested review of facts and opinions which have been hastily assembled together. Too little regard has been paid to the avoidance of internal inconsistencies and to the problems raised by the often indiscriminate use of primary and secondary sources. Moreover the book contains more mis-spellings and other typographical errors than is generally regarded as tolerable. Although there is much in the central portion of the book that will be found valuable, overall it must be concluded that the hopes of those who have been waiting for an authoritative treatment of all aspects of treaty-making in Australia have yet to be realized.

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6. (1922-23) 3 British Year Book of International Law.
7. "The Crown in the British Commonwealth" (1957). 6 International and Comparative Law Quarterly 102.
8. *Legislative, Executive and Judicial Powers in Australia* (3rd ed., 1962).
9. *An Introduction to International Law* (5th ed., 1963).

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ROGERS AND VOUMARD'S MERCANTILE LAW IN AUSTRALIA, *Fourth edition, revised reprint by W. F. Clemens and A. Bonnici.* Butterworth & Co. Ltd., 1966, pp. 1-522.

While this book is now a revised reprint of a fourth edition, this is the first time that the writer has been asked to review it.

The book in the course of some five hundred pages or so provides potted treatments of the history of mercantile law, the law of contract, agency, partnership, companies, sale of goods, hire-purchase, bills of sale, loans and pawn, negotiable instruments, bailment, carriage by land and sea, insurance, guarantees and suretyship, commercial arbitration and awards, bankruptcy, wills, executors, trusts and trustees, receivers, stock exchanges and share markets and patents, trade marks and copyrights.

The book is apparently "intended primarily for use by accountancy students preparing for Commercial Law or Mercantile Law examinations which are included in the several Accountancy syllabuses." (Preface to Fourth Edition.) If the purpose of the courses referred to is only to let students know that the various legal subjects canvassed exist, then the book probably achieves a purpose. But if its purposes are more complicated than this, then it has almost certainly failed in these purposes.

The treatments of the subjects with a significant statutory base, *e.g.* sale of goods, bills of sale, bills of exchange, are for the most part merely paraphrases of the relevant statutes. They are in a sense the most convincing parts of the book. But even then the treatment often tends to be misleading. For example, in the fifteen pages devoted to company law, two cases are cited; almost the whole of the treatment is confined to a statement of various machinery provisions (*e.g.* as to formation) of the Companies Act. The only impression that this treatment could serve to convey to the uninitiated is that company law is to be found in the Companies Act. Most lawyers, of course, would regard the Act as no more than a gloss on the vast body of company law to be found in the common law.

Areas of law without significant statutory base are often even less satisfactorily dealt with. For example, in the law of contract, the whole of the law of mistake was apparently thought capable of adequate treatment in four pages.

To convey the impression to anybody, but particularly to accountants who unfortunately are better placed than most to act on the impression, that the law on most things is to be found exclusively in statutes and that the law on anything can be stated in a series of short, uncomplicated, dogmatic propositions, can scarcely have other than a mischievous effect. Any course so constructed is firstly misleading and secondly, though perhaps less importantly, anti-intellectual. If it must be conceded that courses of the kind at which this book

is apparently directed are worthwhile, then the book might very well be a more than adequate substitute for the services of a live teacher.

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LAW OF MARRIAGE AND DIVORCE, *by the Hon. Mr. Justice Joske.* Fourth Edition, volumes I and II reprinted in one volume and supplement (1960-1966), Butterworth and Co. (Australia) Ltd., 1967, pp. i-cxxvii, 1-827, 1-95.

That Butterworths should have thought fit to reprint (in one volume) the Fourth Edition of *Joske* bespeaks the paucity of the Australian family law library. The Commonwealth Matrimonial Causes and Marriage Acts having only just come into operation when this Edition was first published, the work has an uncomfortably out-of-date ring in 1968.

Joske is too established a treatise to justify a detailed critique. May a law teacher, however, be cautious enough to suggest that it is not a suitable work for university study?

1. It is uncritical.
2. It does not treat the facts of cases.
3. It does not consider social factors.
4. It is unexciting to read.

In short, a student reading *Joske* would glean little of the complex interaction of social and legal forces that is the fascination of family law.

In places, the search for conciseness results in an apparently unsophisticated acceptance of highly disputable *rationes decidendi.* A blatant example is on page 1 itself, where, on the authority on *R.* v. *Millis,* it is baldly stated that, "From the earliest times English law, in contrast with the civil and canon law, required the intervention of an ecclesiastical authority for the celebration of marriage"; an assertion that contains at least three half-truths. Sometimes, too, the writer discusses points of interest raised by earlier cases, that have been rendered sterile by the Commonwealth legislation. Thus (on p. 174) he spends some little time considering the origin and purpose of the requirement that a petitioner for restitution of conjugal rights be sincere in his wish to resume cohabitation, and concludes that "Whatever the reasons for its development may have been, it [this requirement] would now seem to be definitely established." This equivocation is hardly justified, as sincerity is expressly required by section 62 of the Matrimonial Causes Act.

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1. (1844) 10 Cl. & Fin. 534.

The Supplement contains several minor slips and one glaring inconsistency (*Lombardini* v. *Lombardini*[2] is cited as authoritative, some lines above section 9 of the Matrimonial Causes Act 1965, which abrogates it). It gives the general impression of being unedited, and is hardly adequate to evaluate the numerous decisions interpreting the new Acts.

Joske remains the one book of authority on the Australian Law of Marriage and Divorce, and is an indispensable practitioners' treatise. It is yet a pity that no-one in Australia has been prevailed upon to provide a critical up-to-date text-book on this crucial subject.

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2. [1963] W.A.L.R. 98.

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