BOOK REVIEWS

The British Commonwealth: The Development of its Laws and Constitutions (Vol. 2: The Commonwealth of Australia) By G. W. Paton and others, 1952. London: Stevens & Sons, Limited. 000 + 000 pp. (£3/16/6 in Australia)

This is the Australian contribution to the ambitious attempt to produce, in a number of volumes of limited compass, a survey of the development of the laws and constitutions of the members of the British Commonwealth of Nations. As Professor G. W. Paton points out in the preface, "it is no easy task to survey legal evolution in Australia." The Federal structure sets problems familiar to Canadians (and now to Indians) but often unintelligible to lawyers elsewhere in the Commonwealth of Nations; that is particularly true in the field of constitutional law, but even in the field of private law there are six Australian States each of which "received" English law at different times and whose statute law is by no means uniform. Yet the difference in State law can easily be exaggerated; the general pattern is very much the same, a good example being the legislation relating to the Torrens system of registered title to land, which is universal in its application though occasionally differing from State to State in matters of technical detail. This basic identity might have induced the editor and his collaborators (most of whom, for reasons given in the preface, had to be drawn from the ranks of the Victorian lawyers) to take Victorian law as an exemplar of State law, to ignore completely minor differences in the laws of other States, and to relegate to footnotes any necessary references to *major* differences elsewhere. But they have preferred to attempt the much more difficult task of giving a detailed analysis of all State laws bearing on the subject discussed.

The volume gets off to a good start with an introductory chapter by Professor Paton himself which has a good deal more to say than is indicated by its title, "The Reception of the Common Law." The learned editor emphasises that there is still, despite the activities of six legislatures in colonial days and of seven since federation, a surprising degree of uniformity (sometimes achieved, however, by the reluctance of the courts to believe that any Australian legislature ever intends to depart from the course charted by Acts of the United Kingdom or to make any substantial change in common law doctrines). He then briefly draws attention to those fields in which variation has occurred — and has persisted in the face of judicial disapproval. Professor G. Sawer follows with a description of our complex constitutional structure which (the description, not the structure) is a model of compression and clarity; he contends that certain dominant characteristics can be discovered in the High Court's approach to constitutional issues during the fifty years of its existence, and though it is clear that he does not always approve of the trend he has to admit that at least it has the virtue of consistency. Professor W. Friedmann's description of Administrative Law in Australia shows that the problem in this country does not differ substantially from that which is confronting the judges in England, though it is complicated

here by the acute jealousy which the High Court shows of the exercise of anything smacking of federal "judicial power" by tribunals whose members do not have the sacrosanct life tenure (not mentioned anywhere in the Constitution itself) which that Court seems to think is the only guarantee of wisdom and impartiality in adjudication. With these two topics the survey of Public Law comes to an end. Criminal Law is hardly mentioned, a somewhat surprising omission in view of the fact that at least two States (Queensland and Western Australia) have a comprehensive *code* of criminal law and that the substitution of statutory for common law offences has gone a long way in other States.[1] The Queensland Code (virtually copied by Western Australia) is of particular interest; the work of Sir Samuel Griffith, it does make a number of important changes even if some of them were due to the draftsman's misunderstanding of the common law principles to which he sought to give statutory form.

In the field of private law an all too brief chapter by Mr. P. Moerlin Fox deals with the important subject of real property and the impact thereon of the Torrens system of registered title. It is only fair to Mr. Fox to report that the brevity is due to his having been invited at the eleventh hour to contribute to this part of the work; the importance of this subject, including as it does a description of Australia's contribution to the clarification and transfer of title, deserves much more space than is given to other topics of less moment. The other subjects selected from the field of private law are Family Law, Succession, Procedure and Pleading, and the organisation of the Legal Profession; the latter two seem somewhat strange bedfellows for this company, particularly when it is realised that Mercantile Law is excluded and relegated to Part III — "Legislative Intervention in the Life of the Community." Since the chapter on Mercantile Law shows that in this field Australia has wandered very little from the beaten path of English common law and statute one wonders all the more why it appears in this strange setting. Apart from the anomalous inclusion of Mercantile Law in Part III, the latter is very unbalanced. Two laymen have here been summoned in aid of the lawyers. Professor S. M. Wadham (of the Melbourne University Chair of Agriculture) writes about the particular impact of the law on the farming community, and Mr. T. Kewley, a lecturer on Social History in the University of Sydney, explains the substance and working of our manifold system of social services. I am not cavilling at the inclusion of these two topics; but it does seem that in a work intended presumably and primarily for overseas readers there is a lack of proportion in Part III. Many of the agricultural problems discussed are peculiar to Australia by reason of climate, soil conditions, &c., and are of more interest to specialists in agriculture than to lawyers; yet 32 pages are allotted to them, while the vastly more important field (from the legal standpoint) of our comprehensive and controversial industrial law is limited to 21 pages, and the social services in which Australia claims — though not always accurately — to be in the forefront have to be condensed into a mere dozen.

It is in the field of "Public Law" and of "Private Law" as classified in this volume that some detailed criticism is called for.

I do not pretend to have checked the accuracy of references to the laws of all the States, but I have found a number of errors in the description of the law of Western Australia which make me somewhat distrustful of the comments of the laws of the other States except Victoria. A few examples must suffice. On page 39, line 12, there is a minor inaccuracy which is corrected in the Table of Statutes; the constitution of Western Australia is not derived from a British *(sic)* statute of 1889 but from a Western Australian Act of that date which was reserved and

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[1] Those interested can refer to J. V. Barry and G. W. Paton, *An Introduction to the Criminal Law in Australia* (1948). [The fact of this earlier publication may explain the omission.—Ed.]

then formally enacted in 1890 by the Parliament of the United Kingdom.[2] More serious is the assertion, on lines 23-25 of the same page, that (except in Tasmania and Queensland) special majorities were required for constitutional amendment and that all amending Bills had to be reserved. This bald statement was never true of Western Australia, where an absolute majority of both Houses was and is required only for Bills to change the composition of either House[3], and reservation was only required of a very limited class of amending Bills. In footnote 9 of page 40 it is asserted that "A Western Australian consolidation (of the Constitution Act and its amendments) is in progress;" this unfortunately is incorrect. A consolidation was drafted several years ago but for political reasons was never submitted to Parliament; it is now out of date. On page 87, lines 27-29, the statement that in Western Australia "the Crown may sue or be sued in any court or otherwise competent jurisdiction in the same manner as a subject" repeats uncritically and without comment a palpable error in the statute book; the word "or" is a misprint for "of". On the same subject, the sentence in line 5 of page 91 that the Western Australian Crown Suits Act, 1947 "goes some way towards ensuring the execution of judgments against the Crown" is surely an understatement. Under sec. 10 the Registrar of the Supreme Court *shall* issue a certificate of the judgment under the seal of the Court; on receiving the certificate the Governor *shall* cause payment to be made out of Consolidated Revenue Fund.

Similar errors are made in the sphere of private law. For example, on page 159 at line 26 it is said that in Western Australia a widower or widow takes the first £500 and one-third of the balance of the intestate spouse's estate. The amount was raised from £500 to £1000 by Act No. 8, 1949, which should have been available to the writer of the note since the editorial introduction is dated June 1951. On page 211, at lines 2-5, it is stated that "in Tasmania and Western Australia, a person serving five years as an articled clerk and passing specified University examinations, may be admitted to practice without obtaining the law degree of those Universities." This, in regard to Western Australia, is quite incorrect; persons who serve under articles for five years sit for examinations conducted exclusively by the professional body, the Barristers' Board, and are not required to attend the University Law School or to take any of its examinations; in fact the few who enter the profession in this way very rarely come near the University for any purpose. On page 273 the curious reference in note 85 to "Western Australia: Bills of Sale Acts, 1899" suggests that more than one Act of that title was passed in 1899 and that all the provisions thereof are still operative; in point of fact one Bills of Sale Act only was passed in 1899, but that Act has since been amended on ten occasions (the last being in 1940) and, as amended to the end of 1925, was consolidated and printed in the statute book for that year.

Apart from these and other inaccuracies as to the law of Western Australia, there are other passages to which attention must now be drawn. On page 16, line 12, it is asserted dogmatically that "no wife can obtain divorce for a single act of adultery;" that is only partly true even in Victoria, and as a general statement of the law in all States it is wrong and is indeed contradicted by the longer passage on page 138. On page 37, line 36, the "British Nationality and Australian Citizenship Act, 1948, No. 83" is incorrectly styled; it is the Nationality and Citizenship Act 1948 by an enactment of the Commonwealth Parliament. On page 201, in the last two paragraphs, Mr. F. C. Hutley indulges in a splenetic attack on the Australian University Law Schools. None of us resents criticism *if it is based on knowledge of the facts*. But so far as concerns the Law School of the University of Western Australia, of which I became Dean when Mr. Hutley was still in his swaddling clothes, I do not remember his ever having visited us

[2] Western Australia Constitution Act, 1890 (Eng.) 53 & 54 Vict. c 43.
[3] Id. s. 73.

or having made any inquiries, from my colleagues or myself, about our activities in the past or our plans for the future. We are far from being perfect, but we are not quite so conservative or myopic as Mr. Hutley so ingenuously asserts; knowing a good deal about our colleagues in the other Law Schools, we suspect that Mr. Hutley's audacious generalizations will not stand up to close scrutiny.

I must confess that I found the statements on page 258 as to the contractual capacity of the convicted person so puzzling as to be unintelligible; I refer particularly to the two sentences, "The restrictive provisions of the English Forfeiture Act, 1870, do not have any counterpart in the criminal legislation of N.S.W. *(sic)*, Queensland and Tasmania. The former and the latter were original convict settlements, and English legal influence on this occasion failed to induce the legislatures to adopt the English statutory provisions," and to footnote 22, which says that "The English Act was adopted, however, in Victoria, Crimes Act 1928, s. 575, and South Australia, Criminal Law Consolidation Act, 1935, s. 330." I do not believe that in 1870 the legislatures of New South Wales and Tasmania were in any way influenced by the origin of those colonies as convict settlements; in any event the statement that the English statutory provisions were not copied cannot be reconciled with the facts. Tasmania abolished forfeiture and substantially copied the other provisions of the 1870 Act in 1881;[4] (see now Criminal Code Act 1924, s. 11, and Criminal Code 1924, ss. 435-452. New South Wales, by the Criminal Law Amendment Act, 1883[5], abolished forfeiture and provided *inter alia* for the transfer of the convicted person's property to an official assignee (see now Crimes Act, 1900, ss. 465-469). Queensland abolished forfeiture in 1891 by the Escheat (Procedure and Amendment) Act, 1891[6], and made provision in 1915 for the administration of a convict's property (see Public Curator Act, 1915 to 1947).[7] As to the others, the footnote implies that the 1870 Act was not copied in Victoria until 1928, and gives no indication when it was adopted in South Australia; Western Australia is not mentioned in text or footnote. In point of fact Victoria substantially copied the 1870 Act in 1879 by 42 Vict.No.627; South Australia had already done so, in 1874, by the Treason and Felony Forfeiture Act, 1874;[8] Western Australia was actually the first colony to follow the English example, which it did in 1873[9] by copying all but ss. 32 and 33. This, I suggest, is a very different story from what is stated so curiously in the text, and reinforces what I said at the beginning of this review — that there is no fundamental difference in contemporary State law on many topics. so that in this field at least the Victorian statutory provisions could have been safely quoted as typical.

The last criticism to add to an unfortunately long list is one of the form rather than the substance of the volume. I refer to the extraordinary and irritating inconsistency of reference (i) to statutes of the Parliament of the United Kingdom and (ii) to the Australian States. The former are rarely United Kingdom (though occasionally U.K.) Acts; occasionally they are English Acts; more frequently, British or Imperial, with the emphasis slightly in favour of the latter. I dislike both these latter adjectives, because they are misleading; Acts of the Commonwealth of Australia, or of Canada, are just as "British" as those of the Parliament of the United Kingdom; "imperial" suggest either a parliament of the "empire" or enactments operative throughout the "empire." But my likes and dislikes are irrelevant; I do think however that the editor should have used his prerogative in favour of some uniformity of citation. As it is, the changes are rung with bewildering rapidity. Thus on pages 31 and 32, paragraph (a) refers to "the *Imperial* Bankruptcy Act" (no date given); paragraph (d) to "the

[4] The Criminal Law Procedure Act, 1881 (Tas.) 45 Vict. No. 14.
[5] 46 Vict. No. 17.
[6] 55 Vict. No. 12.
[7] 6 Geo. V, No. 14 — 11 Geo. VI, No. 25.
[8] 37 & 38 Vict. No. 25.
[9] 37 Vict. No. 8.

English Legitimacy Act 1926." Paragraph (d) and (e) refer to "English" authority or doctrine and paragraph (f) to "English" statutes. The "Crown Proceedings Act 1947 (U.K.)" in footnote 51 on page 90 becomes the "British" Crown Proceedings Act in line 4 and footnote 53 on the next page. On page 254, line 15 refers to an "*imperial* enactment;" line 24 to "the *English* Act" and "The *English* Sale of Goods Act" (again no date given); line 28 refers to "*English* legal development" but three lines later "*Imperial* law" appears. Uniformity of citation may be monotonous; at least it cannot mislead.

The references to the six States are not likely to confuse many readers; mut they, too, show a marked lack of uniformity. All too often in the text itself New South Wales appears as N.S.W. — an abbreviation which may at times be convenient but it is very ugly and is rarely imitated in references to any other State. The only place for abbreviations of this kind is the footnotes, but even here there is no common pattern. Incidentally, how many readers outside Australia are likely to be able to decipher the cryptic reference on page 103 to "T.A.A." and guess that it means "Trans-Australian Airlines," an organisation created by the Commonwealth and virtually one of its instrumentalities?

It is no satisfaction to a reviewer to find as much to condemn as to praise; but I must voice the opinion that far more time and care ought to have been spent on this book. The task of presenting some 300 pages of synthesis of the law of a unitary State such as New Zealand is difficult enough; it becomes gargantuan when there are (as in Australia) six more or less diverging systems. From a practical point of view the best feature of this volume is its wealth of reference to the statutes of the various States; but the reader who wants to use it for more than cursory information would do well to go to the primary sources.

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Better Employment Relations and other Essays in Labour by O. De R. Foenander, LL.M., Litt., D. Associate Professor of Commerce in the University of Melbourne, Barrister and Solicitor of the Supreme Court of Victoria, pp. i-xxiv, 1-244. The Law Book Co. of Australasia Pty. Ltd. (30/- in Australia).

This is Professor Foenander's sixth study on Australian industrial relations.[1] In it the author does not attempt a comprehensive survey of industrial relations in Australia. Instead, he confines himself to a discussion of certain topics which were not covered in previous works or were passed over lightly there and to a survey of developments in relation to certain matters (notably wages and hours standards) which have occurred since the publication of his last work.[2] This technique has certain merits in that it enables the author to produce, at fairly frequent intervals, a survey of developments in the Australian industrial scene and to treat piecemeal hitherto unexplored topics. On the other hand, it necessarily involves considerable repetition and cross reference, and makes it difficult for the reader to get an overall picture of industrial relations in this country. What is more important, the inclusion of so many topics within a limited space (225 pages in this work) leads Professor Foenander to condense somewhat his treatment of certain matters which would be improved by a more comprehensive discussion. *Better Employment Relations*

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[1] Previous works published by the author are: *Towards Industrial Peace in Australia* (1937); *Solving Labour Problems in Australia* (1941); *Wartime Labour Developments in Australia* (1943); *Industrial Regulation in Australia* (1947); *Studies in Australian Labour Law and Relations* (1952).

[2] This has generally been the author's practice.