JESTING PILATE And Other Papers and Addresses, *by the Rt. Hon. Sir Owen Dixon, O.M., G.C.M.G., D.C.L., LL.D. (collected by His Honour Judge Woinarski, M.A., LL.D.).* The Law Book Co. of Australasia Pty. Ltd., 1965, pp. 1-275.

There are, no doubt, still some who accurately recall Sir Owen Dixon at the bar. To most of us the force of his advocacy before he ascended the Bench of the High Court is known only from the vinous reminiscences of his contemporaries. The wide range, clarity and orderliness of his advocacy can be perceived by anyone who reads the evidence of Mr. Owen Dixon, K.C., presented to the Royal Commission on the Constitution in 1927. The charisma attaches to him as a judge—not to his brief sojourn on the Bench of the Supreme Court of Victoria, but to his long career as a Justice of the High Court.

It was his amiable custom to refer to his judicial utterances as having value only for the moment, but one must distinguish between his decisions given in the ordinary appellate jurisdiction of the High Court and those given in constitutional cases where the Court is a dynamic part of a federal system. The former demonstrate a wide and deep understanding of legal principle. They have the same quality and the same impermanence as any judgments by first class judges in a unitary system. He was legalistic by deliberate choice, but was nevertheless not afraid to extrapolate a line of reasoning from first principles and early sources. Thus he could reach a decision which was logical and based upon early authority, despite conflicting recent decisions which seemed to him to be not rooted in principle. It would not be hard to compile a list of judgments in which he repudiated what he regarded as heretical doctrine in terms which left the reader in no doubt as to his opinion of the legal competence of the authors of that doctrine.

One may perhaps quote from an address included in the present volume ('The Development of the Law of Homicide', p. 68), a statement which seems to epitomize Sir Owen Dixon's approach to a legal problem: 'We are no longer in an age of pedantic legal scholarship when dusty learning will operate to restrain or retard the process of displacing older and less familiar doctrine by generalizations from principles which appear applicable and are held in high esteem.' This approach appears to be a useful judicial tool for judges of ultimate courts of appeal, but less exalted judges may perhaps sustain, if they use it, serious self-inflicted wounds.

No reference to the work of Sir Owen Dixon would be adequate without noticing his ability to change his mind, as for example:

> In *Parton* v. *Milk Board (Vict.)* I had occasion to state why in my opinion the character of the levy dealt with in *Hartley* v. *Walsh* showed that it could not be a duty of excise. I said . . . Had I stopped there I would have nothing to repent. But I did not stop there; I went on with an illustration . . . No doubt I had the system obtaining in Victoria in mind.

> But an examination of the system has convinced me that the illustration was entirely wrong.[1]

It is in the field of constitutional law that Sir Owen Dixon's greatness shines out. Sir Owen Dixon himself deplored the creation of separate federal and state tribunals. To him the exposition of law was not a function to be divided into compartments labelled respectively 'State jurisdiction' and 'Federal jurisdiction'. However, that is the American method and, with considerable leakage between compartments, the Australian method. In a society organized on a federal basis a judge, whether called a 'federal' judge or a 'constitutional' judge or, more happily, a 'judge' without a qualifying adjective is, in the exercise of the jurisdiction conferred upon him, no mere arbiter between disputing citizens: he communicates to the executive as well as to the citizens not only the extent of legislative authority but also the limits of legislative and executive power. He is a central feature of the social organism. In this role Sir Owen Dixon was supreme. 'We should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications.'[2] Every lawyer must applaud the sentiment, which is an expression of the necessity of so interpreting an instrument as to give to each word its full content. It is amusing if idle to speculate on what views Sir Owen Dixon would have expressed on declarations of rights if they had been embodied in the Australian constitution as they are in that of the United States and of many other countries.

Again and again he asserted the special role of the High Court in a federal society. When he was called to the Bar there were persons holding high judicial office (for example, Sir Samuel Way, Bt., Chief Justice of South Australia) who regarded the High Court as being 'no more necessary than a fifth wheel on a coach'. No one who has given any thought to the matter takes or could take that view today. But recognition of the status and function of the High Court of Australia has not come automatically: it is in part an inevitable consequence of distinguished and distinctive work on the High Court Bench performed by a large number of eminent Justices, but much of that recognition is the result of repeated assertion and demonstration by Sir Owen Dixon, presiding over a strong court.[3]

It is commonly said that a judge, if he is to perform his task satisfactorily, must be a man of wide reading and experience. This is true, so long as one keeps in mind that the first requirement of a judge must be a sound knowledge of law. Sir Owen Dixon brought to his aid a profound study of law, a wonderfully retentive memory, a continued interest in Greek and Latin authors, a constant reading of English literature and a curiosity about current affairs. His knowledge came from practical experience and observation as well as from books. He was, for example, Chairman of the Central Wool Committee from 1941 to 1942, Australian Minister to Washington

1. *Dennis Hotels Pty. Ltd.* v. *Victoria* (1959-1960) 104 C.L.R. 529, 538, 539.
2. *Lamshed* v. *Lake* (1957-1958) 99 C.L.R. 132, 144.
3. Cf. *Tait* v. *The Queen* (1962) 108 C.L.R. 620, 624; *Hughes & Vale Pty. Ltd.* v. *Cair* (1954) 90 C.L.R. 203.

from 1942 to 1944, and U.N. Mediator between India and Pakistan in 1950. He sometimes devastated young lawyers in whose company he found himself, by putting a sudden question such as, 'Don't you think that the law of torts has hopelessly failed?' Such questions were natural emanations of a habit of thought which he had and which he was wont to assume that others shared.

Everyone who was honoured with his acquaintance can give examples of the extent and variety of his reading. 'I can without difficulty conjure up a hundred scenes from Thackeray.' 'X [a modern historian] has been reading too much Livy.' 'I have not made any special study of Linear B: I did, however, have an opportune attack of influenza during which I worked out Ventris' grid.' With it all he retained a firm conviction of the ephemeral value of judicial work and a lively sense of humour. 'Judges are almost completely deprived of free will. It is true that there is preserved to them the right to go wrong. But it is their duty to exercise it as little as possible.' The laugh that undoubtedly accompanied that utterance still echoes through the words.

The present group of occasional addresses and papers has been collected and edited by His Honour Judge Woinarski with the approval of the author. The title *Jesting Pilate* is the title of one of the addresses. It is to be hoped that it does not come to be regarded as a nickname for the author, who was always prepared to stay for an answer, although with diminishing enthusiasm if the answer was repeated for a second or a third time.

The works of a judge are his judgments. It is for them that Sir Owen Dixon will primarily be remembered. Nevertheless this collection contains much of interest and importance. When the addresses are read one must keep in mind that they are *occasional* addresses. They range in time from 1934 to 1964; the subject matter is predominantly legal, but often relates some legal concept to a topic of interest to the particular audience; the audiences were sometimes academicians, sometimes practising members of a professional group; some addresses were delivered in Australia, some in the United States. They are the products of a mind capable of giving the same careful scrutiny to Sir Roger Scatcherd's Will in Anthony Trollope's *Doctor Thorne*, as to International Relations, Professional Conduct, or The Teaching of Classics and the Law. They are characterized by sincerity, wisdom and good humour. No purpose would be served by an attempt to epitomize them. Every law student should read them for himself not merely for their felicity of expression and their interesting subject matter but also, and more importantly, to assist him to comprehend the volume of learning and experience which inspires the author's opinions contained in the Commonwealth Law Reports.

Judge Woinarski has conferred a benefit upon us all by rescuing these addresses from oblivion.

C. H. BRIGHT.*

* Justice of the Supreme Court of South Australia.

SIR JOHN LATHAM AND OTHER PAPERS, *by Zelman Cowen, M.A., B.C.L., LL.M.* Oxford University Press, 1965, pp. 1-191.

Professor Cowen is to be commended on essaying a sketch of a biography of Chief Justice Sir John Latham. It is too early yet to write a definitive biography but Australia is notably deficient in biographical sketches of its leaders and it is to be hoped that Profesor Cowen's work may stimulate other research of the same kind.

It was not to be expected that Latham would have popular appeal as a politician. Very few lawyers do. The independence of thought, the logical presentation of facts and the refusal to accept uncritically popular beliefs and legends are the hallmarks of a good lawyer but a poor politician.

As a judge and as a man, as I can testify, he was kindness itself to juniors, and his sense of the dignity of his high office never interfered with his helpful attitude to those who were starting on their way in the law.

As Chief Justice of the High Court his contributions will, I am inclined to think, be found to have been greatest in the sphere of private law, not least in some of his dissents.

Every Chief Justice, it seems to me, is at a disadvantage in constitutional and public law cases in that as Chief Justice he undertakes a discipline different in nature as well as in kind from that of his puisnes. He must address the problem with severe logic shorn of inessentials and should set guide lines with which other members of the Court may either agree or disagree. Latham did this and did it admirably.

The next article deals with the vexed subject of criminal contempt of Court. This is an area in which informed public opinion has in recent years tended to diverge sharply from accepted judicial views. The competing policy questions are so difficult that it is possible to argue, as Professor Cowen indicates, for a number of solutions each with its respective merits and demerits. Probably the simplest solution, though this would be impossible today without legislation, would be to restrict the summary procedure to contempt committed in the face of the Court and to statements calculated to interfere with a jury trial and to treat all other contempt as indictable.

The article on a Century of Constitutional Development in Victoria is fascinating historically. I would have liked to have read what Professor Cowen thinks on the future of State Constitutions such as Victoria's. All these constitutions were designed for unitary states destined to become separate self-governing countries and bear no relation to the state of affairs today with a super-imposed Federal Constitution and a Commonwealth with the power of the purse. The present State Constitutions are nostalgic survivals in the same way as some of the thirteen colonies forming the original United States operated for up to much the same period of time after independence under the Constitutions set out in their respective Charters. By the end of sixty years all the State Constitutions of the

United States had been rewritten, and it is about time that the same process happened in Australia.

The last article is on the law to be applied in places acquired by the Commonwealth for public purposes in the various States. If it were not for *Bamford's* case[1] I would have thought that the provision, 'Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, *subject to this Constitution*, continue in force in the State: . . .' in the Commonwealth Constitution, s. 108, indicated quite clearly by the words I have italicized that State laws ceased in any area which became subject to the exclusive powers of the Commonwealth Parliament to make laws. This seems to me to be reinforced by the later words conferring a power of alteration and repeal on the State Parliament which is obviously inappropriate where the Parliament of the Commonwealth has exclusive power to make laws. However it may be difficult after this lapse of time to induce the High Court to reconsider the present doctrine which is (a) convenient from the point of view of the criminal law; and (b) has stood now for sixty-five years.

The book is full of interesting topics for thought on Commonwealth and State matters, and it is to be hoped that it will be the precursor of others.

HOWARD ZELLING.*

FORMS AND PRACTICE OF THE LANDS TITLES OFFICE OF SOUTH AUSTRALIA, *by G. A. Jessup, I.S.O., LL.B., A.U.A. (Comm.)*. 4th ed. The Law Book Co. of Australasia Pty. Ltd., 1963, pp. i-xi, 1-437.

It is rare indeed to have available to the legal profession a book so thorough, so accurate and so appropriately devised to assist the practical lawyer, as this work by the former South Australian Registrar-General of Deeds. The book has developed with the legislation it expounds and with its administration, and the latest edition provides a comprehensive reference book where a solution may be found for virtually any problem to do with registered land that could confront the practitioner in his daily work.

It would, I suppose, be possible to scrutinise every principle discussed or alluded to, and to suggest further references here and there to decided cases not cited, but to do this would be to perform a work of supererogation, and would be of no real help to the prospective reader. The suggestions appearing hereunder are put forward not for the purpose of drawing attention to any supposed defects in the book, but rather to invite the learned and experienced author to give us his opinions on the topics specified, so that, in addition to the detailed assistance given by the book, the profession may receive the benefit of the views of one who had for many years a unique

1. *R.* v. *Bamford* (1901) 1 S.R. (N.S.W.) 337.

* Q.C., LL.B. (Adel.), of the South Australian Bar.

opportunity of seeing the Real Property Act steadily and as a whole, and of understanding its basic principles and structure.

I should like to see the following additions to the book:

1. A brief exposition of the principal features and objects of the Real Property Act 1886-1963, including in particular a discussion of the meaning and implications of Part VI (The Title of Registered Proprietors), and ss. 186 (purchase from registered proprietor not to be affected by notice), 187 (except in case of fraud), 249 (equities not abolished).
2. A fuller discussion of restrictive covenants and the way in which they can be made to operate within the framework of the Real Property Act.
3. A brief discussion of the Registration of Deeds Act 1935-1962, including an exposition of the meaning and operation of s. 10 (instruments to be registered and the effect of registration).
4. An examination of the Law of Property Act 1936-1960, designed to show which sections affect or are capable of affecting registered land.

An introduction which contained these features would, I am convinced, render the rest of the book more generally serviceable, particularly to the young practitioner, and would give point and meaning to the many operations already so admirably described and annotated.

W. A. N. WELLS.*

LAW IN SOCIETY, *by Geoffrey Sawer, B.A., LL.M.* Oxford University Press, 1965, pp. 1-215.

In Professor Sawer's words:

> This book aims to give a summary account of some problems concerning the social history of law and the social relations of law in contemporary society, with suitable illustrations from a number of different social and legal systems.

The fact that the stated aim is more than adequately achieved is largely due to the author's breadth of knowledge of other legal systems, primitive, archaic and modern, from which interesting information and relevant analogies are continually obtained.

The first two chapters constitute a general adumbration of problems relating to the methods of sociology and the possibility of a separate sociology of law. One particularly interesting question probed by the author relates to the differences between the logic of natural science, of social science and of law. It is unfortunate, though inevitable in a work of this type, that Professor Sawer could not deal with the argument forcefully proposed by Karl R. Popper ('Philosophy of Science: A Personal Report', *British Philosophy in*

* Q.C., M.A., B.C.L. (Oxon.); LL.B. (Adel.); An Assistant Crown Solicitor, South Australia.

the Mid-Century (1957), 155) that science proceeds not by induction but by the hypothetico-deductive method, a system of falsification rather than verification. A re-examination of the supposedly inductive nature of some legal reasoning in the light of Popper's suggestions might well prove rewarding (*vide, e.g.*, Cross: *Precedent in English Law* (1961), 202).

Having distinguished between sociology and the art of legal administration, Professor Sawer points out that what is common to both is a rejection of *Begriffsjurisprudenz*—the jurisprudence of concepts. It is perhaps a little unfortunate that it is the extreme form of this theory which critics state and pillory, the result being to bring into disrepute any form of conceptual jurisprudence. As Professor Sawer points out, 'it is likely that few practitioners or judges would today try to uphold [the extreme] theory'. Both Realism and *Begriffsjurisprudenz* are susceptible to being stated in extreme, indeed, almost ludicrous, form. Perhaps the time has come to give more attention to the more moderate thesis that while concepts may be fuzzy at the edges, there are certain 'logical limits' beyond which one cannot proceed in their development.

The third chapter, 'Primitive Society', contains an illuminating discussion of the oft-debated question 'is Primitive Law "Law"?' As Sawer points out, the disagreements on this question are based not really on differences as to definition, but rather on differences in sociological theory. This leads him on to a most stringent criticism of such anthropologists as Hoebel and Gluckman, who insist upon using the legal concepts of a modern day setting, suitable to a modern society, in analysing the 'law-stuff' of primitive societies. One example is Dr. Salisbury's comparison (*From Stone to Steel* (1962)) of the New Guinea Siane tribe's *merafo* owner with our own trustee. Having pointed out that there are many differences between *merafo* ownership and trusteeship, Sawer concludes that 'whatever he is "like", his actual position can only be described behaviourally by reference to what happens, and comparisons with modern legal relations can be misleading', especially in the conclusions one might draw as to the origin of the concepts involved. Hoebel's use of Hohfeld comes in for particular criticism, though here the criticism extends, perhaps a little less convincingly, to Hohfeld himself, as much as to anthropological use of his table of jural correlatives and opposites. Certainly it seems a little harsh to say that 'a calculus based on such concepts cannot be used to express the dynamics of legal development since such a calculus assumes stable relations and ignores . . . the evaluative aspects of decision', firstly because Hohfeld's scheme assumes stable legal rules, but *not* stable legal relations; secondly because it was never Hohfeld's claim that his system helped to express evaluative aspects of decision-making, but rather that it helped one to discover that the law had been changed, for whatever reasons, when that change was disguised by the use of ambiguous words and phrases. However, the general point that it is most unwise to use our own concepts in analysis of primitive societies is argued convincingly by Sawer. It is important to note this prohibition does not extend to analyses of archaic societies for in many cases our own organizing concepts go back to Anglo-

Saxon, Frankish, Roman or Hebraic law roots. However, Sawer stresses that here again one must take care that one's concepts are not inappropriate to the archaic law.

Chapter IV deals with the relationship of social and legal evolution. Most interesting of all, the author leaps to the defence of Maine's famous dictum (*Ancient Law* (1861), ch. V), 'the movement of the progressive societies has hitherto been a movement from Status to Contract'. Sawer convincingly confounds Maine's critics by showing that his *dictum* has rarely been correctly understood by later writers. One matter, mentioned by Sawer, that could well repay further study, is the influence on the outcome of decided cases of a judge's personal convictions on matters of politics, economics and religion. *The Roman Catholic Archbishop of Melbourne* v. *Lawlor* (1934) 51 C.L.R. 1 is one decision which could prove illuminating in this context.

In the following two chapters, Sawer deals with and criticizes the approach of two of the leading authors in the field of Sociological Jurisprudence—Roscoe Pound on the one hand and Ihering on the other. The work is completed by a chapter entitled Legal Science and Social Science, for which Professor Sawer has reserved a most illuminating treatment of the problem of free will, determinism and responsibility, and the difficulties which would be created for legal theory by an adoption of determinism, especially the 'hard-core' variety.

Professor Sawer's latest volume, which can be regarded as a series of inter-connected essays, raises a great number of problems which confront anyone who is interested in sociology or in jurisprudence. Any one of the topics could well be dealt with in a large volume. It is to be hoped that when such a task is undertaken, the clarity and expression of the present work will be reproduced.

D. ST.L. KELLY.*

THE LIFE AND DEATH OF JOHN PRICE, A Study in the Exercise of Naked Power, *by the Hon. Mr. Justice J. V. Barry.* Melbourne University Press, 1964, pp. i-xiv, 1-204, with 9 plates.

By virtue of his harsh regimes at the penal colonies of Van Diemen's Land and Norfolk Island, and later as Inspector-General of the Penal Establishments in Victoria, John Price has become the legendary counterpart of Ned Kelly. Mr. Justice Barry has followed his sympathetic biography of Alexander Maconochie, an outstanding penal reformer, by this book on Price, the epitome of the retributive 'school'.

Yet *The Life and Death of John Price,* notwithstanding its title, is rather a psychological enquiry than a biography. The author comes to the unequivocal conclusion that Price, although he would

* B.C.L. (Oxon.), LL.B. (Adel.), Senior Lecturer in Law, University of Adelaide.

have admitted only to being a firm disciplinarian, was indeed a cruel man, and suggests that his gruesome murder was not undeserved.

It is difficult to resist this conclusion, though there are several facets of Price's life and character that one would have liked more fully explored. Thus (on. p. 64) it is suggested that he may at one stage have been 'psychopathologically ill', but no attempt is made to examine the whole of his conduct on this assumption. One would also have wished for more details of his childhood and education.

The last chapter is a perceptive essay on cruelty, a minor classic in itself. It is interesting that the judicial author denounces the House of Lords' decision in *Gollins* v. *Gollins* [1964] A.C. 644, the supreme example of the cavalier treatment of language that matrimonial statutes have received from the courts. If this piece of Australiana demonstrates that 'to be stigmatized as cruel is the gravest of human conditions', it should be beneficial reading for divorce judges.

J. NEVILLE TURNER.*

THE LAW OF PARTNERSHIP, by P. F. P. Higgins, LL.B. The Law Book Co. of Australasia Pty. Ltd., 1963, pp. i-lvi, 1-362.

This is the first worthwhile book published on Australian Partnership Law. Simply as a comprehensive compilation of Australian and New Zealand case-law it would be invaluable. However, its merits by no means end with this. The author treats thoroughly, and in general convincingly, most of the issues in Partnership Law. The author's lucid exposition and attractive style considerably assist his treatment of the subject. Apart from its special usefulness in Australia, the book fulfils a valuable function as a treatment of Partnership Law at large by filling a very real gap between the somewhat formidable bulk and detail of *Lindley* on the one hand and very elementary treatises such as *Pollock* and *Underhill* on the other. While this work is considerably shorter than *Lindley*, this is not to suggest that the author's treatment is at all superficial. Indeed he has contrived to canvass some questions not treated by *Lindley* at all. For example (at page 223) the author deals with the question of whether solvent partners have a right to set off debts owing to the partnership by an insolvent partner against debts owing by the partnership to the insolvent partner. As far as the reviewer can ascertain, this point is not dealt with in any other work on Partnership.

One or two omissions might be mentioned.

The Partnership Act 1890, s. 14(2) (Eng.) provides:

> Provided that where after a partner's death the partnership business is continued in the old firm name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his *executors* or *administrators*

* LL.B. (Manchester), Lecturer in Law, University of Adelaide.

> estate or effects liable for any partnership debts contracted after his death.

The South Australian Partnership Act 1891-1935, s. 14(2) provides:

> Provided that where after a partner's death the partnership business is continued in the old firm name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his *executor's* or *administrator's* estate or effects liable for any partnership debt contracted after his death.

This divergence is not mentioned in the book although its existence has emerged in later discussion between the author and the reviewer. It would appear that the English version refers to the deceased's estate or effects, whereas the South Australian version refers to those of the executors or administrators. The English version is almost certainly correct because in any event the personal representatives of a deceased are not personally liable as partners.

Another point which the author might have considered, either in the context of section 5 or section 14, is in what circumstances can partners be liable to a third party for the acts of a person who is not a partner, but who has been held out (by whom?) as such. This question is distinct from that of the liability of the person held out which section 14 is concerned with only.

One other criticism might be made. The book is occasionally marred by pieces of extreme overstatement or dogmatism. For example, in dealing with the history of commercial associations in his Introduction, the author says (at page 16) of *Salomon* v. *Salomon* [1897] A.C. 22: 'Seldom has the entire House of Lords sunk to such a level of jurisprudential ineptitude as to reject the clear intention of the legislature in favour of the so-called literal rule of interpretation. . . . The decision in that case has probably done more to undermine commercial integrity in sixty years than did the Statute of Frauds in nearly three hundred.'

These views, which the reviewer would vigorously dispute on their own merits, are in the context gratuitous, and in any event unbecomingly put.

The book contains elaborate indices, comparative tables of Acts and other appendices, all of which are useful. The author also adopts the practice, when dealing with a case reported in the Nominate Reports, of giving a reference to it not only in the Nominate Reports, but also in the English Reports. This practice is an admirable one and should be more frequently adopted.

The reviewer's criticisms of the book are all minor and there seems to be little doubt that it will rightly come to be recognized as a standard work on Partnership Law in Australia at least.

M. J. TREBILCOCK.*

* LL.B. (N.Z.), LL.M. (Adel.), Lecturer in Law, University of Adelaide.