BOOK REVIEWS

An Introduction to Australian Legal History, Alex C. Castles, Law Book Company Limited, 1971. Cloth $8.25, Paperback $5.75.

Professor Castles has produced a pioneering work in a field which, although important, is virtually unknown to all but what he himself describes as a "small band of enthusiasts". Legal history is often regarded as unimportant and it is true, as Alan Harding has pointed out, that real history may be unnecessary for the daily work of the courts in applying legal rules (*A Social History of English Law*, Penguin, 1966, p. 8). Harding was of course speaking in the context of English legal history. Australian legal history is much shorter in duration and the Australian courts have often been very closely concerned with the history of the legal rules which they are called upon to apply. However, the importance of legal history is even greater when it comes to making and changing the law for, again to cite Harding, "law exists for society and must constantly be reforming itself up to date with social change (that is, history)" and "it is difficult to see how things can be changed without knowing how they came to be as they are" (*ibid.*).

This book, therefore, is a very welcome "first" which it is to be hoped will be followed by other historical studies. In his book, Professor Castles does not purport to make an exhaustive examination of the evolution of all Australian legal institutions: he has concerned himself mainly with the reception of English law in Australia and the evolution of the judicial system there. After two chapters in which he sets out the colonial background and the history of the Australian settlements, he then considers the courts as they existed in New South Wales, and later in the other Australian colonies, up to 1900. In his final three chapters, Professor Castles discusses the problems which surround the reception of English law into Australia between 1788 and 1828 and the subsequent status of the common law and British statutes. He has collated much unpublished or relatively inaccessible material and, in doing this, has provided a very useful aid to the legal researcher.

However, unfortunately, in this reviewer's opinion, Professor Castles may not succeed in one of his expressed aims: to "stimulate an interest amongst students and others in the legal history of this country". This is because his style is often inelegant and lacking in clarity. His use of periodic and frequently unpunctuated sentences makes much of the text difficult to grasp at a first reading. His, sometimes irritating, tendency to repeat favourite expressions, such as "ordering" the legal system and "guidelines", also detracts from his attempted stimulation of the unversed reader: some variation of expression, particularly in the first two chapters, would make the book more likely to achieve this objective.

Another fault in style is the author's tendency to use mixed metaphors, although this may seriously hinder only the purist's enjoyment of the book. A typical example is that which appears on p. 5 where he states:

> "In *Calvin's Case* . . . the dead hand of mediaeval learning on the ordering of England's relationships with overseas possessions seems to have taken firm root on the threshold of a major era of colonial expansion. . . ."

Enjoyable reading for the purposes of stimulating interest is also hindered by the layout of the text. The advantages gained by the relegation of footnotes to a list of references at the end of each chapter is offset by the frequent inclusion of full case references in the text: often, the case references are fuller in the text than in the Table of Cases. For the convenience of the reader it would surely have been suffi-

cient for the date of the case to have been included in the text and for the full case reference to be cited in the Table. By way of contrast, the cases of *MacDonald* v. *Levy* and *R.* v. *Moloney* are cited in the text without even their dates: for the keen reader this means an unnecessary diversion to the list of references or the Table of Cases. It might also be mentioned here that the case of *East India Co.* v. *Sandys* (10 St. Tr. Col. 371), cited at p. 6 of the book, is not included in the Table of Cases: though no attempt was made by the reviewer to check all the references.

The value of the book to the researcher is also diminished to some extent by the author's failure to come to grips with two important problems concerning the reception of English law in overseas countries: the authority of English precedents after the date of reception, and the date of applicability of the content of particular rules of law. The importance of these matters has been illustrated recently in articles by Professor Rupert Cross (1969) 43 A.L.J. 3, and Mr. R. S. O'Regan (1970) 19 I.C.L.Q. 217 and (1971) 20 I.C.L.Q. 342, and by a note in the *Canadian Bar Review* (Vol. 48 at p. 38) by Mr. J. E. Côté. Although it is appreciated that the book is only an Introduction, more use of comparative material would also have improved it from the point of view of the researcher.

In spite of these criticisms it must be recognized that Professor Castles has made a valuable contribution to the literature on the legal history of Australia. It is to be hoped that his work may encourage others to undertake the more detailed researches which, as he intimated in his preface, might be one of the results of the publication of this book.

L. K. Young.

The English Legal System, R. J. Walker and M. G. Walker, 2nd edition, London, Butterworths, 1970. Bound £3.50 stg. Paperback £2.50 stg.

This book has been well reviewed elsewhere. It is in the present reviewer's opinion probably the best coverage of the English legal system available to students in other countries. Its comprehensive coverage of the Historical Sources and Divisions of English Law is particularly helpful to students whose basic law, while not being English, has its origins in the English system. The same is of course true of the part dealing with Legal and Literary Sources of English Law. Whilst the language of the authors will not always be easily understood by the student whose mother language is not English, the text is reasonably easy to read and is very suitable for background reading on these two topics. Although, like another reviewer (86 L.Q.R. 578-9), I have doubts as to the desirability of confining a discussion of the "divisions" of the law to the basic subjects, it seems inevitable that this must be so in a work of this size which attempts, otherwise successfully, such a wide coverage.

The book has also a very good introduction to the law of evidence. The method of treatment of this complex subject makes it much easier to appreciate the fundamental principles--and the case law and other authorities cited would make this part of the book a handy *aide memoire* for even a busy practitioner.

The parts dealing with the Administration of Justice and Procedure (Civil and Criminal), while being excellent coverages of their subject matter are, of course, less relevant to the student in overseas countries. However, much of what is said—and, again, the explanation is quite easily readable—can assist the overseas student to understand the workings of a well-developed legal system and to understand the problems which are continually faced by such a system and which must inevitably be faced in a developing country. Although these parts, like the remainder of the book, are essentially descriptive and not critical, the authors' approach gives the keen student an adequate opportunity to compare and contrast the English system with that of his own country.

Whilst this is essentially a student's text, the qualified lawyer, whatever his practice, who requires a summary of the English legal system will also find that it provides possibly the best descriptive coverage of the subject available.

L. K. Young.

African Businessmen: A study of entrepreneurship and development in Kenya, Peter Marris and Anthony Somerset, London, Routledge & Kegan Paul (for the Institute of Community Studies), 1971. Price £3.00 stg.

In his essay, "Law and African Business",[1] Marris provided some guidelines for reforming the law of commercial organization. The essay was based mainly on surveys then being carried out in Kenya and the book under review is the result of these surveys. I shall give a combined outline of and critical commentary on the book and then consider the extent to which the assertions and proposals made in the essay can be accepted for the purpose of law reform.

Early in the work the authors sketch an exciting scheme of analysis. They find they were faced with a dilemma in that

> "[the analysis of entrepreneurship] . . . is drawn either to the comprehensive analysis of a unique instance, which cannot then be generalised, or to the analysis of the kind of supportive institutions whose success or failure cannot then be interpreted in isolation." (p. 20)

They try to resolve this dilemma

> ". . . by proceeding from one kind of analysis to the other—starting with an historical exploration of entrepreneurship in one community, and ending with the relevance of capital and trainable skills. In this way, we hope to show how different levels of analysis relate to each other, and how all may be combined to interpret the way an African enterprise works . . ." (p. 20)

The historical exploration is one of economic innovation over the last one hundred years in a small part of Nyeri district in Kikuyu country. Although this exploration remains in rather splendid isolation, the idea of the two levels of analysis gives a fair indication of the gist of the work as a whole.

The main survey was one of about half the businesses to which the Industrial Commercial Development Corporation of Kenya (ICDC) had made loans. Interviews were conducted in relation to eighty-seven businesses. A large number of Asian and market businesses were surveyed also and the results obtained were used for occasional comparison with the results of the ICDC-based survey. The interview schedules are set out in appendices. The schedule used for the ICDC-based survey is the most extensive; it covers the structure and running of the business, its progress or lack of it, details of the entrepreneur and his views on the development of business in Kenya.

The results of this survey are fascinating but the analysis of them is flawed since it depends on a mixture of results proper and information the significance of which is not assessed. For example, one factor which serves to identify the entrepreneur is that he suffered from occupational frustration. This is not very enlightening but it is fairly clearly established. In searching for further factors the authors say that the businessmen supported by the ICDC (they are assumed to be entrepreneurs) "had characteristically been active in the struggle for independence" (p. 67); after independence ". . . they transmuted African nationalism into African capitalism" (p. 69). The verb is apt and the idea interesting but evidence given in support of it is scant. Further, when they consider "the African business creed" the idea seems to be contradicted:

> "A Kenya businessman judges himself and his society by the achievements of contemporary Britain, as he sees them. Whether or not they are ultimately desirable, he needs to prove that they are within his grasp: otherwise he remains humiliated by a power which has dominated him, and which he has never challenged." (p. 91)

Here and elsewhere it is often difficult to separate description and explanation.

[1] In Thomas, P. A. (ed.), *Private Enterprise and the East African Company,* Tanzania Publishing House, 1969, p. 1.

In examining the organization of the businesses the authors move closer to the actual results of the survey. An interesting point which emerges here is the difficulty in expanding a particular business:

> "When a businessman has spare resources to invest, he prefers to start another small concern, which he can start with a manager whose qualifications and expectations do not threaten him, than to expand his present business beyond the critical limit of direct supervision." (p. 125)

The role of the family in business is considered and there is a brief section on customers and competitors. The basic quandary is familiar:

> "As a struggling African concern in an economy dominated by Europeans and Asians, it has to accept stricter terms of business than established competitors of other races, because its competence and probity are on trial. Yet it cannot readily pass this strict dealing on to its African customers, since the system of exchange in a community of peasant farmers is governed by a different understanding from a modern commercial economy." (p. 151)

The work is rounded off with proposals aimed at promoting the development of business. Under the rubric "the illusion of capital shortage" the predominant part played by reinvestment out of profits is emphasized. The author's treatment of education and training stresses the link between levels of general education and the likelihood of expansion of the business. The workings and shortcomings of the ICDC are thoroughly analysed. The suggestion is made that many of these shortcomings would be overcome if the ICDC obtained and temporarily held shares in businesses rather than made loans. What seems really to be needed, however, is an interest combining elements of the secured loan and the share. The existing law could accommodate such an interest if a few technicalities relating to taxation were modified. Some estimate is given of the part which law reform can play in the development of business. This brings me back to the more extensive treatment which Marris gives this subject in the essay referred to earlier.

The pith of the essay was that certain legal reforms could do much to differentiate business relationships from other social relationships. The fuller account of the surveys in the book serves to raise objections against an unqualified acceptance of the reforms urged. Although conclusions are drawn in the book about business "in Kenya" or "in Africa" (and the argument in Marris' essay is put in similarly wide terms), the sample on which the main survey is based is clearly biased. Granted the difficulties in doing this kind of research in developing countries, there are ways of roughly gauging representativeness of a sample like this. The book also lacks perspective in its theoretical framework. This framework is not made explicit but it can be deduced from the unbroken emphasis on what are taken to be the businessman's interests and from the authors' clear preference, in this context, for private enterprise.[2] No regard is had to any possible legitimacy that may attach to the interests of customers and of members of the entrepreneur's family who in many cases contributed to the setting up of the businesses.

From this narrow frame the businessmen emerge, for the most part, as grim utilitarians "pursuing their own advantage as they understand it, disregarding their obligations when they think they can get away with it".[3] This line of criticism is more than a complaint that the authors have not done something other than what they did; the absence of a wider perspective weakens the theoretical frame used and leads to confusion. For example the key term "family" is used ambiguously in the interview schedule and we are given no indication as to what the businessman

[2] Expressed at pp. 240-1. See also for this and the argument that follows the conscious limitations advocated by Marris and Colin Leys in Seers, D. and Joy (eds.), *Development in a Divided World*, Penguin Books, 1971, p. 273.

[3] This way of putting it is taken from Lucy Mair, *New Nations*, Weidenfeld and Nicolson, 1967, p. 8.

might take it to mean. As another example, it is at least arguable that the entrepreneur could have been identified less inconclusively if some account had been taken of his position in his kin-based society.

The upshot is that these same qualifications should be applied to Marris' essay but to do this is not to deny that both the essay and the book contain, within their limitations, much that would prove valuable in reforming the law.

P. G. Fitzpatrick.

The Common Law in Papua and New Guinea, Robin S. O'Regan, Law Book Company Limited, 1971. $2.60.

Outline of Law in Papua and New Guinea, L. K. Young, Law Book Company Limited, 1971. $1.50.

A significant step in the development of the law in Papua and New Guinea occurred recently with the publication of two law books. The only book specifically dealing with the law of the Territory prior to the appearance of these two works was *Fashion of Law in New Guinea. Fashion of Law* is not a treatise; it is a collection of essays dealing with assorted legal topics of importance in the country. The works by Mr. O'Regan and Mr. Young (who are both members of the Law Faculty of the University of Papua and New Guinea), modest though they both are in size, are the country's first legal treatises.

Although the books are quite similar in appearance, and on a quick glance seem to have similar titles, they are in fact very different. Mr. O'Regan's is the more scholarly work. It is an excellent analysis of the reception of the common law into Papua and New Guinea, an area of law in which many problems, most of which unfortunately seem to be glossed over in practice in the Territory, have arisen and will continue to arise.[1]

English law was received into the two Territories at different times, and by different kinds of enactments. In Papua, the reception provisions were enacted in the *Courts and Laws Adopting Ordinance (Amended)* of 1889. This enactment, which is still in force, adopted for Papua the "principles and rules of common law and equity that for the time being shall be in force and prevail in England",[2] subject to the requirement of circumstantial applicability. In New Guinea a date was fixed for the ascertainment of the adopted common law rules. Section 16 of the *Laws Repeal and Adopting Ordinance* 1921 adopted, again subject to circumstantial applicability, the "principles and rules of common law and equity that were in force in England on the ninth day of May, One thousand nine hundred and twenty-one". When one considers the development which has taken place in the common law since 1921, such as in the area of negligence, the result at this day is that the common law rules applicable in Papua are probably quite different from those applicable in New Guinea. It seems ludicrous that a reception provision different from that applying to Papua should have been adopted for New Guinea in 1921, and incredible that a uniform provision was not adopted at some time in the ensuing fifty years, especially as the joint administration of the two Territories must have been seen as a reasonably likely thing to occur at some time in the future.

After dealing with circumstantial applicability and the exclusion of common law by local legislation, Mr. O'Regan proceeds to an analysis of the vexing question—how is the adopted common law affected by English legislation modifying or abrogating it prior to the reception date? Mr. O'Regan criticizes the majority view in *Booth* v. *Booth*,[3] namely that the principles of common law in New Guinea must be read "subject to and together with the statutory modifications in their application

1 See e.g. *In re Johns*, discussed at p. 81 of this issue.
2 Section 4.
3 (1935) 53 C.L.R. 1. The majority viewpoint was that expressed by Rich and Dixon, JJ. A slightly different approach was taken by Starke, J.

which had been made in England before 9th May, 1921". This approach, which enables English Acts to be adopted under the common law reception provision as well as under the provisions relating to the adoption of statutes, leads, so the author contends, to some strange results. Some statutes may have been adopted twice. Further, the statutory reception provisions adopt English legislation in force in Queensland at a given date. It is possible that an English statute in force in Queensland on the given date may have been subject to amendment or repeal in England prior to that date. If statutory modifications are positively adopted by the common law reception provision, the extraordinary result could occur that the English statute in its original form is adopted by one section, whereas the statute in its amended form is adopted by the other.

This reviewer does not agree with these criticisms. There is no reason why the general rule that common law is excluded by statutes covering the field in question should not apply to the reception provisions. Thus, if a statute governing, say, the assignment of choses in action, had been adopted under the provision relating to the adoption of statutes, the common law relating to the assignment of choses in action would not be adopted pursuant to the common law reception clause. The statute would have been adopted once, not twice. Subsequent English amendments to the statute would not be received while the statute in the form in which it was received at the reception date remains adopted by force of the statute adopting clause.

Of course, if the statute did not cover the entire field of assignment of choses in action, there would be scope for arguing that an English amendment dealing with the area not previously covered had been adopted as a common law modification. But no conflict could arise, since *ex hypothesi* the amendment relates to a part of the law not dealt with in the statute as originally adopted.

The view of the majority in *Booth* v. *Booth* was criticized on another basis by Mann, C.J. in *Murray* v. *Brown River Timber Co. Ltd.*[4] His Honour said the test would mean, in Papua, "that a vast body of legislation and no doubt subordinate legislation promulgated in England would have to be closely considered to see whether it had any effect on the common law, and since we are concerned with the principles and rules in force for the time being, that process would continue for all time".

It is extremely doubtful whether the majority view in *Booth* v. *Booth* places quite the onerous burden on lawyers and judges in the Territory that His Honour imagined. However that may be, and whatever be the strength of the criticism of the logical consequences of the *Booth* v. *Booth* formulation, little seems to be gained from criticizing it unless a more logical approach can be offered as an alternative. The approach propounded by Mr. O'Regan leads, it is submitted, to even more difficulty.

Mr. O'Regan suggests that the adoption provisions should be interpreted as meaning that the common law as modified by statute is adopted, while the statutory modifications are not to be taken as having been positively adopted. To use his example (related to New Guinea), "Assume that in 1900 a common law rule comprised elements A, B and C and then in 1910 legislation in England abrogated element C and substituted element D. It would be the common law rule comprising elements A and B which would have been received in New Guinea in 1921 not a rule comprising elements A, B and D. In other words, pre-1921 legislation in England may cut down or repeal the common law rule but cannot reconstitute it."[5] Mr. O'Regan considers that, despite *Booth* v. *Booth*, it is still open to the High Court to adopt this approach.

It may well be doubted whether statutory enactments affecting the common law can be classified as simply as the author suggests into abrogations and substitutions, particularly in areas where the common law remained unclear at the time of the enactment of the statute in question. However that may be, there are difficulties in

[4] 1964 P. & N.G.L.R. 167.

[5] At pp. 49-50.

this approach even where both the common law rule and the effect on it of the statutory enactment are clear. Take the common law rule that one cannot recover damages for innocent misrepresentation. This has now been affected by the United Kingdom *Misrepresentation Act* 1967, which, after giving a right of action for innocent misrepresentation, then proceeds to state the limited circumstances in which the right is to apply, e.g. relief is not given if the representor establishes that he had reasonable grounds to believe and did believe that he was telling the truth. According to Mr. O'Regan's approach, the rule that one cannot sue for damages for innocent misrepresentation has been abrogated. However, the statutory modification limiting the right now created has not been adopted. It would follow that in Papua at the present time a person has an unrestricted right to sue for damages for innocent misrepresentation.

The fallacy in Mr. O'Regan's reasoning is his assumption that, when a common law rule is treated as being abrogated, a rule which in effect is the opposite of the common law rule must be taken as being adopted. Thus he says of the situation which arose in *Murray* v. *Brown River Timber Co. Ltd.* that "Mann, C.J. should have concluded that there was nothing in the common law as adopted in Papua which barred the action of a plaintiff guilty of contributory negligence. Of course it would not have been correct for him to have gone any further and said that the 1945 English Act applied in Papua." Why, it may be asked, should one assume that, because the rule that contributory negligence bars an action has been abrogated, the position is that contributory negligence is no bar at all to an action? Surely the effect of the abrogation is, as the majority pointed out in *Booth* v. *Booth,* to leave a vacuum as to contributory negligence. Mr. O'Regan's analysis would produce the extraordinary result in the *Murray Case* of the plaintiff receiving his damages in full even if he were ninety-five per cent to blame for the collision.

Mr. O'Regan's reasoning in relation to the *Murray Case* seems logical at first glance because the common law rule there being considered was a negative rule of law (or at least is most readily expressed in a negative way)—a plaintiff cannot recover damages for personal injuries if he has been guilty of contributory negligence. The same may be said of *Booth* v. *Booth,* where the common law rule under consideration was that a married woman may not own separate property. Treating such rules as abrogated by a statutory modification does not lead to quite the same curious result as occurs where a positive rule of the common law is replaced by another positive rule, where, on Mr. O'Regan's approach one must now in effect apply the opposite proposition to the positive common law rule.

An example may be found in the *Infants Relief Act.* The common law relating to infants' contracts might be broadly stated thus: contracts with infants, other than for necessaries and certain other "beneficial" contracts, are voidable. The *Infants Relief Act* of 1874 rendered such contracts void. On Mr. O'Regan's formulation, the common law rule has been abrogated by the 1874 Act, but the Act itself has not been positively adopted into the law of the Territory as a common law modification. Adopting the same line of analysis as he used in relation to contributory negligence, the conclusion would seem to be that all contracts with infants are now valid. The result is thus at odds with both the common law rule and its statutory modification.

It is accordingly submitted that Mr. O'Regan's approach leads to much more haphazard results than the application of the literal interpretation of the *Booth* v. *Booth* formulation. It does not have the virtue of the *Booth* v. *Booth* approach, especially in its application to Papua, which is that it enables the adoption of common law as updated by English statute law. Instead, it roots us firmly in the past, either to the old common law rules themselves, or the opposite of them. Where the latter applies, we could be applying a rule which might have shocked both the common lawyers and the statutory modifiers—such as Mr. O'Regan's suggested result in the *Murray Case* that the plaintiff should be entitled to an award of damages for personal injuries without his own contributory negligence being taken into account at all. In the reviewer's opinion, *Murray* v. *Brown River Timber*

Co. Ltd. is incorrectly decided, and Mann, C.J. should have applied the *Booth* v. *Booth* formulation so as to treat the *Law Reform (Contributory Negligence) Act* 1945 as received into the law of Papua as a modification of the common law relating to contributory negligence.

It is plain that the reception provisions are in need of review, and that a uniform provision should be adopted for both Papua and New Guinea. Mr. O'Regan suggests:

> "Subject to any Act, Ordinance or subordinate enactment in force in the Territory or a part of the Territory the principles and rules of common law and equity shall be in force in the Territory so far as they are applicable to the circumstances of the Territory."

Such a provision would be uniform and, wisely, contains no reception date. However, it does nothing to resolve the present uncertainty as to the way the common law is to be treated as affected by English legislation which impinges on it. This reviewer would add to the suggested section: "together with any revisions of the said principles and rules by the English legislature insofar as those revisions themselves are applicable to Territory circumstances". The word "revision" is preferable to modification since it clearly includes abrogation. The suggested addition makes it plain that "circumstantial applicability" should operate at two levels—first, in considering whether the common law rule is itself suitable to the Territory, and, secondly, in considering if the change is suitable. Thus it would be possible to apply the common law in its original form if the original rule, but not the statutory alterations, were suitable for application to the Territory.

In addition to the topics already mentioned, Mr. O'Regan's book contains a useful chapter on the authority of common law precedents in the Territory.

Whereas Mr. O'Regan's book can be expected to excite judicial and academic minds in the Territory and elsewhere, Mr. Young's book, *Outline of Law in Papua and New Guinea* is aimed at the first year law student, and members of the general public interested in obtaining a general impression of the Territory's legal system. There are inaccuracies in the rather general statements made by the author, but this is only to be expected since wide areas of law have been covered briefly and in simple language. It is therefore recommended that the professional lawyer should leave this book alone, lest he become filled with frustration from the unqualified general assertions of law on topics in fact bristling with problems. For the audience for which the book was intended, however, the work is an excellent starting-point, and provided, in the case of law students, the lecturer recommending its use also gives out appropriate warning, it will play a worth-while part in the process of legal education.

J. A. Griffin.