BOOK REVIEWS[1]

A SOCIAL HISTORY OF ENGLISH LAW, by Alan Harding. Penguin books, 1966. 503 pp. (including Abbreviations, Bibliography and References, Table of Cases, Table of Statutes and Index). New Zealand price $1.05.

This is one of those books into which the author has put a lot of work but which it is possible to read from cover to cover with little reward. Mr Harding has presented in a broad sweep of some 431 pages an account of the development of English law in its social context from A.D. 597 to the 1960s—from the feud and the peace to the creation of "Old Baileys" at Manchester and Liverpool and of bodies of permanent Law Commissioners. The author's industry goes without saying; what is doubtful is the value either to the student or to the general reader of this type of rapid trip across the centuries.

The book begins with an introduction on "Law and History" which, along with some snide cracks at lawyers, makes the point with which few lawyers would argue; "Perhaps the main practical value of legal history is simply to remind law that it exists for society and must constantly be reforming itself up to date with social change (that is history)." Then follow three "parts" and an "Epilogue". Parts One and Two, which the reviewer found the most readable sections of the book, take the story from 597 to 1642, from the old English law to the common law—criminal and private, substantive and procedural—with digressions on the Legal Profession and their repositories of learning the Law Books. Part Three, in which Mr Harding's effort to "cover the field" is most obvious, skims quickly over "The Age of Improvisation, 1642-1789", "Empire and Commerce: the Expansion of the Common Law", and "Law Reform in the Nineteenth Century". A typical example of the difficulties of balance involved in this sort of exercise occurs in relation to the death penalty and the question of punishment generally. One would have thought that these matters were central to the great nineteenth century debates on the criminal law and were crying out for Mr Harding's "social" treatment, but they rate a mere two pages of rather scrappy discussion.

The final section of the book, the Epilogue entitled "Reform Continued" draws together some twentieth century strands and suggests a falling away from the nineteenth century impetus. Although the book bears the date 1966 and makes reference to the abolition of the death penalty late in 1965, the Epilogue reads as though it was written well before the current round of English law reform (abortion, homosexuality, the Ombudsman) got under way. These healthy signs, coupled with the House of Lords' announcement that it may in future depart from its earlier decisions suggest that some of Mr Harding's

1. The New Zealand prices given in these Reviews are subject to alteration as a result of devaluation.

fears for lawyers may be groundless. But failure to predict the way things will go after one's book is at the printer is not the main failing here. What is wrong with this book is that it is too full of badly digested detail to be of much interest to the general reader and too superficial to be of value to the academic.

R.S.C.

THE SETTLEMENT OF LABOR DISPUTES ON RIGHTS IN AUSTRALIA, by Paul F. Brissenden, Institute of Industrial Relations, Los Angeles, California. 125 pages plus appendices, plus bibliography.

The title of this short monograph is a little puzzling but Professor Brissenden soon makes it clear that he is using the word "Rights" in contradistinction to "Interests". Industrial disputes about wages and conditions for the future are disputes over *interests;* disputes arising out of grievances arising under awards of the Commonwealth Conciliation and Arbitration Commission and the other industrial tribunals are disputes about *rights.* The latter correspond with disputes about the correct interpretation of an award brought before the New Zealand Court of Arbitration. In this country the distinction is inevitably blurred as the court deals with both varieties of dispute. In Australia the distinction became a little sharper with the separation of the Commission from the Industrial Court for constitutional reasons following the *Boilermakers* case in 1957 *(Attorney-General for Australia* v. *The Queen* [1957] A.C. 288). For the newly created Industrial Court deals largely with disputes over rights. Even so, Professor Brissenden's terminology is not ordinarily used, and the reason is not hard to find. Australia's arbitrators deal with rights disputes as well as interests disputes; and the Industrial Court is much concerned, though Brissenden does not mention it, with internal union matters; there is its extensive jurisdiction over the contents and the administration of union rules, for instance. Such matters concern neither rights nor interests. Moreover, some disputes are not readily identifiable as belonging to one or other of the two categories, as the author admits (pages 59 and 95).

This is a useful account of the working of the arbitral system. It is principally addressed to an American audience, and comparisons between the Australian and the American way of doing things abound. Perhaps the most interesting conclusion arrived at by the author is that, in contrast to the position in North America, little formal grievance machinery exists in Australia for dealing with small intra-factory disputes. There is a vacuum at the shop level.

We are given a good discussion of boards of reference established under the authority of awards. But the total picture which emerges is notable chiefly for the variety of ways in which a rights dispute may be disposed of—at the one extreme is the single Industrial Magistrate in Queensland and at the other the array of talent on the bench of the Commonwealth Industrial Court. Often a union or a man with a grievance has a choice of tribunal.

One who has not studied the Australian scene closely is scarcely entitled to criticize Professor Brissendon's work. But the reviewer would nevertheless venture the criticism that the author manages to leave his readers up in the air where, if he had pursued his research a little further, greater precision would have been attainable. Too often he "presumes" that a particular award contains, say, a "bans clause" (see e.g. page 112). Either it does or it does not: why not find out? The author, in fact, has not made an extensive fact-finding survey of the Australian scene; one is thus unsure how far some of his generalizations can be trusted. But, all the same, there is a good deal of useful information in this monograph and it makes a New Zealand reader reflect that little research into industrial relations at the everyday level has been undertaken on this side of the Tasman.

D.L.M.

AN INTRODUCTION TO THE LAW OF TORTS by John G. Fleming D.C.L. Oxford: Clarendon Press, 1967. 230 pp. (including index) New Zealand price $11.00.

To those who are already familiar with Professor Fleming's *Law of Torts,* now in its third edition, this book will need little introduction. The reader is presented once again with a masterly survey of the whole field of tort law, in which the social purpose of the law in this area is analysed and the law is examined critically to see how effectively it achieves this purpose.

The perspective appears already in the larger work and the reader will not find any significantly new view put forward in this later book. Its special merit lies in the fact that, as befits a volume in the Clarendon Law Series, it introduces the reader to the general principles and structure underlying this area of the law but keeping technical terms to a minimum, and avoiding detailed discussion of particular cases and statutes.

Professor Fleming sees the purpose of the law of torts in the spreading of the plaintiff's loss amongst a wide section of society. Almost all of today's human activity, he considers, can be tested for social adequacy by the criteria of the law of negligence. Most of the book is, therefore, given over to a discussion of negligence. Indeed, 123 of the 230 pages in the book are concerned with this tort, an emphasis which rightly takes into account the practical significance of this basis of liability. But Professor Fleming also points out the tenuous claim which tort liability today has as a means for distributing losses. Now that the welfare state has assumed increasing responsibility to provide for society's casualties, the function reserved for tort law in the larger scheme of social security is at best to supply additional aid and redistribute the accident cost with more discrimination.

An example of the illuminating insight which this book gives to this area of the law is shown by its treatment of *Donoghue* v. *Stevenson* [1932] A.C. 562. At page 47 Professor Fleming observes that the

so-called "neighbour principle" set out in that case, while it has been used to expand the duty of care, contains within itself the seeds of its own destruction. The gradual expansion of legal protection against negligence has progressively reduced the need to invoke the "duty of care" concept, what Fleming calls "this hedging device", and with the disappearance of the duty of care the "neighbour principle" becomes redundant. But as Fleming points out we have still not reached the position where the foreseeability test becomes the sole basis for finding the duty of care. The nervous shock cases (although *Chadwick* v. *British Transport Commission* [1967] 2 All E.R. 945 appeared too late to be the subject of comment in this book), and the pre-natal injury cases show how foreseeability has been subordinated to competing policies when formulating the legal duty.

These chapters on negligence and on the task of the law of torts must become vital reading to the lawyer and the student who wishes to understand the place of the law of torts in relation to the law as a whole and to the society in which it has evolved. Professor Fleming's experience in several common law countries renders him particularly able to critically examine the law of torts. Australia, United States and Canadian experience is referred to throughout the book to indicate some areas in which English law has been less successful in achieving the purpose which Fleming has assigned to the law of torts, and conversely those areas in which the courts of other common law countries have been less progressive. But there is a sense in which this book is best used as a supplement to one of the standard works on torts. Fleming is more concerned with the direction in which the law is moving or ought to move, than with the state of the law at present. As an introduction to the law of torts this book may prove difficult for the student who does not have a working knowledge of the law as it is. To a student or lawyer with this background, this book will be far more rewarding, and will illuminate what would otherwise be recital of detail in the standard texts.

One point of criticism that may be made about a book that serves as an introduction to the law of torts is that very brief treatment is given to the changing relationship between the law of contract and the law of torts. The discussion of *Hedley Byrne & Co. Ltd* v. *Heller & Partners Ltd* [1964] A.C. 465 is disappointingly brief and the effect of this decision on an innocent misrepresentation which induces a contract is not explored. Again, there is no discussion of the far reaching implication of the pronouncements in *Rookes* v. *Barnard* [1964] A.C. 1129 where a breach of contract was treated as being an unlawful act, thereby attracting tortious liability.

Another criticism that is attracted by this book is the difficulty of its language. The sentence structure is often complex making some passages in the book difficult to follow. The author's compressed style, in which he seeks to cover several points in one sentence, no doubt accounts for this. An example which illustrates this difficulty is found at page 3:

> Indeed so solicitous was the law in this respect in protecting the human psyche that merely placing another person intentionally in apprehension of imminent physical contact was deemed an actionable wrong, known as assault, which to this day remains the only instance in English jurisprudence of a mere offensive sensation unaccompanied by any untoward psychosomatic symptoms, let alone external trauma, giving a cause of action for damages.

But although the reader is presented with this difficulty in style, his appetite is whetted by the use of unusually apt expression and striking phrases. An example appears on page 217 where a statement of Lord Halsbury's in *Mayor of Bradford* v. *Pickles* [1895] A.C. 587 is considered: "But this like so many of Lord Halsbury's observations, was as dogmatic as it was shallow." The common law rule that a landowner is under no duty of care to fence in his livestock or otherwise prevent them from straying on the highway is castigated at page 170 as "an outrageous subsidy shamelessly exacted by the farming lobby at the expense of public safety." In a discussion at page 94 of *Poole* v. *Crittal Metal Windows* [1964] N.Z.L.R. 522 C.A. we read "The erector was excused because he had no more reason to anticipate that the platform would be used in such an unorthodox and perilous manner than a manufacturer of a nail varnish would have to expect that it be set on fire and burn somebody's fingers."

P.D.M.

PRINCIPLES OF REGISTERED LAND CONVEYANCING, by J. A. Holland, LL.B. and J. R. Lewis, LL.B. London. Butterworth & Co. Ltd, 1967. xiii and 239 p.p. (including index). New Zealand price $4.50.

As a students' introduction to registered land conveyancing in England Lewis and Holland have provided an easily readable and able summary of a branch of English land law, which, in most real property textbooks, is relegated to the final chapters. The appearance of this book therefore fills an important gap in the English law students' library, and in addition provides the New Zealand reader with a concise account of the English land registration system. Any faults there may be in the book, and at times it seems a little sketchy and vague, may be due more to the nature of English land law as a whole than to the basic fault of the authors. Registered conveyancing in England is a mere conveyancing technique and is therefore part of, and very largely dependent on an understanding of, the total sum of English land law. Thus such knowledge is taken for granted in the book. Nevertheless, there is much in the book that would interest the New Zealand lawyer, steeped as he is in the Land Transfer System. In Australasia the Torrens system of land registration is now so familiar, and is known to have been adopted in many other Common Law jurisdictions, that it may be little known to many New Zealanders that England, the

original home of the Common Law, has developed an independent system of land registration of equal antiquity with the Torrens system. However, while Torrens took the Merchant shipping register as his base, the English preferred to base land transfer on the transfer of stocks and shares. Both systems approach the same ultimate goal, but by different paths.

In their first chapter Lewis and Holland set out briefly the history of land registration in England. While this part of their book is, of necessity brief, it does reveal that in England land registration was at first a matter of rather unsuccessful trial and error. The first Act, the Land Registry Act 1862 was a "flop", but after some initial hesitation, the present successful system began to emerge with the Land Transfer Act, 1875 as amended by the Land Transfer Act 1897, to be finalised in its present form in the Land Registration Act 1925 which has only rarely been amended. The reasons for the almost total failure of the 1862 Act and the partial failure of that of 1875 are not discussed by Lewis and Holland, but an interesting analysis of the Acts by Douglas Whalan "Immediate success of Registration of Title to Land in Australasia and Early Failures in England", (1967) 2 N.Z.U.L.R. 416 puts the cause of the English failures in the social and political conditions of nineteenth century England. However, a warning against writing off the modern English system (1875-1925 Acts) as still a failure is given by England's Chief Land Registrar, T.B.F. Ruoff in his book *An Englishman looks at the Torrens System* (1957) 3, and is further evidenced by the appearance of the present book.

When considering land registration in England, especially when judging its historical success, it must always be borne in mind that from the passing of the Real Property Act 1845, English land law and conveyancing had been undergoing substantial reform, which tended to achieve many of Torrens' reforms and other aims without the introduction of registration. These reforms culminated in the Real Property legislation of 1925, when a total of seven reforming acts were passed, which, even today, comprise the almost unamended land law code for England and Wales. Amongst many other matters, the Acts created a system of land law and conveyancing which was simple and safe whether by deed or by transfer, by:—

(i) Reducing *legal* estates in land to two only—the fee simple absolute in possession and the term of years absolute.

(ii) Banishing beneficial equitable estates and interests from the title to land and by placing them behind the curtain of the trust, and forbidding purchasers of land to look behind the curtain.

(iii) Establishing an immediate land charges register for the registration and protection of all land charges (except first mortgages), affecting land.

(iv) Introducing the mortgage by way of deed of charge instead of by conveyance or demise.

It is against the background of these reforms, and not that of the New Zealand "deeds system", that English registered conveyancing must be

examined. Because of these reforms, which had indeed been progressing since 1845, title registration in England had no need to reform the substantive law as did the Torrens system, but merely reformed the conveyancing machinery, keeping reform of substantive law to a necessary minimum.

Be this as it may, much in the book would, nonetheless strike the New Zealand lawyer with an air of familiarity, though much would also seem strange and contrary to his philosophy of registration. The New Zealander would face an initial shock on finding that the facsimile title certificate reproduced, contains no description of the land based on survey measurements merely describing it as " . . . freehold land shown and edged red on the plan . . . filed at the registry . . . being land between Blake Road and the Square". The reason for this lack of measurements is threefold—first, a scale plan of the land is incorporated into the certificate book; secondly, the English landowner is more concerned with his address than the exact measurements of his land; and thirdly, minor discrepancies of a couple of feet would be *de minimis*. After this other differences would appear; such as:

(i) the extensive jurisdiction of the Chief Land Registrar into legal disputes concerning the register.

(ii) the division of interests and charges affecting land into minor interests which may be overridden on a purchase unless protected, and overriding interests including easements which bind a subsequent purchaser whether or not they are noted on the register.

(iii) the fact, that the protection devices, known in New Zealand as caveats, take four forms in England—notices, cautions, inhibitions and restrictions, each of which has a particular function.

(iv) the considerable ease with which either the Registrar or the court may order rectification of the register particularly where there is fraud or forgery. One could perhaps suggest that *Frazer* v. *Walker* ([1967] 1 A.C. 569 P.C.) would not have been such a *cause célèbre* in England.

These matters aside, two points would be noticed immediately by New Zealanders:

(a) Land registration in England is not compulsory in the New Zealand sense of immediate and total application of the Act on a national basis. There is compulsory registration which is established in any particular area at the instigation of the appropriate local authority.

(b) The English title register is not a public register, and indeed the public have few rights of access to it. This fact perhaps, has the advantage that the purchaser of registered land obtains from Land Registry officials an accurate and guaranteed search with 14 days priority for completing his transaction.

In spite of, or perhaps because of these differences between the two systems, the book would be of use to New Zealand lawyers, for much of advantage to both systems of registration could arise from a study of the different ways of the other. There is much in the English system which might benefit that of New Zealand (and also vice versa), and in their book Lewis and Holland have produced a more than adequate summary of the English system. B.H.D.