

Book reviews

THE ANNUAL SURVEY OF LAW 1980. Edited by R. Baxt. Published by the Law Book Company Ltd., Sydney, 1981, xxiii and 576 pages. Cloth. A\$48. Reviewed by C. E. F. Rickett.*

The object of *The Annual Survey of Law* is stated by its editor in his Preface — “an important contribution to the busy practitioner’s attempts to keep up to date with the ever increasing body of case law and statute law that is appearing.” As against this criterion, the book is on the whole a success. It contains nineteen chapters, each dealing with a separate area of the law. On the whole, the chapters read easily and are very informative. Several comments are, however, in order.

First, if the aim is to provide an information publication for busy practitioners, it may be that some of the more academic writing is out of place. Mr C. R. Williams’ chapter on Criminal Law makes very interesting reading for the academic lawyer, but one wonders whether it does not really go too far beyond the provision of mere information. The eleven page discussion on the defence of intoxication may be better suited to a specialist criminal law journal. The other point to make of course is that busy practitioners want to know, when they approach a volume of this sort, what the law is, not what the law ought to be. In the area of Conflict of Laws, the decision of Slade J. in *Winkworth v. Christie Manson and Woods Ltd.*,¹ was consistent with established authority in applying the *lex situs* to determine title to tangible movables. Professor Sykes, in, for me as an academic, a stimulating four-page discussion, challenges the suitability of the *lex situs* as a connecting factor in this area; but is this not a little out of place? It may be, of course, that practitioners need a little bit of the academic from time to time! If so, a more consistent approach needs to be adopted by the contributors.

Secondly, what is the purpose of the bibliography at the end of each chapter? Perhaps those practitioners who want to know what the academics think the law ought to be should be told where to go for the best of such material. So be it. This is a laudable aim, but some greater consistency is needed. In the chapter on Environmental Law only two items are referred to, in the Conflict of Laws chapter there are nine items, whilst in the chapter on Succession and Administration there are over 120 items! The mind boggles. Is it really worthwhile citing material in the *Southwestern Law Journal*, or the *Houston Law Review*, or even the *Gonzaga*

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1 [1980] 2 W.L.R. 937.

Law Review? This may make some practitioners feel terribly inadequate, whilst in others it might just confirm their worst suspicions about academic lawyers.

Thirdly, there are some unfortunate omissions in the areas covered. The 1979 volume had no chapter on Administrative law — neither does this volume. This is a gross omission. A chapter on Planning Law might be useful, as well as one on the Law of Restitution, and one on Welfare Law. All four areas seem to me to be of more immediate concern to the average practitioner than Environmental Law or Natural Resources Law. Commercial Law might form a separate chapter, as might Maritime Law and International Trade, and tax other than Income Tax. The chapter on Constitutional Law might find an interesting companion in International Law. It is to be hoped that the areas covered in future volumes will be wider than at present.

Fourthly, there appears to me to be some doubt about the jurisdictions from which material for inclusion should be drawn. Some chapters limit themselves entirely to Australian material, often because, within the subject they cover, any foreign material would merely be of a comparative nature, and this is probably not within the ambit of the volume. The chapters on Income Tax, Family Law, Environmental Law and Natural Resources Law fall into this category. These deal primarily with local statutory developments and interpretation by the courts. Other chapters achieve a good balance, and include relevant New Zealand and English decisions, although some Canadian decisions perhaps ought to find their way in. The editor's chapter on Corporations and Securities is a good example of this balance, as are Professor Ellinger's chapter on Banking Law, Mr Rowland's chapter on Succession and Administration, and Professor Lindgren's chapter on Contract. One does not wish to change the *Annual Survey of Law* into the Annual Survey of Commonwealth Law, but I suspect there are in most areas surprising omissions. In my own area of trusts, for example, it is rather surprising that Professor Heydon does not mention (in either the 1979 or 1980 volume) the decision of Mahon J. in the New Zealand Supreme Court in *Avondale Printers & Stationers Ltd. v. Haggie*² dealing with the law of restitution and constructive trusts. This is an important decision which is at the very least relevant within a general area on developments in Australia (see the long discussion on constructive trusts in the 1979 volume).

Fifthly, because of the obviously artificial way in which lawyers categorise subjects, some material is bound to be of relevance in more than one chapter. So, for example, *Re Grant's Will Trusts*³ is quite properly discussed both in the Trusts chapter and in the Succession chapter; *Watts v. Public Trustee for Western Australia*⁴ appears in both the Succession chapter and the Torts chapter; and *Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.*⁵ is noted in both the Contract and Land Law chapters. However, I suspect that sometimes material which should be referred to in one chapter is not brought to one's attention unless

2 [1979] 2 N.Z.L.R. 124.

3 [1980] 1 W.L.R. 360.

4 [1980] W.A.R. 97.

5 [1980] 1 W.L.R. 277

one reads the whole volume. For example, in the Family Law chapter reference is made to Australia's adoption of the Hague Convention on Celebration and Recognition of the Validity of Marriage, and to the enactment of Domicile Acts in New South Wales, Victoria, Tasmania and the Northern Territory. Neither of these developments is referred to in the Conflict of Laws chapter.

Sixthly, there are some unfortunate slips. Some are printing errors, but these are rare. Others are slips by the author. For instance, when referring to the House of Lords' decision in *I.R.C. v. McMullen*⁶ where their Lordships considered the validity of a trust to promote the playing of association football, Professor Heydon tells us that "the House of Lords held this charitable as being for the advancement of religion." It is true that several million Britons regard soccer as their god, but surely the Law Lords are not among them! In one chapter, the introductory paragraph struck me as designed to put off the potential practitioner reader:⁷

The notion of environmental law has been something of a novelty for the Australian legal system. The effluxion of time indicates its growing maturity as an aspect of the overall system. Although the emphasis continues to change, the fundamental structures of the environmental legal system are clearly identifiable. The most recent changes of emphasis are functional rather than structural and the system as a whole is becoming increasingly integrated in functional terms. Such an evolution is consistent with a holistic conception of environment.

By the time the busy practitioner has worked this out, he will have lost a few dollars. He knows this, so he will move on without working it out! Simplicity is a must for this sort of work.

Most of these points may sound destructive — they are intended, however, as constructive criticisms. This is a useful, well-produced book. It is to be hoped that it continues to provide a readily available source of information for the busy practitioner (and for the harassed academic!).

6 [1980] 2 W.L.R. 416.

7 Chapter on Environmental Law

MIGRANT CRIME IN AUSTRALIA by Ronald D. Francis. University of Queensland Press, St. Lucia 1981, xiii + 217 pp. (including appendices, bibliography, and index). New Zealand price \$19.95. Reviewed by Diane Sleek.*

This book, whose major purpose is to investigate the relative crime rates of native-born Australians and migrants to Australia, should be of special interest to New Zealanders, second only to its interest to Australians. Since this book was written, the phenomenon of the extensive involvement of New Zealanders in the Australian illegal drug dealing scene has come to light as a result of the "Mr Asia" murder trial in Britain. The Australian Royal Commission of Inquiry into Drug Trafficking, which was recently established to investigate the "Mr Asia" drugs ring, has been given tentative approval to conduct some of its hearings in New Zealand. And a passport requirement has been instituted for New Zealanders travelling to Australia in an effort to stem a perceived flow of criminals across the Tasman. In the light of all these recent developments, it is fascinating that, in study after study reported in this book, it has been found that New Zealand-born migrants to Australia are an exception to the general rule that migrant crime rates are lower than native-born rates in Australia. Indeed, along with migrants born in Yugoslavia, New Zealand migrants tend to have the highest crime rate of any group studied. There is some suggestion in the book that the high New Zealand rate is due to the lack of restrictions on entry to Australia by New Zealanders. It could be interesting for New Zealand readers to speculate on whether the recent introduction of the passport requirement will have any effect on the New Zealand migrant crime rate, given that there is still no requirement of an entry permit of any type.

Unfortunately, this book has so many defects in its form and presentation that few readers (New Zealand or otherwise) would probably stay interested in its content long enough to engage in any such speculation. The author mentions that he produced the book from a collection of earlier papers and reports. The lack of a proper integration of these earlier pieces of work into a coherent whole has resulted in a narrative that is extremely difficult to follow. In the first half of the book especially (but not exclusively), there is a tendency to throw in the odd paragraph or sentence that does not relate to the previous or succeeding paragraphs or sentences and often does not even relate to the subject heading introducing the discussion. There are also various paragraphs that do not make sense internally because at least one sentence has been left out. One example is a paragraph discussing a previously mentioned study:¹

Among the data presented there, is a table indicating the stated reasons why the needy do not use lawyers. This finding was true for all migrant groups as well as the native-born. For migrants, other than U.K.-born (and presumably the majority of alien tongue), the second most common reason was the language problem. Third in order of importance for all three nativity groups was fear, ignorance or lack of confidence.

Luckily for the reader in this instance, the content of the missing material becomes clear a few paragraphs later. That is not always the case with this book. Other

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1 Page 112.

defects abound that make the book a chore to read. An initial reference to table 10.1 suddenly becomes a reference to tables 7.1 and 7.2, which have nothing to do with the particular topic being discussed.²

Undoubtedly the chapter that is most difficult to get through is Chapter 3, *Migrants and the Law*. This chapter contains many of the defects in form contained throughout the book. In addition, its content is such a haphazard conglomeration of information and ideas that one can only wonder why the author chose to include the topics he did and why he chose to fit them together as he did. In a book concerned with migrant crime rates, a discussion would be expected of the disadvantages (such as ignorance of legal aid) migrants encounter when faced with the criminal justice system in their new country. It might not be surprising to even have a discussion of the problem of which court system should have jurisdiction over a migrant who has committed a criminal offence, that of his home country, that of his adopted country, or that of the country where the offence has been committed. On the other hand, one would not expect to read about problems of jurisdiction in the following terms:³

As one hypothetical example . . . , consider a case of criminal violence between an Australian and a migrant alien on a British ship within Australian territorial waters but bound for New Zealand. In civil law, is an Australian court competent to hear a breach of contract case between migrants where that contract was entered into in their homeland?

This paragraph is then followed immediately by a discussion concerned with the validity under Australian law of a marriage performed overseas between a resident of Australia and a non-resident of Australia and how that question of validity affects the non-resident's eligibility to enter Australia! Quite a few paragraphs later, there appears the roots of what could have been a valuable discussion of the clash between common law precepts and cultural precepts of acceptable behaviour, with particular regard to crime of violence. It seems a pity that an irrelevant discussion about marriage and entry requirements could not have been foregone in favour of a more extended discussion of this topic.

Later in the chapter, there is a brief review of the Migration Act 1958-73. Before quoting sections of the Act, the author states that "[u]ntil the mid 1970s federal parliament had distinguished two categories of immigrant — alien and non-alien."⁴ He then quotes sections of the Act, which contrary to his preliminary statement, do still discriminate between aliens and non-aliens, and follows these quotes with a statement noting the distinction made between aliens and non-aliens.⁵ Nor has he quoted from a version of the Act in force prior to the mid 1970s without explicitly saying so. The version quoted is the latest one. This review of the statute is followed by a discussion of several particular cases concerned with deportation. For some reason, the author describes the details of the case of John Stonehouse (the British M.P. who faked his own drowning in the U.S. in order to defraud a

2 Pages 137-138.

3 Page 35.

4 Page 39.

5 Pages 39-40.

life insurance company), describing the case as "a valuable one in that it points up one category of persons exempt from entry permit requirements."⁶ Somehow, however, it is hard to picture boatloads of scheming British Members of Parliament taking advantage of unrestricted entry to increase Australia's migrant crime rate. A further example of the virtually incomprehensible organization and choice of content of the book can be found in the section immediately following the discussion of the Stonehouse case. The section is titled Entry Categories but begins with the following sentence:⁷

Another way of indicating community involvement is to examine the permissible categories of persons on the electoral roll.

Only later is there some inadequate discussion of illegal entry into Australia.

As for the studies into migrant crime rates which purport to be the major focus of the book but whose description and analysis constitute considerably fewer than one half of the pages in the book (discounting the bibliography and index), it is hard to be satisfied with them either. First, there is the inability to fully trust in the validity of studies carried out and reported by someone who has done such a poor job of setting out general background information and points for discussion. Second, there is the inherently suspect nature of conclusions, even tentative ones, which are drawn from studies which involve low numbers of subjects. This occurs most often when statistics are broken down for individual countries of birth. Of course, experts in the use of social statistics might disagree with the validity or applicability of the latter point, or might find other faults with the studies that are beyond the expertise of the reviewer. However, the former point seems more a matter of common sense than expert knowledge and thus harder to refute. Finally, although this book does not ever purport to be concerned to any significant extent with the causes for the differential crime rates between native-born Australians and overseas-born Australian residents, a substantial investigation into such causal factors might have proved more valuable than, for example, a study into the peripheral topic of sentencing bias against convicted migrant offenders.

In conclusion, the subject of migrant crime in Australia may be topical because of recently publicized events in the Australian drug world. It may be relevant to New Zealand both because New Zealanders constitute a significant portion of Australia-bound migrants and because what is true of migrants in Australia could be true of migrants in New Zealand. But this books falls far short of doing justice to that subject.

6 Page 43.

7 Page 43.

COMPANY RECEIVERS AND MANAGERS by James O'Donovan. Published by the Law Book Company Limited, Sydney, 1981, 1xxxiii + 545 pp. (including index). A\$47.50. Reviewed by P. D. McKenzie.*

This is the first significant text on company receivers and managers to be published for a considerable time. The standard work which has been used by practitioners in New Zealand, *Kerr on Receivers*, now in its fourteenth edition, suffers both from concentration on court appointed receivers which are seldom encountered in New Zealand, and from the fate often suffered by a text which has passed through many editions. Recent cases are all too often treated in *Kerr* by way of a footnote reference instead of a considered treatment in the text. O'Donovan has provided a fresh approach to the subject comprehensively and competently.

The text is written from an Australian perspective but New Zealand practitioners and students will find it exceedingly helpful. There is frequent reference to relevant New Zealand decisions. For example *Re Manurewa Transport Ltd.*¹ is dealt with at pages 52-54 in the context of a useful discussion on automatic crystallisation, and the author draws attention to D. W. McLauchlan's article² on this case. The indexing is careful, and useful, and the author treats his subject in an analytical form with liberal uses of sub-headings which assist when using the text as a reference tool.

This reviewer suspects that the text originated as a thesis. Each section of the work is given a conclusion. The practitioner may perhaps be irritated by the trite statements of conclusion which appear throughout the text but these will doubtless be of assistance to the student who wishes to gain quickly an overview of the subject.

The law is stated as at 30 June 1980 and this provided the author with the opportunity to deal with the significant judgment of Needham J. in *Expo International Pty. Ltd. v. Chant*.³ It is fortunate that the New Zealand Companies Amendment Act 1980 was apparently not available to the author in time for him to deal with section 345B which places a duty on a receiver selling property to obtain the best price reasonably obtainable.

This is a text which the commercial lawyer will wish to include in his library and which will be of value to any student researching this particular branch of the law.

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1 [1971] N.Z.L.R. 909.

2 [1972] N.Z.L.J. 330.

3 [1979] 3 A.C.L.R. 888.

THE LAW RELATING TO PARENTS AND CHILDREN by Helen Gamble.

Law Book Co. Ltd., Sydney 1981, vii + 341 pp. including index, table of cases, table of statutes. \$15.75. Reviewed by W. R. Atkin.*

A question nowadays frequently posed is whether the law as we traditionally understand it has much of a place in matters affecting children. There is a body of opinion which says that lawyers with their adversary techniques and the law with its rules and precedents are no longer suitable to determine disputes raised by or about children.

Of course lawyers and the law can be adaptable. We see this in New Zealand in the approach being actively espoused by those involved in the new Family Courts. Adjudication, the imposition of a judicial decision based on legal principle and reached after hearing both sides of the dispute, may now become a rarity, especially where the issue is one of child custody. Great emphasis is placed not on the preparation of legal argument but on the encouragement given to the parties, whether by means of conciliation or mediation conference, to reach their own consensus as to what should happen. Legal rules take a back seat.

The important international literature which might assist this process is tending to emanate not from the usual halls of legal scholarship but from the pens of teams such as Goldstein, Freud and Solnit on the one hand and Wallerstein and Kelly on the other.¹ Their approaches are interdisciplinary and child-centred.

It is a little surprising therefore to find a new publication called *The Law Relating to Parents and Children*. The book is by an Australian author, a lecturer in law at the Australian National University in Canberra. The title of the book certainly suggests that there is a body of law in the traditional sense which the author wishes to bring to readers' attention. However therein lies another surprise, for the book is not aimed at lawyers, students and those professionally engaged in the legal process but, according to its preface, at parents and children themselves. In other words, it is supposed to be geared for the popular and not the professional market. The author is then faced with the difficulty of knowing how much solid "law" — case law and statute — to include and how much to leave out.

In the end the book is, in parts, something of a compromise. From a strictly legal point of view, somewhat inadequate treatment is given to matters such as custody and maintenance. Little or no reference is made to the status of the much maligned "mother principle" or to the weight to be attached to psychological and psychiatric evidence.² Maintenance is dealt with largely in terms of spousal rather than child support, with a leading English decision, *Wachtel v. Wachtel*,³ being, strangely, the main case cited. Little attention is paid to the relationship between

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1 Cf. Goldstein, Freud and Solnit *Beyond the Best Interests of the Child* (New York, The Free Press, 1973) and *Before the Best Interests of the Child* (New York, The Free Press, 1979) and Wallerstein and Kelly *Surviving the Break-up: How Children and Parents Cope with Divorce* (London, Grant McIntyre, 1980).

2 For instance, the case of *Epperson v. Dampney* (1976) 10 A.L.R. 229 is not cited.

3 [1973] Fam. 72. The official reports citation is not given in the book.

maintenance and the state provision of welfare benefits.⁴ The general reader, however, as opposed to the professional, is confronted with what he might regard as a mountain of information. For example there are 483 footnotes and the first couple of pages are spent, perhaps a little unwisely, discussing the Poor Law and the historical jurisdiction of the English Court of Chancery — not entirely the sort of thing many parents and children would want to find on opening the book.

Confusion will greet the reader early on when the concept of “guardianship” is explained.⁵ Having learnt that both parents are guardians of their child, the reader is then informed that “guardianship” will be used to describe the situation where someone other than a parent has charge of the child — a very different usage indeed but one which is not sustained in the subsequent discussion. Curiosity will also be aroused by the decision to refer to ex-nuptial children as “illegitimate” children.⁶ This is despite the now unfortunate etymology of the word and the existence in most parts of Australia of legislation equivalent to the New Zealand Status of Children Act 1969 abolishing the legal status of illegitimacy.

These points aside, there are a number of very positive things which can be said about this book. It brings together in a concerted way a usefully wide range of legal topics relating to children. Traditional areas such as custody, access, child maintenance, paternity and adoption are covered but there is much more besides. The opening chapter reviews parental rights and duties (perhaps still the correct approach, even though there is a current “push” in the direction of children’s rights), and there are chapters on child abuse and neglect, the criminal law, the child’s right to leave home and, as a development of adoption, foster care. Many of these areas are not rebounding with case law and statutory provisions. The author therefore wisely eschews any attempt to concentrate on the kind of strict legal analysis which was earlier suggested as being less appropriate. Instead she prefers to describe the circumstances which people are likely to find themselves in and to aid this purpose, she illustrates with typical and straightforward examples.

For instance, in discussing foster care and the authority of the children’s court to commit a child to the care of a “fit” or “willing” person, she uses the story of an older girl who finds it impossible to live at home and is believed uncontrollable by her parents.⁷ In a different environment however the girl is quite manageable and would like to live with a friend or relation. The resolution is to commit the girl to the care of those able to offer appropriate accommodation. No “law” is necessary to spell out the details of this kind of situation and yet in the light of a broad understanding of what the legal process is, the description in the book may be a very real reflection of what actually happens.

On matters of substance, two topics in particular generate special interest: the adoption of child refugees and the legal position of children’s refugees. The first of these⁸ is topical because of the adoption of children from South East Asia. The author points out the very real legal difficulties in arranging the adoption of such

4 Referred to mainly at p. 101 and n.20 of Chapter 4.

5 See p. 8 and later p. 75.

6 Chapter 10 and n.1 of that chapter.

7 See pp. 192-193.

8 See pp. 183-188.

children while they are overseas. She suggests there are two main hurdles to be overcome, first satisfying the adoption rules of the home country and then satisfying the immigration authorities of the adopters' country, including the rules on recognition of foreign adoptions. A foreign adoption might be challenged on the basis that consent to the adoption was given under pressure of circumstances such as war or famine (although one suspects that many of the children in question would have been orphans) or that the adopting parents did not have a sufficient enough connection with the child's country, such as domicile or residence. Of course, these problems do not arise where a government as a matter of policy admits children and the adoption is then effected after their arrival in the country of their future home.

Children's refuges are apparently being established throughout Australia as more children run away from home.⁹ The legal position of refuges is somewhat dubious as they face possible civil and criminal challenges. The writer refers to the possibility of civil action brought by the child's parents in the event of the child's being harmed (action not possible in New Zealand because of the accident compensation scheme) and of criminal proceedings based on incitement, conspiracy or complicity. It is also pointed out that the refuge cannot actively encourage children to use their facilities nor let the place be one where children are attracted merely for novelty and excitement. Just what happens legally in these circumstances is not made entirely clear. The author is clear however that if a case does go to court a suitable departure from orthodox legal principle should be found to accommodate the new situation of children's refuges.

This book is about the law in Australia. It is nevertheless not without interest to the New Zealand reader. New Zealand cases are referred to in places and there is discussion of many issues which are common to both sides of the Tasman.

9 See pp. 212-218 and Chapter 7 on "The Child's Right to Leave Home"