

“A formidable subject”: Some thoughts on the writing of Australasian Legal History”

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In 1969, the then Dean of the Law School at the Australian National University, Professor J E Richardson wrote,

The history of law is apt to be a formidable subject, being largely concerned with the development of legal theory and the changes in legal procedure brought about by the problems created by social evolution. So far as individuals are dealt with they are assessed almost entirely according to the value of their contributions to the evolutionary process. This is inevitable and right”¹.

If that was the philosophy underlying the “history of law”, it is little wonder that many Australasians – especially perhaps the captive student audiences – were indoctrinated with the idea that “legal history” was essentially something that happened in England. (I would add that when I was a student at my current Law School in the mid-1970s, the first year course included “legal history” from Henry II to the Judicature Acts 1873-75; with never a mention of New Zealand or, indeed, any other former British colonial possession). To be fair to the teachers of the very Anglo-centric courses, it is difficult to teach any course without books to which students can be referred, or, more importantly, lectures derived without great labour. The books which were available were either English (and by and large English legal histories ignore the British Empire); or partial in coverage, or dated or bad – or any combination thereof².

I suspect many Australasian legal academics were to greater or lesser extent conditioned by such university courses, and attitudes like this expressed in them. This, I conjecture, lead to a widespread set of beliefs such as:

- legal history was a subject to be avoided where possible;

¹ In the introduction to *Founders of the Law in Australia* (ANU Law School, Canberra, 1969), as quoted in introduction to the identically titled work by Whitfield (L Whitfield *Founders of the Law in Australia* (ANU Press, Canberra, 1971)

² In 1980 when I first introduced an element of NZ Legal History into the Canterbury LLB, I found myself forced to refer students to a text published in 1914! (Hight & Bamford *Constitutional History and Law of New Zealand* (Whitcombe & Tombs, Christchurch, 1914).

- There was no local legal history anyway;
- legal history was unconnected with the “real world”;
- legal history was not something to be placed high on any research agenda or career plan.

I may add that if one were to accept Richardson’s definition of the province of the “history of law”, one would have to say there was, until the 1980s, almost nothing with qualified under the first head, the development of “legal theory”; some of the extant writing did perhaps aspire to the second element, the “changes in legal procedure brought about by the problems created by social evolution”. Most if it, however, could not be claimed to be aimed at either aspect.

Both the attitudes of the Law Schools, and of at least many students, have changed drastically since then.

First there is a “patriation” issue – students, and societies, have become more nationalistic; less Anglo-centric; more ready to explore their own pasts.

Secondly, the study of national legal history in Australia and New Zealand is much facilitated by the existence of a substantial corpus of good scholarship in Australia, and of a lesser volume of work in New Zealand. I would add here that although “Australasian” history is possible, it has few students or practitioners.

Digression 1 – “Australasia” or Australia” and “New Zealand”.

One of the more interesting feature of both Australian and New Zealand academics working in legal history is the way in which the framework of enquiry into historical topics reflects subsequent political or geographical events. The most obvious example is that it is extremely rare to find any twentieth century work which studies *Australasia* – once New Zealand did not come into the federation, the network of relationships between New Zealand and parts of Australia apparently vanishes from sight³.

A similar phenomenon is often encountered when looking at the shifting boundaries of colonies or states – a number of works will consider the some aspect of the history of New South Wales, and will mention in it the affairs of Port Philip and Moreton Bay up to the time of the creation of the new colonies of Victoria and Queensland – whereupon those districts drop out of the study. The same seems to be true of the Northern territory before and after separation from South Australia. This of course may to some extent reflect the location of governmental records, which generally mirror the political changes. Yet this clearly has had its effect - there are few, if any, Australian studies which are *regional* rather than “colony” or “state”.

³ One of the few historians to escape the Australia / New Zealand dichotomy is Jenks (see n5 below) , who as late as 1912 wrote an “Australasian” history (Edward Jenks, *A History of the Australasian Colonies (from their Foundation to the year 1911)* (Cambridge UP 1912)) , which in places gives real assistance in tracking the movement of reforms from one colony to another.

In New Zealand there is a somewhat similar willingness to construct history either in national terms or in terms of the “provinces” that existed from 1852 to 1876 – there is very little attempt at, for instance “Island” based studies.

What was the state of play in Australasian legal history by 1970?

2. The “corpus” of works on Australasian legal history.

2A legal history books

Constitutional history obviously overlaps to some extent with the field of legal history, and on occasion writers in this field can be of real utility. Indeed there is a clear tradition inherited, I suspect unconsciously, from England of treating constitutional history and constitutional law as so intertwined that authors customarily dealt with both⁴.

One of the earliest books written as a substantial historico-legal treatise on an Australian jurisdiction was published in 1897. This was *The Government of Victoria Australia*, written by Edward Jenks⁵. Jenks had previously been a professor at the University of Melbourne from 1889 to 1892, (appointed at the tender age of 29) before returning to his native England and a very successful career at Liverpool, Manchester and Oxford. While Jenks certainly produced a substantial and detailed treatise, and it has real strengths as one of the few early histories to make substantial reference to similarities to, or divergences from, legislation or institutions in other colonies. However there is a degree of Anglo-centrism, and occasional belittling of colonial initiatives, which seems to proceed more from prejudice than from his data⁶.

Of the more modern writers two stand out. As Castles has indicated in his writings, an enormous contribution has been made to Australian legal history by John Bennett and Enid Campbell. Bennett’s writings will be mentioned at various points in this paper; but Campbell’s

⁴ In New Zealand the prime example is J D Hight and A Bamford, *Constitutional History and Law of New Zealand* (Whitcombe & Tombs, Christchurch 1914) - a work was not supplanted until the 1980s! Other aspects of New Zealand’s constitutional history have been dealt with by various writers. The most scholarly are A H McLintock, *Crown Colony Government in New Zealand*, (Government Printer, Wellington, 1958) and Keith Jackson *The Failure and Abolition of the New Zealand Legislative Council* (Otago UP, 1972). Mention must also be made of the idiosyncratic but occasionally useful works by N A Foden: *Constitutional Development of New Zealand in the First Decade 1839-49* (1937) and *New Zealand Legal History (1642-1842)* (Sweet & Maxwell, Wellington, 1965). There is also William Swainson’s *New Zealand and its Colonisation* (Smith Elder, London, 1859), a totally unreliable and partisan work by an early lawyer-politician. Another very curious kind of writing, which appears to have been found in New Zealand rather more than in Australia (or perhaps I am more familiar with its manifestations in New Zealand) is the polemic or propaganda work masquerading as reportage or history. Works such as William Pember Reeves, *State Experiments in New Zealand* (Allen & Unwin, London, 1902). Must be used with caution because of the central personal role of the author and the political agenda behind the work.

⁵ Edward Jenks, *The Government of Victoria Australia* (Geo Roberston, Melbourne 1897). For a brief biography see Chorley “Edward Jenks 1861-1939” (1947) 1 JSPTL(NS) 114.

⁶ See for example the discussion of the electoral machinery for the Legislative Council; Jenks, op cit n5, pp81-85. At p.85 Jenks opines that “... the Colonial Electoral Act and the Standing Orders of the Council almost slavishly imitate their English precedents” – a statement not self-evidently true.

numerically smaller output⁷ deserves special mention because, to my eye, she was the first to venture beyond the studies of institutions and individuals and to write about the impact of law on people, thus treat legal history as a form of, or at least an adjunct to social history.

Institutional histories of law societies and the like may be of some use. Some, such as Bennett's very scholarly account of the New South Wales bar⁸ or Michael Cullen's history of the Otago District Law Society⁹, are accurate and insightful. I cannot say the same for all the others of the genre – the New Zealand Law Society's centennial history¹⁰ is particularly uneven in quality and reliability. Victoria is perhaps best served, with two accounts, of which Forde's 1913 book *The Story of the Bar of Victoria* is certainly a more lively treatment¹¹. The Tasmanian legal profession has also been described, albeit very briefly, in a pamphlet published in 1968¹². Some general Australian histories are useful, particularly for particular events¹³ or for social factors surrounding legislation, but others suffer from a lack of judgment bordering on hyperbole in assessing legal developments¹⁴. New Zealand histories of the period are generally not helpful for legal history.

Special mention must be made of one enormously valuable work, Roberts's *History of Australian Land Settlement*¹⁵ which not only collects in detailed but accessible form the law and practice relating to government alienation of land, land tenures etc, closer settlement and the like but also has useful, if more limited material on the development of irrigation, railways and

⁷ Enid Campbell "Women and Public Functions" (1961) 1 Adelaide LR 190; "Prerogative rule in NSW 1788 –1823" (1964) 50 JRAHS 161; "The Royal Prerogative to create Colonial courts" (1963) 4 Sydney LR 343; "Conditional Land Grants by the Crown" (1966) 5 Sydney LR 267; "Colonial Legislation and the Laws of England" (1966) 2 U Tas LR 148.

⁸ J M Bennett (ed) *A History of the New South Wales Bar* (Law Book Co, Sydney, 1969).

⁹ M J Cullen, *Lawfully Occupied, the Centennial History of the Otago Law Society* (ODLS, Dunedin 1979).

¹⁰ R B Cooke, (ed) *Portrait of a Profession: the Centennial Book of the New Zealand Law Society* (A H and A W Reed, Wellington, 1969). At that, it is considerably more useful than the remarkably exiguous Auckland centennial history (Don Dugdale, *Lawful Occasion: Notes on the History of the Auckland District Law Society 1879-1979* (ADLS, Auckland, 1979)).

¹¹ J L Forde, *The Story of the Bar of Victoria* (Whitcombe & Tombs, Melbourne, 1913). The other Victorian history is Sir Arthur Dean, *"A Multitude of Counsellors: A History of the Bar of Victoria"* (FW Cheshire & Co, for Bar Council of Victoria, Melbourne, 1968).

¹² M Crisp, *History and Status of the Legal Profession* (U Tasmania, 1968).

¹³ A good example of this is the useful account of proposals in the 1850s for uniform legislation among the Australian colonies in J M Ward, *Earl Grey and the Australian Colonies 1846-1857* (Melbourne UP 1958) p14, 350 and 377. Useful material for the legal historian is also to be quarried from historians or political scientists writing about institutions or individuals. If, for instance, a historian wanted to consider the impact made by lawyer members of any Australian parliament in the nineteenth century, it would be essential to discover who these lawyer members were. In New South Wales the task of data gathering was performed by Martin and Wardle in 1959 (A W Martin and P Wardle, *Members of the Legislative Assembly of New South Wales 1856-1901: Biographical Notes* (ANU Press, Canberra, 1959); a work apparently only emulated in other jurisdictions by a superb compilation of biographical information on Queensland politicians (D J Murphy and R B Joyce, (eds) *Queensland Political Portraits 1859-1952*", (U Queensland Press, 1978)), although there is a more limited study of the Victorian parliament over a twenty-five year period, see J Mills, "The Composition of the Victorian Parliament 1856-1881" (1942) 2 HSAZ 25.

¹⁴ For example the sensationalist tendency shown by Geoffrey Blainey in *A Land Half Won* (MacMillan of Australia, 1980)

¹⁵ S H Roberts *History of Australian Land Settlement 1788-1920* (1924; reprinted MacMillan of Australia 1968).

land grants and government provision of credit and loan finance. Unfortunately Roberts had no New Zealand counterpart. Some useful material had been published over the years, but it cannot compare in depth or scope with Roberts's work¹⁶.

2B Biography as legal history.

You will remember that Richardson considered that in the history of law individuals are assessed almost entirely according to the value of their contributions to the evolutionary process by which law develops. If indeed that is the case, one of the differences between "history of the law" and legal history is that legal history accords a far more prominent place to biography. For much of the period before 1970, indeed, biography was one of the most important aspects of substantial legal-historical writing.

Pride of place must go to the works of Charles Currey for his studies of Sir Frances Forbes¹⁷ and of the brothers Ellis Bent and Jeffery Hart Bent¹⁸. The study of Forbes is a ground-breaking work of Australian legal history, and one to which Castles has paid tribute.

But this book does not stand alone even in the period before 1970. A very early biography, the earliest substantial one of a legal figure of which I am aware is an 1895 biography of George Higinbotham¹⁹, a book which remains of interest even now because of the spectacular nature of its subject. Higinbotham is a fitting subject for a full-dress biography²⁰ (if anyone is seeking a topic!). A number of other judicial biographies were published in the period to 1970, but are of uneven standard²¹:

¹⁶ See for example R W Jourdain, *History of Land Legislation and Settlement in NZ* (Government Printer, Wellington 1925) J D N McDonald, "New Zealand Land Legislation" (1952) 5 HSANZ 195.

¹⁷ C H Currey *Sir Francis Forbes* (Angus and Robertson, Sydney, 1968). Not the least valuable of the features of this work is the inclusion of an illuminating discussion about the introduction of bankruptcy law in 1830 (pp 350ff) prompted by the economic distress of the colony and also of the relaxation of the usury laws (pp 424ff) – it is rare to find any discussion before this of the economic and social impact of law changes, or of economic imperatives driving the introduction of statutes.

¹⁸ C H Currey *The Brothers Bent: Judge-Advocate Ellis Bent and Judge Jeffery Hart Bent* (Sydney UP, 1968). The work is useful reading, even though the bulk of their careers were spent outside NSW, they do emphasise the weaknesses of the Colonial Office's attempts to provide adequate judicial and legal personnel at the beginning of the nineteenth century. Currey's other historical writings often involved consideration of legal issues. He wrote articles on the influence of the early nineteenth century law reforms in England on New South Wales law, and on marriage and divorce law in nineteenth century New South Wales, see "The Influence of the English Law Reformers of the Early Nineteenth Century on the Law of New South Wales" JRAHS vol 23, 1937, p227 and "The Law of Marriage and Divorce in New South Wales" JRAHS, vol 41, 1955, p97.

¹⁹ by E E Morris, *A Memoir of George Higinbotham* (MacMillan & Co, London, 1895).

²⁰ I can recommend a recent study of Higinbotham and two contemporaries: S Macintyre, *A Colonial Liberalism: The Lost World of Three Victorian Visionaries* (OUP, Melbourne, 1991). A fuller study is merited.

²¹ Among the better legal biographies of the period is D J Hannan, *The Life of Chief Justice Way* (Angus & Robertson, Sydney, 1960); others such as Grainger, *Martin of Martin Place* (Alpha Books, Sydney 1970) are of less value. A more difficult piece to assess is the article-length treatment of a prominent Sydney lawyer of the 1830s by a descendant (J B Windeyer "Richard Windeyer: Aspects of his work in NSW 1835-1847" JRAHS, vol 50, p81 (1964)). While the article is interesting, it is perhaps less than easy to accept at face value the author's account of Windeyer's role in the Myall Creek massacre trial and the subsequent rejection by the Legislative Council of a Bill to allow Aboriginal evidence.

New Zealand has seen fewer biographies of legal figures. There are only two of real significance in the period to 1970²². One is Lennard's study of Sir William Martin, the first Chief Justice of New Zealand,²³ which focuses principally on Martin's involvement in issues relating to the treatment of Maori by the colonial government, and treats the remainder of his judicial career rather thinly. The other is Richardson and Dunn's biography of Sir Robert Stout²⁴, which does cover his professional and judicial career, but only rather shallowly; the book is primarily concerned with Stout's political career.

Perhaps the most disappointing form of biography for the legal historian is a scholarly biography of a leading legal and political figure where the biographer has bypassed, for whatever reason, the whole or a substantial part of the legal career of the subject. As a prime example I would instance D B Copland's biography of Hearn²⁵, an eminent law teacher at Melbourne and drafter of a Code of law for Victoria. Copland's area of concern is evident in the title of his work *W E Hearn, First Australian Economist*; he scarcely mentions Hearn's legal accomplishments and failures. A similar, but less pronounced, effect is evident in La Nauze's biography of Deakin, where "legal aspects" of Deakin's career are pushed very much into the background by the emphasis on federation and post-federation events, so matters such as Deakin's influence on irrigation law are very briefly treated²⁶.

Mention must also be made of the legal autobiography. Pride of place here without question goes to Roger Therry's memoir of his time in New South Wales²⁷, which is both readable and informative. There are some useful sidelights into aspects of legislation, and the process of legislative reform, by one of the more successful lawyer-politicians of the late nineteenth century, Sir George Reid. As an instance, we may gain an insight into the nature of legal reform at the time by the fact that Reid saw nothing unusual or worthy of comment that in 1891, he had in 1891, moved the adoption of two

²² There are other works, dating back as 1897. William Gisborne, *New Zealand Rulers and Statesmen from 1840 to 1897* (Sampson Low Marston, London, 1897) is unreliable but in places lively. Rather more scholarly works by W Downie Stewart are *Life and Times of Sir Francis Bell* (Butterworths, Wellington, 1937) and *William Rolleston, a New Zealand Statesman* (Whitcombe and Tombs, 1940).

²³ G Lennard, *Sir William Martin* (Whitcombe and Tombs, Christchurch, 1961).

²⁴ I L M Richardson and W H Dunn, *Sir Robert Stout* (Reed, Wellington, 1961).

²⁵ D B Copland *W E Hearn, First Australian Economist* (Melbourne UP 1935)

²⁶ J A La Nauze, J.A. *Alfred Deakin: A Biography* (Melbourne UP 1965). Deakin's role in the Irrigation Act 1886(Vic) is discussed at pp85-88.

²⁷ R Therry, *Reminiscences of Thirty Years Residence in New South Wales and Victoria* (first published 1863, facsimile edition 1974, Sydney University Press, with introduction by J.M. Bennett). Of less academic use, and perhaps a less lively read is Sir Charles Gavan Duffy's autobiography. Sir Charles Gavan Duffy *My Life in Two Hemispheres* (2 vols, T Fisher Unwin, London 1898, facsimile edition Irish UP 1969). Certainly Gavan Duffy's life is best approached through his memoirs rather than through a rather disappointing biography published in 1979 (C Peart *The Three Lives of Gavan Duffy* (New South Wales UP, 1979)

“valuable English codifications of the laws relating to arbitration and the laws of partnership They were passed without difficulty”²⁸.

However generally reminiscences by practising lawyers may yield better anecdotes than formal biographies, but the selection is limited and the quality very uneven²⁹.

On occasion other biographies can be of value to the legal historian – in particular biographical studies of governors can often shed much light on the development of the law in particular colonies. Shaw’s biography of Sir George Arthur³⁰ is perhaps the very best of these. It has, in my eyes at least, the great merit that in tracing Arthur’s career, Shaw compares events in different colonies and thus allows us to consider how far Arthur was influenced by his varied colonial experiences.

2C Legal Textbooks

It was common in older textbooks to have substantial “historical” introductions or sections in the text, though in fact few went far beyond a collection and arrangement of prior statutes and perhaps a reference to leading cases. The value of such ancillary chapters naturally is as varied as the diligence and skills of the authors. Some were exhaustive in their collection – as with a text on “mercantile” (commercial) law published in 1940³¹ which enumerated all the Australian state enactments in its field – from sale of goods to pawnbrokers by way of inn-keepers and carriers. It is an interesting comment on the thinking of the authors that a chapter on testator’s family maintenance is included as a part of “:mercantile” law. Such texts need to be handles with care for other reasons, as some of the authors certainly appeared to have views born more out of prejudice than analysis. One author, writing in 1898 in New South Wales, said:

p.5 "the statutes passed in this colony on the subject of personal property consist, almost entirely, of more or less close copies of English Acts. ... Speaking generally, it may be said, and said without any

²⁸ Sir George Reid *My Reminiscences* (Cassell, London, 1917) p94.

²⁹ My personal favourites are W Blackett *May It Please Your Honour* (Cornstalk Publishing Co, Sydney, 1927) and A C Hanlon, *Random Recollections* (Otago Daily Times, Dunedin, 1939). A prime contender for the dreariest legal memoir published in Australasia at any time must be that of the quondam Parliamentary Draftsman for Victoria, John Augustus Gurner: J A Gurner, *Life's Panorama* (Lothian Publishing Co, Melbourne, 1930)

³⁰ A G L Shaw, *Sir George Arthur, Bart, 1784-1854: Superintendent of British Honduras, Lieutenant-Governor of Van Diemen's Land and of Upper Canada, Governor of the Bombay Presidency* (Melbourne U P 1980). A very good full-length biography is Mona Macmillan, *Sir Henry Barkly; Mediator and Moderator 1815-1898* (AA Balkema, Capetown, 1970); a shorter but very good piece is Hazel King "Richard Bourke and his Two Colonial Administrations; a comparative study of Cape Colony and New South Wales" *JRAHS*, 1964, vol 49 p360. Older works of lesser value include G C Henderson *Sir George Grey: Pioneer of Empire in Southern Lands* (Dent, London, 1907). There is also K Fitzpatrick *Sir John Franklin in Tasmania 1837-43* (Melbourne UP 1949). A rare example of a gubernatorial autobiography is Sir William Denison *Varieties of Vice-Regal Life* (2 vols) (London, Longmans Green, 1870).

³¹ R K Yorston and E E Fortescue *Australian Mercantile Law* (2nd ed) (Law Book Co of Australasia, 1940).

reflection whatever on our legislators, that there is nothing at all original in our legislation on the subject of personal property"³².

It may be doubted that modern scholars – or anyone who had considered the innovative *wool liens* laws of early New South Wales would agree. I note, too, that the passage cited is substantially repeated in later editions, at least up to 1965³³. New Zealand law books too need to be treated with care. One of the more substantial historical introductions to any New Zealand law book is that to Ian Campbell's book on adoption, but the material cannot, alas, be used without some care as it contains at least one important error – in claiming for New Zealand primacy in the Empire in enacting adoption legislation, where that honour belongs to New Brunswick.³⁴

2D periodical writing

Legal historians may of course derive great benefit from reading legal journals published during the period under study. Although features of legislation which seemed important to contemporary writers may not be those which now interest us, much can be learned about contemporary perspectives on law and practice. For much of Australasia's history, the problem with recourse to this kind of material is that few useful journals exist until the 1950s. One of the most informative of the contemporary journals articles is that of A P Canaway whose 1904 article on crown liability in tort in Australia³⁵ has apparently rested in undeserved obscurity for it does provide a most useful account of the development of Crown proceedings legislation in the Australian colonies. Perhaps this is because the article has been overshadowed by the more modern writings of Peter Hogg³⁶.

Early New Zealand legal sources, it must be said are in more disarray than, I think, any part of Australia. Perhaps the most peculiar aspect is that one of the few useful summaries of liquor licensing law is to be found in a article in the *Law Quarterly Review* written by Sir Robert Stout, former Premier of NZ and at that time Chief Justice, and primarily intended to suggest that the Privy Council had regularly misinterpreted New Zealand law – including, of course, reversing a decision to which Stout had been a party³⁷. Almost as strange is the fact that for many years the

³² G W Millard, *The Law of Personal Property in New South Wales* (Maxwell, Sydney, 1898), p1.

³³ B A Helmore, (ed), *The Law of Personal Property in New South Wales* (7th ed), (Sydney, Law Book Co of Australasia, 1965) p.2).

³⁴ I D Campbell *Law of Adoption in New Zealand* (2nd ed), (Butterworths (Australia) Ltd, 1957), p 6 where New Zealand is correctly shown as enacting its first statute in 1881, but New Brunswick is wrongly shown as first legislating in 1890, rather than the correct date of 1873.

³⁵ A P Canaway "Actions Against the Commonwealth for Torts (1904) 1 Commonwealth LR 241.

³⁶ For instance Peter Hogg "Victoria's Crown Proceedings Act 1958" (1970) 7 Melb ULR 342.

³⁷ Sir Robert Stout "Is the Privy Council a Legislative Body?" (1905) 21 LQR 9

most substantial account of the history of testator's family maintenance legislation in New Zealand appeared in a Canadian journal³⁸.

In addition to such early indigenous periodicals, assistance may be gained from overseas journals – and the resource these represent seems rarely to have been adequately exploited by Australasian writers. One of the earliest journals of reasonable reliability is the *Journal of Comparative Legislation* (later the *Journal of Comparative Legislation and International Law*, now the *ICLQ*), published from 1897 by the Society for Comparative Legislation in London. The *Journal* is of real use both for historians of one jurisdiction and for those interested in comparative history – and may indeed be of more use to the latter. Among a plethora of examples, I would instance only a cluster of early-twentieth century articles on immigration law and policy³⁹ and an unusually early comparative accounts of British and Dominion anti-trust law⁴⁰. The same journal also published several articles commemorating the centenary of various jurisdictions⁴¹.

Historical journals in both Australia and New Zealand published some works on legal history, though it must be said that the New Zealand publications are few indeed in number.

The Australian material is very much more substantial. The *Journal of the Royal Australian Historical Society* published a number of small number of articles on legal history before 1970⁴², and there were a smattering of other law-related pieces in other journals⁴³.

2E "student" and research works

³⁸ Mannie Brown, "Dependants' Relief Acts (part 1)" (1940) 18 *Can Bar Rev* 261. Oddly, an article by a New Zealand writer on the area, published in the *LQR*, neglected the historical aspects entirely: see S A Wiren "Testator's Family Maintenance in New Zealand" (1929) 45 *LQR* 378.

³⁹ A R Butterworth "The Immigration of Coloured Races into British Colonies" (1900) 1 *JCL&IL* (serII) 336; Manson; Edward "The Admission of Aliens" (1902) 4 *JCL&IL* (2nd series) 114 and, rather less reliable, E Digby "Immigration Restriction in Australia" (1903) 5 *JCL&IL* (2nd series) 143.

⁴⁰ P Strickland. "A Comparative Study of the Anti-trust Laws of the British Dominions and their Administration" (1936) 17 *JCL & IL* (3rd) 240; (1937) 19 *JCL&IL* (3rd) 52 and (1937) 19 *JCL & IL* (3rd) 62.

⁴¹ See Harrison Moore "A Century of Victorian Law" (1934) 16 *JCL*(3rd series) 175 but not the (rather more pedestrian) South Australian centenary piece by Angas Parsons and A L Campbell "*The South Australian Centenary of Legislation*" (1936) 17 *JCL & IL* (3rd series) 21. Curiously Castles has cited the former, but not the latter, in his writings. New Zealand had a companion piece H G R Mason "*One Hundred years of Legislative Development in New Zealand*" (1941) 23 *JCL & IL* (3rd series) 1, but it appears to have been completely overlooked by New Zealand writers before the 1990s.

⁴² See for example Charles Currey "The Influence of the English Law reformers of the Early Nineteenth Century on the Law of New South Wales" *JRAHS*, 1937, vol 23, p 227; Currey "The Law of Marriage and Divorce in New South Wales" *JRAHS*, 1956, vol 41, p 978 (Mr Justice) Rae Else-Mitchell "The Foundation of NSW and the Inheritance of the Common Law" *JRAHS*, 1963, vol 49, p1 and J B Windeyer "Richard Windeyer: Aspects of his work in NSW 1835-1847" *JRAHS*, 1964, vol 50, p81.

⁴³ Some of these were of great merit, such as Geoffrey Serle's account of the Victorian Legislative Council (G Serle, "*The Victorian Legislative Council 1856-1950*" *HSANZ*, 1954, p 186) which contains a very informative discussion of Victorian Factories Legislation and the restriction of legislative reform by the Legislative Council.

It is notable that before 1970 there appears to have been relatively little in the way of student writing which could be of real assistance to the legal historian. Apart from the two massive unpublished theses by Hague and Woinarski to which Castles often refers, there appears only to have been a handful of lesser BA Honours theses and the like⁴⁴.

3. An evaluation of Castles's *Introduction to Australian Legal History*

Why is the state of legal history generally relevant? Because it explains, in part, the scope of the challenge facing Alex Castles in writing his *Introduction to Australian Legal History* ("*Introduction*"), at a time when there was only the most limited amount of material of any quality on which he could draw – and, perhaps, also explains why he was able to make such a much more rounded work of *An Australian Legal History* ("*History*").

Introduction is, as it was designed and acknowledged to be a limited history.

This is not the occasion to undertake any substantial review of the work, but I may make a note of some of its features.

As a book it is:

- on a broader canvas than many, but still very much more a history of the south east of Australia rather than a true Australian history;
- a history limited in period time to very much the first half of the nineteenth century;
- essentially framed around accounts of institutions,
- a "top-down" history in that it concentrates substantially on the transactions of the Supreme Courts of the colonies, and discusses the minor courts in far lesser detail.
- what we may call "city-based" – very with focussed on events in the dominant centres, and with little discussion of the administration of the law in the country districts
- "rule-based" – where it is concerned with specific rules of law, usually statutes, it is concerned much more with the text of the statutes than with whether the statute worked in practice – or how it worked.
- Formal record driven
- it is a history of the elite – of the governors, judges and, later, Ministers; it is almost silent on the "out-groups" – women, working class and aborigines.

Of course many of these criticisms can be answered by the relatively simple response that, given the state of legal history in Australia in 1970, nothing more could be expected, and indeed it is remarkable that such a significant book could be produced at all.

Digression 2 – the use of private papers.

Even the most cursory inspection of the footnotes to *Introduction* reveals the enormous extent to which Castles has made use of published official documents. I think one major between Australian and New Zealand historians writing on law and law related topics lies in the use

⁴⁴ Hague "History of the Law in South Australia" and Woinarski "Sine Historia Caeca Jurisprudencia"; see Castles *Introduction* *pv*.

made of such records, with the Australians generally having greater recourse to such sources. This may at least partly be a reflection on the accessibility of sources - nothing can approach the importance of the *Historical Records of Australia* - an importance obvious on even a brief scrutiny. Unfortunately there is no real New Zealand counterpart to the *HRA* series, although the papers collected and published as a part of the British Parliamentary Papers provides a partial substitute.

There is also potential for assistance to be gained from the published editions of collections of documents, private or public. However, in New Zealand, legal historians have been slow to use the resources of this nature which are available. I would instance the two volumes of correspondence between members of the Atkinson and Richmond families, whose leading members included several lawyers and politicians, including a future premier and a Supreme Court Judge⁴⁵. These volumes contain some very useful information, and insights, into nineteenth century law-making and legal practice – in particular they are the best source of information for the sedition trial of Irish Home Rule partisans on the West Coast of the South Island in 1868 - but the original editor focussed more on the political roles of the correspondents, rather than their legal roles. This may explain, though not excuse, the lack of interest shown by later scholars.

4 Legal writing between 1970 and 1980

4A books

Published between the two Castles books, and paid tribute to in *History*, is perhaps the most substantial “state” or “colony” legal histories, Enid Russell’s *A History of the Law in Western Australia*⁴⁶. Russell’s work is a classic of the painstaking assemblage of data, and as such is invaluable. It does severely suffer from a lack of analytical rigour, and from a tendency to assume the law “on the books” was the law actually in operation – but these weaknesses are to some extent counterbalanced by the books unusual breadth of coverage. Even today it is rare to find a legal history which will outline the development of the law in fields as diverse as family law, public health, shipping and labour law.

⁴⁵ G H Scholefield (ed), *The Richmond-Atkinson Papers*, (Government Printer, Wellington, 1960). A more recent, and equally interesting but better edited and annotated New Zealand source is provided by the diary of Henry Sewell, a prominent early lawyer and politician: W David MacIntyre (ed) *The Journal of Henry Sewell 1853-7* (2 vols, Whitcoulls, Christchurch, 1980). Other published collections of documents and letter may be of less use to the historian – for instance those of Robert Herbert contain little bearing on legal history (see Bruce Knox (ed), *The Queensland Years of Robert Herbert, Premier; Letters and Papers* (UQ Press, 1977).

⁴⁶ Enid Russell *A History of the Law in Western Australia* (edited and completed by F M Robinson and P W Nichols) (UWA Press, 1980).

Legal biographies make less of a contribution to the corpus of scholarship in the 12970s – there are relatively fewer of them, and unfortunately there remains a degree of unevenness in quality⁴⁷.

New Zealand saw little movement in this decade, although, for reasons which are not clear, there was a sudden bubble of published work in the field of penology and the criminal justice system⁴⁸.

4B Periodicals 1970-1980

In my more cynical moments, I am tempted to consider the pattern of appearance of articles with a historical content in Australasian law journals as an unusual expression of Parkinson's Law⁴⁹ – which states that “work expands to fill the time available for its completion” – in the case of legal history – the quantum of published work expands to fill the pages of a new journal. Whether this phenomenon, if it exists, is a function of academics being stirred to research by the possibilities opened by the new journal or whether it is caused by editors who might otherwise refuse historical articles as not professionally relevant were concerned to fill up their early issues, I would not care to speculate.

Although there were occasional pieces in the *Australian Law Journal* and such less long-lived publication as *Res Judicata*⁵⁰, which began publication in Melbourne just before the Second World War and deserves mention as being publishing what appears the first semi-historical piece by Alex Castles⁵¹, the real growth of published journal articles comes with the establishment and multiplication of university-based Law Reviews in the 1950s and 1960s.

⁴⁷ A very scholarly and sound biography is J N Molony, *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869* (ANU Press, 1973); J M Bennett, *Portraits of the Chief Justices of New South Wales* (John Fergusson Pty Ltd, Sydney 1977) is a slighter work, and H F Behan, *Mr Justice J W Willis* (privately published, Melbourne, 1979) is less scholarly, though interesting in its description of Willis's treatment of cases involving aboriginals. In some cases the biographies need to be treated with reserve because the author has apparently uncritically accepted statements in sources such as contemporary newspaper accounts, as for example in the perhaps unduly sympathetic treatment of Willis and Montagu by B A Keon-Cohen, "John Walpole Willis: First Resident Judge in Victoria" (1971-72) 8 *Melb ULR* 703 and "Mad Judge Montagu: A Misnomer?" (1976) 2 *Monash LR* 50.

⁴⁸ See R M Burnett, *Penal Transportation: An Episode in New Zealand History* (Institute of Criminology VUW; Occasional Papers in Criminology no. 9 1978); R M Burnett, *Executive Discretion and Criminal Justice: the prerogative of Mercy in New Zealand 1840-53*. (Institute of Criminology VUW; Occasional Papers in Criminology no. 5 1977) and J A Seymour, *Dealing with Young Offenders in New Zealand: the system in evolution* (LegalResearch Foundation Monograph, Auckland, 1976. These were not the first published writings in the field, see P K Mayhew, *The Penal System of New Zealand 1840-1924* (Department of Justice, Wellington 1959).

⁴⁹ C Northcote Parkinson who expressed this view was, amongst other interests, an interesting historian of maritime warfare in the 19th century.

⁵⁰ Articles with serious historical content include, Coppel, "The Control of the Custody of Children by the Supreme Court of Victoria" (1939) 2 *Res Judicata* 33; Sholl, "The Administration of Justice in Victoria: the State and its Lawyers" (1955) 7 *Res Judicata* 33; Barry, "The Defence of Provocation" (1949) 4 *Res Judicata* 129 and "A Note on the Prisoner's Right to Give Evidence in Victoria" (1952) 6 *Res Judicata* 60.

⁵¹ Alex Castles, "Discretionary Power in Adoption Statutes" (1956) 7 *Res Judicata* 307

The University of Western Australia is the first such review, but its profile at that time was probably less prominent than the second review, the *Sydney Law Review*. That journal published in its early years by far the largest volume of legal-historical writings of any Australian journal to that time. This must however be seen perhaps less as the product of a school of historians than as the result of the extraordinary fecundity of the pen of John Bennett, who published four substantial pieces in the Review in its first seven volumes, and co-authored another three⁵².

An equally substantial, but more broad-based, range of articles can be found in the early numbers of the *University of Tasmania Law Review*. Alex Castles has frequently cited an important article by Sir Victor Windeyer⁵³, but the journal published a number of other very significant articles in those early years⁵⁴.

Adelaide too shows evidence of an early willingness to publish articles on a historical theme – the first issue of the *Adelaide Law Review* published pieces by Campbell and by Pike⁵⁵ and in later years the Review published an excellent article by Lendrum on the treatment of Aboriginals in the early years of the colony⁵⁶. I note, by way of digression, that Castles, in a common feature of his writing, prefers to cite Lendrum's thesis, on which the article was based, rather than the article itself. A similar, though less pronounced burst of at least partially-historical writing is to be found in the early years of the *University of Queensland Law Journal*, although here there were fewer articles of purely historical aspect and more where the focus was on current law, though a historical perspective was given⁵⁷.

⁵² J M Bennett, "The Status and Authority of the Deputy Judge-Advocates of New South Wales" (1958) 2 Sydney LR 501; "The establishment of Jury Trial in New South Wales" (1961) 3 Sydney LR 463; "The Establishment of Divorce Laws in New South Wales" (1963) 4 Sydney LR 241 and "The Office of Sheriff: Historical Notes on its Evolution in New South Wales" (1975) 7 Sydney LR 360. In addition Bennett co-authored other pieces: R W Bentham and J M Bennett, "Fusion or Separation? Historical Notes on the Division of the Legal Profession in New South Wales" (1960) 3 Sydney LR 285; R W Bentham and JM Bennett, "The Office of Prothonotary" (1959) 3 Sydney LR 47 and J H McClemens and J M Bennett "Historical Notes on the Law of Mental Illness in New South Wales" (1962) 4 Sydney LR 49.

⁵³ Sir Victor Windeyer "A Birthright and Inheritance" (1953) 1 U Tas LR 635.

⁵⁴ I would instance (in chronological order) R L Wettenhall, "Early Railway Management Legislation in New South Wales" (1960) 1 U Tas LR 446; W H Craig and M F C Scott, "The Maintenance of Concubines" (1961) 1 U Tas LR 685; Enid Campbell "Colonial Legislation and the Laws of England" (1965) 2 U Tas LR 148; P A Howell, "The Van Diemen's Land Judge Storm" (1965) 2 U Tas LR 253 and A P Davidson, "A Skeleton in the Cupboard: Master and Servant Legislation and the Industrial Torts in Tasmania" (1975) 5 U Tas LR 123. Less substantial historical references appear in S D Ross, "The Legal Profession in Tasmania" (1975) 5 U Tas LR 1 and C G Brettingham-Moore, "The Office of Master" (1963) 1 U Tas LR 842.

⁵⁵ Enid Campbell "Women and Public Functions" (1961) 1 Adelaide LR 190; D Pike "The Introduction of the Real Property Act in South Australia" (1961) 1 Adelaide LR 169.

⁵⁶ S D Lendrum "The "Coorong" Massacre: Martial Law and the Aborigines at First Settlement" (1977) 6 Adelaide LR 26.

⁵⁷ The three truly historical articles are W N Harrison, "The Transformation of Torrens's System into the Torrens System" (1961-4) 4 U Qld LJ 125; June Stoodley, "An Early Aspect of Queensland Mining Law: the Area of Gold-mining Leases" (1966) 5 U Qld LJ 179 and J M Bennett and J R Forbes, "Tradition and Experiment; Some Australian Legal Attitudes of the 19th century" (1971) 7 U Qld LJ 172. This latter article is one of the most significant pieces of legal historical writing of the 1970s. The latter category includes June Stoodley, "Miner v Landowner: The Conflict over Mining on Private Land in Queensland" (1967) 5 U Qld LJ 353;

The pattern is a little different in Western Australia. As noted earlier the *University of Western Australia Law Review* was the first in Australia (issue 1 in 1948). Curiously the *UWALR* also published a small number of articles touching on legal history, but this was not in the early years of the review, in the latter part of the 1960s and the 1970s. It is very notable that the two articles directly focussed on historical topics are not by local authors but by the ubiquitous John Bennett⁵⁸. The Victorian universities were rather later in entering the field of legal history, though some of the works then published rank among the best written in Australia to that time⁵⁹.

New Zealand seems to have differed somewhat from Australia. In the period with which we are concerned, there existed first the *New Zealand Universities Law Review* and, in order of commencement, the *Otago, Victoria, Auckland and Canterbury Law Reviews*⁶⁰. There was also the *New Zealand Law Journal* of which I need only say that its not infrequent items billed as "history" were almost entirely merely records of biographical details or recollections by elderly judges and practitioners – than which there is little less reliable – or were otherwise suspect⁶¹. The quality of the articles in the University Law reviews was undoubtedly higher than that in the *NZLJ*, but there was not a great deal of it. The *NZULR* published one extremely important piece Paul Cornford's two-part article on the administration of justice in the first few years after 1840⁶².

Ross Cranston, "The Aborigines and the Law : An Overview" (1973) 8 U Qld LJ 60 and P N Davis, "'Nationalization' of Water use Rights in the Australian States" (1976) 9 U Qld LJ 1.

⁵⁸ See J M Bennett, "Historical Trends in Australian Law Reform" (1970) 9 U WALR 211 and J M Bennett, "Sir Henry Wrenfordsley" (1977) 13 UWALR 25. Articles with a some substantial historical content include J Neville Turner, "The Marriage of Minors" (1968) 8 UWALR 319 and D Brown, "Police Offences" (1972) 10 UWALR 254.

⁵⁹ I would instance S D Clarke and I D Renard, "The Riparian Doctrine and Australian Legislation" (1970) 7 Melb ULR 475, which remains the best account I know of the law relating to exploitation of rivers and water resources in nineteenth century Australia, and two superb articles by Terry Carney on drug laws and on the legal position of the mentally handicapped: Terry Carney, "The History of Australian Drug laws: Commercialism to Confusion?" (1980) 7 Monash LR 165 and "Civil and Social Guardianship of Intellectually Handicapped People" (1981) 8 Monash LR 199.

⁶⁰ Peculiarly enough some New Zealand writers (but apparently few Australians) made occasional ventures into legal history in overseas journals, notably in the early volumes of the *Anglo-American Law Review*. Some of these produced interesting and valuable work, alas the majority did not. As an exemplar of the latter I would instance a piece by a former Dean of my own Law School (John L Ryan, "The New Zealandness of New Zealand Law" (1972) 1 Anglo-American LR 204) which is largely devoid of merit. Of higher quality are G Curry, "A Bundle of Diverse Offences: The Vagrancy Laws with special Reference to the New Zealand experience" (1972) 1 Anglo-American LR 523; and E J Haughey, "The Maori Land Court of New Zealand" (1973) 3 Anglo-American LR 230.

⁶¹ As with B J Cameron "Law Reform in New Zealand" (1956) 32 NZLJ 72,88, 106, who is remarkably ignorant of, or dismissive of, local initiatives in law reform. Crowley Weston "Early Law Tuition in Canterbury" [1958] NZLJ 71 is an honourable exception.

⁶² P A Cornford, "The Administration of Justice in New Zealand 1841-1846 (A Legislative Chronicle) [Part I] The Fisher Period" (1970) 4 NZULR 18 and "The Administration of Justice in New Zealand" 1841-1846 (A Legislative Chronicle) [Part II] The Swainson Period" (1970) 4 NZULR 120. Other articles with some historical content include: A G Davis "Liability for Animals in New Zealand" (1964) 1 NZULR 206; Douglas Whalan "The Immediate Success of Registration of Title to Land in Australasia and Early Failures in England" (1967) 2 NZULR 416; Sir Alexander Turner, "Changing the Law" (1969) 3 NZULR 404 and I L McKay, "Historical Aspects of the Estate Tax" (1978) 8 NZULR 1. Even where an author promised to consider historical issues, those considered were not necessarily Antipodean, as with an article published in 1969 in the *New Zealand Universities Law Review* with the title "Legal Aspects of the History and Background of Town and Country Planning", which however only

The *Victoria University of Wellington Law Review* was the next review established, and the first linked solely to one Law School, and is notable for publishing perhaps the least volume of legal history in its early years; although that pattern has been reversed of recent times⁶³. The position in Auckland was a little different, as the Auckland University was, as it still is, primarily a publisher of student works, some of which, it must be said, contained "history" of a less than desirable standard⁶⁴. The *Canterbury Law Review* was first published in 1980, and in a style somewhat reminiscent of Australia, began with historical articles on both the law School itself and a biography of its founding teacher⁶⁵. Of the individual New Zealand reviews, one stands out for the quality, though not the number of its pieces – the *Otago Law Review* published amongst other pieces an extremely valuable article by Ellinger and McKay on commercial law and practice in nineteenth century New Zealand⁶⁶, an article which interweaves the legal and economic aspects of history in an exemplary fashion.

Digression 3 – law and economics

To digress for a moment, the Ellinger and McKay article highlights, by the lack of any comparable works, one of the great weaknesses in Australasian legal history before the 1980s—the lack of attention to the economic impact of laws and legal practices⁶⁷. Although the American and Canadian historians had shown how it could be done, Australasia in this period produced nothing to compare, even at a distance, with Richard Risk's magnificent studies of law and economics in nineteenth century Ontario⁶⁸. Some more recent work in Australia has improved the position there – New Zealand has not yet been so fortunate.

discussed classical and medieval European practice, without ever touching on the development of statutory rules, see Brian Davis, "Legal Aspects of the History and Background of Town and Country Planning" (1969) 3 NZULR 310.

⁶³ The VUWLR published one of the first article-length treatments of a New Zealand legal institution: G A Wood, "Construction and Reform : The establishment of the New Zealand Supreme Court" (1968) 5 VUWLR 1, an article very much overtaken by the better and more detailed work by Cornford, op cit n 62, above. There is also some historical material in W R Flaus "Discipline within the New Zealand Legal Profession" (1973) 6 VUWLR 377.

⁶⁴ I would instance H Sargisson "Matrimonial Property Legislation; its history and a Critique of the present New Zealand Law (1976) 3 Auckland LR 82 and B Carter "The Incorporation of the treaty of Waitangi into Municipal law" (1980) 4 Auckland LR 1.

⁶⁵ Isobel Matson, "University of Canterbury Faculty of Law: An Historical Note" (1980) 1 Canterbury LR 1 and John Farrar, "Dr. C J Foster, Canterbury's First Law Teacher" (1980) 1 Canterbury LR 5.

⁶⁶ E P Ellinger, and L McKay "Chattels Securities in New Zealand 1843-1887" (1974) 3 Otago LR 153. Other articles of note include David Williams "New Zealand Immigration Policies and the Law: a Perspective" (1978) 4 Otago LR 185; JLRyan "Law and Industrial Relations: The Influence of the Courts: II" (1971) 2 Otago LR 298 and an unusual article by Nigel Jamieson which appears to be the only article I know of which has considered why Scots law was not adopted in the colonies: Nigel Jamieson, "English Law but British Justice" (1980) 4 Otago LR 488.

⁶⁷ There is some attention paid to statutes impacting on matters economic in J LRobson, *New Zealand; The Development of its Laws and Constitution* (2nd ed, London, Stevens & Sons, 1967) but there is no consideration of the effect in practice of these laws.

⁶⁸ Richard Risk "The Nineteenth Century Foundations of the Business Corporation in Ontario" (1973) 20 U Toronto LJ 270; "The Golden Age: The Law about the Market in Nineteenth Century Ontario" (1976) 26 U Toronto LJ 307; "The Last Golden Age :

In the years before 1980 the deficiency was made up, to a limited extent but only to a limited extent, by economic historians. There, are for example, very useful insights into land law and land taxation issues to be gained from works such as Goodwin's *Economic Enquiry in Australia*⁶⁹, but these are, at best, only a partial substitute.

As with the period before 1970, historical journals published significantly fewer pieces on legal history than did the legal journals. Of the historical journals, pride of place once again goes to the *JRAHS*, which dominates the field for both quantity and average quality⁷⁰. Other journals are less reliable⁷¹ and it is rare to find articles which were both legally accurate and also insightful in their account of the impact of laws on social issues⁷².

4D Research by students

I am very much reluctant to try to assess the total amount of serious student research and writing in the area of legal history in the 1970s – there may have been a substantial amount of which I am not aware, but I can say there was virtually none of any real value in New Zealand, and the only major New South Wales work I know of is the very valuable study of private member's bills in New South Wales by Robin Parsons⁷³, a thesis which deserves to be better known as it essentially stands alone as a study of an activity or type of legal change..

Property and the Allocation of Losses in Ontario in the Nineteenth Century" (1977) 27 U Toronto LJ 199; "The Law and the Economy in Mid-Nineteenth century Ontario: A Perspective" (1977) 27 U Toronto LJ 403. In New Zealand, for example, only E P Ellinger and L McKay "Chattels Securities in New Zealand 1843-1887" (1974) 3 Otago LR 153 can stand any comparison.

⁶⁹ C D W Goodwin, *Economic Enquiry in Australia* (Duke UP, Durham NC, 1966).

⁷⁰ See eg J M Bennett, "Sir Julian Salomons: Fifth CJ of New South Wales", *JRAHS*, 1972, vol 58. p 101; Hazel King, "Pulling Strings at the Colonial Office" *JRAHS*, 1975, vol 61, p145; J M Bennett, "Patronage and the Law: The Career of J F Hargrave" *JRAHS*, 1980, vol 66, p97; R Stein, "Sir Robert Richard Torrens and the Introduction of the Torrens System" *JRAHS*, 1981, vol.67, p.119.

⁷¹ I would instance the less than reliable articles in Western Australian journals: C W Collins, "Matters of Social Conscience: Western Australia 1829-90" (1968) 2 *University Studies in History* 1; P J Boyce, "The Governors of Western Australia under Representative Government, 1870-1890" (1961) 4 *University Studies in History* 101 and Suzanne Welborn, "Politicians and Aborigines in Queensland and Western Australia 1897-1907" (1978) 2 *Studies in Western Australian History* 18.

⁷² A rare but worthy exception is F I Norman and A D Young, "Short-sighted and doubly short-sighted are they Game Laws of Victoria 1858-1958" (1980) 7 *J Aust Stud* 2. Also valuable are R S Neale "H S Chapman and the "Victorian" Ballot" *HSANZ*, 1967, vol 12, p 506 and Alan Ward, "Law and law-enforcement on the New Zealand frontier", *NZJH*, 1971, 5,.

⁷³ Robin Parsons, "Lawyers in the New South Wales Parliament 1870-1890: A study in the Legislative Role of Private Members" (PhD Thesis, Macquarie University, March 1972).

5. *An Australian Legal History and the progress of legal history 1970-1980*

Those of you who are familiar with both *Introduction* and *History* will understand me when I say that more than just the span of a decade separates the two books. Although much of the text of *Introduction* is repeated, the context in which it is put, and the generally much more broadly wrought interpretation given to legal history means they are very different books. Again, this is not accidental, Alex Castles set out to take advantage of the opportunity to write a more finished work, and succeeded.

Again, this is not the occasion to give a detailed analysis of *History*, but if one compares it with its predecessor, it can be said that it:

- covers a much broader canvas, both geographically and temporally – although it is still “city-based”, that is focussed on events in the dominant centres
-
- is less structured around institutions and more concerned with individuals and social impacts of law. However where it does discuss institutions, it remains centred on the superior court centred – although there are rather more references to inferior courts such as District Courts, Courts of Requests and Magistrate’s Courts etc in *History* than in *Introduction*, the increased discussion of the superior courts means the relativities hardly change, and it is still very much a “top-down” history⁷⁴. (Is this common feature of legal history as written by lawyers a function of the greater accessibility and smaller bulk of materials to be mastered, or a subconscious result of law school insistence on studying leading cases within the framework of rules of binding precedent?)
-

Two features contribute to the greater breadth of analysis and the general richness of the book. One is that Castles has, as one would expect, made substantial use of a greater range of sources, and is much less driven by, and reliant on, the official records.

To read works of the first period, including Castles’s *Introduction*, is to be struck with the dominance of the narrative element. This is legal history as a matter of recital of the facts as derived from convenient sources. There is a very notable degree of reliance on official documents; comparatively little in the way of emphasis on either unofficial sources such as private papers, letters or memoirs or secondary works such as academic writings, theses etc. Only a limited number of individuals are discussed, and that often in rather less than analytical fashion; there is almost no consideration of social and economic causes, and effects, of legal developments.

⁷⁴ The scarcity of references to District Courts is not solely a function of access to materials, as Castles makes but a single reference to a full-length study of the New South Wales District Court (H T E Holt, *A Court Rises: The Lives and Times of the Judges of the District Court of New South Wales* (Law Foundation of New South Wales, 1976)) cited *History* p369.

By contrast the works published around 1980 or afterwards are far richer in their texture – there is considerably more reference to alternative interpretations of events, there is much more ready reference to individuals who figured in events – and a much greater gallery of characters is presented. Above all the legal histories begin, though only begin, to consider the human side of the law – to consider those “others” who are acted on by the law, rather than shaping it. One may as a simple example of the difference, instance the fact that in the index to *Introduction*, there are two references, spanning three pages in total, to “Aborigines”; in *History*, the whole of chapter 18 is on Aborigines and British law, and there 12 index entries to references in other chapters.

I would not want here to be seen as singling out Alex Castles’s work. The omission in the 1960s and 1970s of references to indigenous peoples was common-place. New Zealanders now must find it strange, to use a mild term, that there is but a single reference, and that dismissive, to the Treaty of Waitangi in the Centennial History of the New Zealand Law Society published in 1969⁷⁵.

The change in the degree of coverage between *Introduction* and *History* is reflective of an enormous upsurge in the 1970s in both popular and academic interest in the history of indigenous peoples and their treatment under European law. I would instance the works of Elizabeth Eggleston and Alan Ward⁷⁶. This upsurge in interest must both motivate an author to address the issue, and facilitate the preparation of appropriate text.

But it must be remembered that academics of the 1960s and 1970s did have material available which would have provided at least some reference point – Paul Hasluck’s important study of government policy toward Aborigines in Western Australia⁷⁷ could, and perhaps, should, have been much more widely consulted by legal writers. Or is it possible that the “South-Eastern” focus of most Australian writers contributed to the lack of interest in a book dealing with the West?

Yet too much must not be made of this. Although legal history in the 1970s accommodated a concern for, and academic writing about, Aborigines, the shift was limited in scope. Other “out-groups” of the period before 1970 – women, ethnic minorities, labourers, the poor – remained outside the mainstream of legal-historical scholarship.

Fortunately, that mainstream has broadened to enrich the field further – and that, I suggest, is because legal history has become as much the province of the historian as of the lawyer.

⁷⁵ R B Cooke, (ed) *Portrait of a Profession: the Centennial Book of the New Zealand Law Society* (A H and A W Reed, Wellington, 1969).

⁷⁶ Elizabeth Eggleston, *Fear, Favour or Affection* (ANU Press, Canberra, 1976); Alan Ward *A Show of Justice* (ANU Press, 1974).

⁷⁷ Paul Hasluck, *Black Australians : A Survey of Native Policy in Western Australia 1829-97* (Melbourne UP 1942).