

Books

THE RECEPTION OF ENGLISH LAW ABROAD

by B H McPherson, The Supreme Court of Queensland Library,
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There are very few books in the area of the humanities which deserve the title 'great'. This volume, by his Honour Mr Justice McPherson, is one that does. It is a major work of legal expertise, a mile-post of historical research, and an academic work of the greatest importance.

His Honour deals with the mechanisms whereby English law — the Common Law and Parliamentary Acts of a foreign country — have become binding law in one third of the globe (or, in other words, in every country whose language is English except South Africa and Sri Lanka).

In broad terms, in 'settled' countries, the law of England is inherited at birth by the people of those countries. In countries which are either 'ceded' or 'conquered', the law of England can only be acquired by legislation: either statutes of the UK Parliament directly or indirectly or by local legislation of the country concerned, in which case there must be a local assembly of some sort to enact that legislation (one which is often created pursuant to Charters of Justice or the like).

Simple as this may sound, it actually involves a detailed constitutional examination of the laws of each of the Australian States, each of the States of the United States of America, each of the Territories of the West Indies, each of the Canadian Provinces, each of the Indian States, and much else. It also necessitated reference to hundreds of Court cases, although the general principles are enunciated in just two of them *Calvin's Case* (1608) 7 Co Rep 1a; 77 ER 1308 and *Anonymous* (1722) 2 P Wms 75, 24 ER 646.

In every single country, there is a point in time where one can say a 'reception' of English law has taken place, either by birthright or by legislation. When that point is ascertained, one must then consider whether what is 'received' is only the common law of England or its statutes as well (the answer is the latter); whether the ecclesiastical law of England is part of the 'Common Law' so received (the answer is No: see *Colenso's Case* (1864) 3 Moo PC NS 116); if the statutes are 'received', are the statutes passed in England after the date of reception also 'received' (the answer is no); and can there be an exception to 'reception' in the case of wholly inappropriate statutes (the answer is Yes).

The statute most widely held to be appropriate for reception was the *Fraudulent Conveyances Act 1571*, and the Statute most widely categorised as inappropriate was the *Mortmain Statute* 9 Geo 2 c 36 (1736).

Of course, once a 'reception' has taken place, a judicial hierarchy of Courts must be established to administer the law so received, and its manifestations are many and various. The most exotic of them was the Britannic Majesty's Supreme Consular Court in the Dominions of the Sublime Ottoman Porte.

All the problems involved in the application of these principles *are* set out in clear and trenchant prose. An example is ‘The first general statutory departure from the uniform dominance of English law abroad came from the *Quebec Act 1774* (14 Geo 3 c 83), which, in derogation of the Acts of Supremacy and Uniformity and of the Common law itself, allowed the inhabitants of that Province to retain their own religion, clergy and civil laws, and to take a modified oath in allegiance that accommodated their Roman Catholic beliefs.’

The footnotes are a model for this kind of book, accurate, informative and suggestive of further avenues of research. Indeed, so succinct are they that they sometimes appear a little skimpy. For example, the important principle that a State Governor’s own Commission, and those of other Colonial officers, including judges, appointed under the royal seal was vacated on the King’s death, is supported by no more than an opinion given in 1729 by an Attorney General of Barbados.

The work is obviously aimed at not only the legal profession, who will instantly recognise its worth, but also at intelligent, reasonable non-lawyers. There are, however, some passages with which one would not expect an accountant or a real estate agent to register an immediate accord. For example, dealing with the prerogative right in the Crown to the gold and silver below the surface of the land, he says: ‘Whether at independence any of the former colonies succeeded to these royal rights does not seem to have been tested by litigation, but one of the reasons why the United States did not acquire mineral rights as Sovereign rather than as proprietor of the territories of the south and west was that the right to mine was a prerogative personal to the King and not one of the *jura regalia* powers incidental to the exercise of sovereign power.’

Of particular interest to Australian readers will be the author’s treatment of the legal position of Aborigines. On land rights, all he says is that the ultimate title to all land is in the Crown, subject to the rights of native owners or occupiers whose rights cannot be extinguished except for legislation or surrender to the Crown. In this respect he accepts *Mabo (No 2) v Queensland* (1992) 175 CLR 1, although avoiding any argument about the application of the principle to the facts of that case. The doctrine of *terra nullius* gets short shrift. What is of more interest is the question of what law applies in disputes between Aborigines? There are two relevant decisions: *R v Murrell* (1836) 1 Legge 72, which held that Aborigines were subject to English laws, like everybody else, and *R v Ballard* (1829) NSWSC 26 which seems to hold the contrary *viz* that the Aborigines are exempt from such laws. Mysteriously the judges on both cases were substantially identical.

This is the author’s third important book. His first was *The Law of Company Liquidation*, by far the most important work on that subject, and the only company law work devoted exclusively to liquidators. The second was *The History of the Supreme Court of Queensland*, a work which was unfortunately self-sanitized before publication owing to the sensibility of some current Queensland lawyers about the behaviour of their ancestors. And now this book, his masterpiece.

R P MEAGHER