

BOOK REVIEWS

AN ANNUAL SURVEY OF LAW 1979. Edited by R. Baxt. Sydney, Law Book Company, 1980. Recommended retail price \$32.50.

This is the fourth annual volume in a series which, since 1976, has been providing a most valuable summary, in convenient form, of developments in Australian law at twelve-monthly intervals. The series, according to the preface to the original volume, was inspired by the dramatic speed of change and development in the law in Australia over the past few years, producing an ever-increasing volume of legislation, reported cases, and secondary material such as journals and digests. 'Valuable though all such publications are, they are not in general by their nature suited to give a general conspectus of change. It is therefore believed that, notwithstanding the already voluminous body of legal literature, there is a place for a work such as this which—at greater length than is possible in learned articles—surveys developments in major areas of law.' Four years later, it is clear that the need which Professor Baxt then identified has been amply met by the *Annual Survey* which, as the preface to the current volume states, 'has now become an established publication for the Australian legal community', recognised by the High Court and the Law Reform Commission.

There are, of course, excellent digests for keeping up to date. The *Annual Survey* in no way seeks to replace works such as the *Australian Legal Monthly Digest* or *Australian Current Law*. It is by no means as comprehensive, nor does it appear so frequently. What it does do, however, is to give, in convenient form, a survey of developments over a given period in all the major areas of law, each written by a specialist in that field. Since the specialist has already done the preliminary sifting, and can emphasise what is important and how new developments affect existing law, it is much easier for the reader to appreciate what are the important developments in a particular area than it would be if he worked only with the digests. As Australian legislation becomes ever more independent of English equivalents, and Australian cases assume an ever-growing importance, a work which stresses the Australian contribution to law becomes increasingly necessary, and this *Annual Survey* can worthily sit on the shelves alongside the established works of similar purport dealing with the law in the Commonwealth, in the United States and in South Africa.

There are seventeen contributions in the present volume—two more than in 1977 and 1978. There are now chapters on Banking Law and Practice, Land Law and Conflict of Laws. All of these were serious omissions in previous editions and all are to be welcomed: it should be noted in particular that the Banking chapter, since it includes letters of credit and other matters of an international nature, covers a considerable area. Also in the current volume are chapters on Constitutional Law, which did not appear last year, and Evidence, which has been missing for two years. Unfortunately, Industrial and Intellectual Property, Administrative Law and Family Law, which all appeared in previous years, are omitted this year—in two cases due to the illness of the authors.

It is the sort of problem highlighted by the last paragraph which is preventing the *Annual Survey* from being the total success it deserves to be. If the three omitted areas could have been inserted, then this volume, with its new additions, would have covered all the important areas of Australian law. But if every year something has to be omitted, for whatever reason, the work will never fulfil its true potential. Every effort should therefore be made to ensure that all the chapters appear every year. Moreover, it might add to the usefulness of the work if some sort of consistency could be imposed over it in various respects. At the moment the order of contributions appears to be random, and changes from year to year, as do the titles of individual contributions—the editor's contribution on Company Law and Securities, for example, has had four different titles in the four years of its appearance. As the series grows, use of it will be aided if the titling and order of the various chapters is consistent. Likewise the valuable bibliographies at the end of each chapter—it is suggested that all contributors should follow the example of those who write on Industrial Law and Succession and divide the material up into subject categories, rather than simply produce an alphabetical list. There is also some inconsistency in the extent to which individual contributors feel it incumbent upon them to cover case-law developments outside Australia—the chapters on Contract and Tort, for example, offer an interesting comparison in this respect.

All in all, however, and despite the difficulties referred to, this is a valuable work to have on one's shelves. It is beautifully produced and fairly free from printing and similar errors—although the chapter on Restrictive Trade Practices does manage to mis-spell the names of three of the members of the High Court in as many pages. One looks forward to the annual appearance of future volumes.

PETER HANDFORD

PROBLEMS OF CODIFICATION. Edited by S. J. Stoljar. Canberra, A.N.U. Press, 1977. Recommended retail price \$6.95.

'Comparative law' as a subject of study can be many things. The combinations of areas that may be examined—history, institutions, procedures, substantive rules—and of legal systems that may be involved, are almost limitless. It is very significant, however, that most of the writing in the English language on comparative law has been devoted to the comparison between the common law and the civil law systems of Western Europe, particularly France and Germany. Most of this writing has emanated either from England or from the United States, and it is not too difficult to understand why English and American writers have been concerned with Western Europe: in England the physical proximity to the countries concerned, the fact that the common law has grown up despite the pressure of civil law from across the English Channel, and now the fact that the United Kingdom has joined the other Western European nations in the E.E.C., all explain the importance of this area of comparative study; and in the United States the colonising activities of the French and the Spanish, as well as the British, resulting in the existence of civil law enclaves such as Louisiana and Quebec in the middle of political units dominated by common law, and the nearness of the Spanish-influenced legal systems of Central and South America, plus considerable Spanish influence in certain American states, amply justifies the interest in the civil law systems. In Australia, however, all this seems a little remote. The legal systems of surrounding countries are basically non-Western and hail from different traditions—although most have been touched, to some degree or other, by common law or civil law influences. It is therefore perhaps not surprising that very little literature on the European civil law systems has so far come out of Australia—and yet it is a matter for regret, because either the French or the German example has influenced every civil law system in existence, and therefore the study of the French and German legal experience is of great value.

In this context the work under review is of major significance. It owes its origin to an international seminar on Codification held in Canberra in September 1975, 'perhaps the first of its kind in this part of the world.' Four of the six contributions to this book originated in papers presented at that seminar. The contributors are internationally-renowned specialists in comparative law—André Tunc from the University of Paris, Helmut Coing from the University of Frankfurt and the Max-Planck Institute for European Legal History, Konrad Zweigert and Harmut Dietrich from the Max-Planck Institute for Comparative Law

in Hamburg, Wolfram Müller-Freienfels from the Institute for Comparative Law at the University of Freiburg, and Alfred von Overbeck from the University of Fribourg—a team completed by the editor, a distinguished Australian scholar. The result is an important contribution to the literature on comparative law in English and (so far as the present reviewer is aware), the first book civil law, apart from Professor Ryan's most useful *Introduction to the Civil Law*, to be produced in Australia.

Codification is of course a central issue in any comparative consideration of common and civil law, because most civil law systems have codes and most common law systems do not; and in recent years there have been many who have advocated codification for the common law. This is the topic taken up in the editor's contribution, which introduces the others: in a valuable discussion he discounts some of the alleged differences between code and case law systems, and concludes that code law and case law can be complementary—the rules eventually put into codified form were built up by case law, and further case law will be built up by the judges interpreting the codes.

The five pieces which follow are all devoted to the great European codifications of the late eighteenth century onwards: all the most important issues are covered, and so we really have not just a collection of essays, but much more—a systematic study of the European codifications. Helmut Coing's contribution, 'An Intellectual History of European Codification', is the most general: he examines the intellectual background of the codes from the sixteenth century onwards, and discusses the goals of the codifiers and the techniques by which they sought to achieve them. He summarises the various codifications, from the Prussian 'Allgemeines Landrecht' in 1794, through the great codifications of the early nineteenth century—principally in France, but also in Austria—to the important later codifications in Germany and Switzerland, and asks to what extent the expectations of the codifiers have been fulfilled. Not the least interesting aspect of his paper in his attempt to define what he understands by codification—he says that a code must be comprehensive, be made with the aim of unifying the law in a given jurisdiction, be systematic, lay down broad general principles and avoid dealing with individual cases. As he points out, given these essentials, modern civil law is a 'unique historical phenomenon'—Roman law was not codified in this sense, and one doubts whether the code-type statutes of England and Australia, with the possible exception of the Criminal Codes in force in certain Australian states, are true codes either.

Then come four further essays, each a detailed study of a particular aspect of European codification. Zweigert and Dietrich deal with a par-

ticular feature of the technique of the German Civil Code—the use of a ‘General Part’, containing rules which relate not just to property or obligations but to all areas of civil law—and there is a penetrating account of the extent to which similar techniques are found in the other codes. They conclude that, although the German General Part has defects of detail, the idea is sound. André Tunc deals with the French experience of codification—the French code was the first successful civil code and remains the most influential of all—and he deals in particular with its attempt to state general principles and avoid specificity, in accordance with the dictates of its chief draughtsman, Portalis. In his opinion the French code has been a great success. Wolfram Müller-Freienfels, in the longest of the papers, discusses whether commercial law and family law should be included in a civil code or should be separate—the civil law systems generally have separate commercial codes, but he feels that there is much to be said for merging commercial rules with the civil code as has been done in Switzerland and Italy. By contrast he thinks that, although family law has traditionally not been separated but has been contained within the civil law rules, there is much to be said for separate family codes as found in socialist legal systems. The final contribution returns to the theme introduced by Stoljar—that codes will require interpretation by judges (however much their compilers strive to avoid this and to make the code complete). In this respect the Swiss Code, articles 1 and 4 of which expressly recognise the need for interpretation and direct the judge how to go about it, has been generally praised, and Alfred von Overbeck’s essay discusses this aspect of the Swiss Code, one which has been paid all too little attention in previous writing on the European codes.

The essays in this book are of a uniformly high standard, as the reputation of their contributors would lead one to expect. The book is a very worthy addition to the literature in English on comparative law, and can also be read with much profit by all those involved in law reform activities. One could wish the footnotes were at the foot of the pages, not at the end of the chapters—though this may not matter much to most readers, since most of the references are to works in languages other than English, which are unlikely to be found in most Australian law libraries.

PETER HANDFORD

BAILMENT By N. E. Palmer. Law Book Company Ltd, Sydney, 1979. pp. cvi, 1056. Recommended retail price \$57.50.

If the task of reviewer of this book can be described as mammoth, that of the author must have been nothing short of gargantuan. Mr Palmer recognises, in his preface, contributions from colleagues but one can still only marvel at the fact there stated that the work took just three years to complete. Incidentally, the ups and down of an author of a legal text during the publication period are made abundantly plain to lesser mortals by the chronicles contained in the preface. It is probable that the two minor textual errors noticed are a product of this hectic activity.

A comprehensive text on bailment has been overdue since Professor Sir George Paton's work lost its first blush of youth and without any doubt at all this book will be welcomed by academics and practitioners alike. The changes of emphasis which have been wrought in our law of bailment since those days of the 1950s become instantly apparent upon even a superficial comparison of these two texts. For example the question of involuntary bailment has grown from just four pages to fifty-five pages of treatment while exclusion clauses which formerly occupied some twelve pages of scattered material now boasts a separate chapter of forty-five pages as well as other occasional material where relevant to a particular topic. But such statements do less than justice to this new work. Chapter XX on constructive bailments and Chapter XXI on bailment by attornment give proof of accomplishment of what the author expresses to be his primary objective 'to place the bailment relation within its proper perspective in the modern sphere of obligations.' The chapters on carriage of goods by road, sea, air and rail naturally go beyond bailment simpliciter but are happily integrated and although contributed by other writers, appear to maintain a uniform standard. There is much reorganisation and reassessment of the raw material in this work and the author's intellectual industry is obvious.

Dipping into the text indicates that intellectual capacity as well as industry was also brought to bear. In the segments which this reviewer has read carefully only the most petty, carping criticisms could be offered. No mention was found in the section dealing with trespass on account of the bailor¹ of the English Court of Appeal decision in *National Coal Board v. J. E. Evans & Co. (Cardiff) Ltd*² a case which may have added something to the total presentation but against this a quite extensive treatment of *Penfolds Wines Pty Ltd v. Elliott*³ is contained in the text, albeit, of course, somewhat spread over the various points of issue raised. Here, perhaps, lies one of the inherent strengths and weaknesses

of any large, comprehensive text—its general inability to put matters sufficiently succinctly for the beginner to grasp an overall perspective. In light of this it may well be that Mr Palmer was correct in doubting the entire suitability of this text for both students and practitioners in like measure. This text is very much the standard reference work rather than a student workbook.

Nevertheless the author, in line with his principle objective of 'rationalised placement' of bailment does not shy away from the complex conceptual issues. Whether or not one agrees with the author's enthusiasm for his own thesis of the consensual element in bailment, the treatment afforded the matter is both comprehensive and scholarly. The present reviewer has reservations about the apparent equation used of consent and agreement in this context and while energetic attempts to deny a necessary agreement element in bailment would find a sympathetic eye—it is contrawise upon the question of the place of consent in bailment.

This reviewer admits to an academic conservatism which is now totally unfashionable and while wanting his cases to have been matured a little in the cask of life so too with new texts. This is such a large work that only living with it will provide any proper assessment of it. Unlike some motor vehicles which seem to perform brilliantly in the hands of a professional road-tester but then present nothing but trouble after a few thousand kilometers of everyday use, there appears every reason to suppose that Mr Palmer's work will impress even more with use and will come to be recognised as a really first class work.

DEREK W. CHANTLER

¹ At 117-124.

² [1951] 2 K.B. 861.

³ (1946) 74 C.L.R. 204.