

ALEX CASTLES ON THE RECEPTION OF ENGLISH LAW

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In 1963, when he was already a Senior Lecturer in Law at the University of Adelaide, Alex Castles wrote his first important legal history article, called 'The Reception and Status of English Law in Australia'.¹ It was very much a creature of its intellectual times, but, particularly in its discussion of American law, it also showed something of the Alex Castles to come. In this paper, I intend to trace his views on the area which I think is his central interest, the reception and rejection of Englishness in Australian law.

The argument of Alex's article, so far as it related to Australia, was in the positivist tradition which was so dominant at the time it was written. With positivism came an attachment to England as the source of both the authority of Australian law and its fundamental contents. In the first paragraph, the article stated that 'Up to the time of their settlement each of the Australian States has the same legal history as Britain. The basic sources of law in both countries are the same.' There was no hint that the Aboriginal peoples of Australia might have had laws which were displaced by the actions and decisions of the British. Nor does the article question the notion that Australia was peacefully settled among a scattering of native peoples, but of course no lawyers, academic or otherwise, questioned these assumptions in 1963.

This article tells the official story of the reception of English law, one in which law-making powers, and the bulk of the law, were essentially English and trickled downwards to the colonies. It divides the received law into two classes, judge-made law and statute law, and argues that the courts in the Australian colonies had little difficulty in accepting the applicability of nearly the whole of the common law and equity. The article tells us that there were doubts about this common law reception in the earliest colonial history of New South Wales, when amateurs ruled the courts aided only by convict attorneys, but once professional judges arrived, they had little difficulty in accepting that the common law ruled in all its complexity. This was in contrast to the experience in North America, where there was pre-revolutionary resistance to the application of English law, and where local customary laws developed. The article concludes that there was 'a general disinclination on the part

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¹ AC Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 1 (hereafter 'Reception').

of Australian courts to take into account special local conditions in deciding whether the general principles of unenacted law should apply'.²

The records of the Supreme Court of New South Wales (which were then unavailable to Alex) suggest a larger degree of innovation and questioning than Alex and others of this period imagined. The first Chief Justice of New South Wales (1824-1836), Francis Forbes, had had, like Alex Castles, experience in North America. Relying on North American precedents, Forbes held both in New South Wales and Newfoundland (where he had also been Chief Justice) that the date of reception of statute law was the date of establishment of a local legislature, which was 1823 for New South Wales and Van Diemen's Land. Writing this early article, Alex was apparently unaware that it was Forbes' North American views about the date of reception that led to the passage in 1828 of the *Australian Courts Act*³ with its new date of reception for the eastern half of Australia (July 1828). Under this new date, New South Wales absorbed the first wave of English statutory reform (although there was much to come).

Alex had yet to spend hours in the Mitchell Library, where the judicial archives were then kept, reading the judges' notebooks and old newspapers with their hidden stories about the same kinds of resistance which Americans had discovered. We recently uncovered evidence of a very vigorous debate in the early Supreme Court of New South Wales about the reception of the common law. Alex's early article discusses *R v Farrell*,⁴ in which the court split two to one in refusing to accept the English rule against hearing the evidence of attainted convicts. In that case, Forbes uncharacteristically dissented, wanting to receive the common law rule into New South Wales law despite colonial practice to the contrary. There were other cases on the same point which Alex's article did not examine, including *R v McCabe* 1835, and, most importantly, *R v Gardener* 1829. In the latter, Forbes felt bound by the necessity of the situation to admit attainted evidence despite the firm common law rule to the contrary. The complexity of the situation was compounded by Forbes' refusal to admit Aboriginal evidence on the basis of necessity, much as he wished to do so.⁵ The other major area of debate concerned land law. Australian land law was always very different from that of England, and this, too, was reflected in the debates over the reception of English law. Forbes' general tendency was to stick strictly to English law when the landed rights of the Crown were in question, but to give strong support to colonial practices and customs when the case was merely between one subject and another.⁶ The problem for Alex at this time (as

² 'Reception', 9.

³ (1828) 9 Geo 4 c 83, s 24.

⁴ (1831) 1 Legge 5.

⁵ See *R v Fitzpatrick and Coville* 1824. All of these cases are online at www.law.mq.edu.au/scnsw.

⁶ Contrast *Brown v Alexander* 1828; *R v Steele* (1834) 1 Legge 65; and *Doe ex diem Antill v Hodges*, 1835. These differences are analysed by Bruce Kercher and Jodie Young, 'Formal and informal law in two new lands: land law in Newfoundland and New South Wales under Francis Forbes' (in preparation for a volume on the law of Newfoundland, 2000). (Jodie Young provided the analysis of the New South Wales cases.) Other reception of common law

it still is for practising lawyers) was that the published law reports gave a very small sample of cases in the Forbes period, when reception of law questions were most evidently alive. In this period, New South Wales was subject to the same kinds of debates that Alex had noted in North America.

The 1963 article recognises the considerable debate over the reception of English statute law, including consideration of whether the Act in question was merely local to England, whether it was generally suitable to the colonies, and whether it was suitable to the particular colony in question. Oddly, however, it does not include a discussion of *Macdonald v Levy*.⁷ This is the greatest of the reception of law cases in colonial Australia, and in overlooking it Alex missed the chance to discuss the views of a judge as passionately wedded to English law as the famous South Australian, Boothby, whose idiosyncrasies are examined in the conclusion of his article. Since 1788, interest rates in the New South Wales had often been very high, much higher than English law would have allowed. Following the words of s 24, the question in *Macdonald v Levy* was whether the English usury statute ‘can be applied within the said Colonies’ of New South Wales and Van Diemen’s Land. This was very simple, according to the Anglophile Burton J. Emphasising only the words of the statute, he asked himself a simple mechanical question, whether the particular law ‘can’ be applied, and it obviously could. Like Boothby, Burton believed that the common law and equity of England was the peak of perfection: no colonial practices, such as the acceptance of high interest rates, could derogate from the received wisdom of England. One fully accepted source of English common law was the customs of the country, but Burton said that no colonial practice could ever be elevated to such heights. Customs had to have been in existence since time immemorial, that is, time beyond memory. People remembered when the colony was founded, so none of its practices could be recognisable customs. According to Burton, nothing colonial could ever have the status of law, except through legislation.

Burton was over-ruled by his two colleagues, Forbes CJ and Dowling J. Forbes held that s 24 was merely a restatement of the old common law rule on the reception of law, with a new date of reception. Forbes’ concern in *Macdonald v Levy* and in other cases was to see that the law was applicable to the circumstances of the colony, that it was suitable to its conditions. Laws were necessary evils, he said, and it was important to see whether they were necessary: there was nothing worse than to be ruled by unsuitable laws. English usury laws were merely local to England he concluded, and inapplicable in the colony. The majority judgments show that even within the strict, official story of the creation of Australian law, there was room for great flexibility when the question was decided by a judge like Forbes or Dowling. As in North America, the early Australian courts, and Forbes in particular, often found ways to incorporate the local practices of colonial people. Forbes’ reception of law test under s 24 (like the common law test) concentrated on the circumstances

cases concerned whether an emu could be stolen (*R v Lee*) 1830; and the liability of the sheriff (*Lyons v Macquoid* 1835).

⁷ (1833) 1 *Legge* 39.

of the colony in question, unlike the mechanical test applied by Burton who merely asked whether there were any obstacles to the law being received. In inventing his test, Burton was overly reliant on a literal reading of the 1828 statute. Ironically, in its most recent consideration of the question, the High Court adopted what was in origin Burton's statutory mechanical test to a case involving the common law rule on reception: even when invisible to the people applying the test, Burton's strictly English ghost ruled as late as 1979.⁸

The restrictions operating on Alex in 1963 were both material and intellectual. New South Wales had no continuous series of law reports until the 1860s, apart from Legge's retrospective volumes published in the 1890s and it was Legge's reports he relied on the most. Western Australia and Tasmania are even worse off: Western Australia had no continuous reports until 1897, and Tasmania none until 1905. Operating within the constraints of published law reports, only the official story was evident to Alex, and that was restricted for the early years of the New South Wales Supreme Court by whatever the barrister Gordon Legge thought in the 1890s was still interesting.

The intellectual atmosphere of 1963 was stifling. At that time, positivism ruled unchallenged in the Law Schools and courts of Australia. The High Court still routinely followed even the decisions of the Court of Appeal⁹ in London, as well as those of the Privy Council and House of Lords. This was about to change: over the next generation, the courts, legal academics and, led by Alex Castles, legal historians were to question the automatic deference to England which had been in place for the previous century of high legal imperialism. By coincidence, this process began in 1963, when Dixon CJ led the High Court in holding for the first time that the House of Lords had made an error and that the High Court would not follow it.¹⁰ That was followed by the three-stage abolition of appeals to the Privy Council, culminating in the *Australia Acts* 1986. At the same time, a new generation of full-time legal academics, some of whom, like Alex, concluded their formal education in the United States rather than England, were looking for inspiration in places other than the official legal world in London.

Legal history, led by Alex Castles, became an important part of this process of looking for broader influences. In this 1963 article, we see a beginning of his interest in the development of colonial ideas about law. He had learnt in America that the process of adoption of law was not necessarily a simple one-way movement from London down, but that local people sometimes made local law. Over the next 35 years, he would lead legal historians to teach Australians the same. In this article, he pointed out the high degree of Australian deference towards England, but did not yet fully see the exceptions to it, nor that it would soon come to an end.

⁸ *State Government Insurance Commission v Trigwell* (1979) (1979) 142 CLR 617.

⁹ See *Sexton v Horton* (1926) 38 CLR 240, 244, as noted by Alex Castles at 'The Unmarked Bicentennial of Jury Usage in Australia and some Consequences of its Decline' (1990) 64 *ALJ* 505.

¹⁰ *Parker v R* (1963) 37 *ALJR* 3.

By 1971, Alex had obviously spent a good deal of time in the archival repositories around Australia. In that year he published the first general history of Australian law, modestly called *An Introduction to Australian Legal History*.¹¹ In the preface, he pointed out how limited his resources were, and that the aim of the book was to stimulate interest in the subject. His aim was now to show how law operated in Australia: 'Too often, in the past, our Universities have concentrated almost wholly upon English legal history without showing the relevance of this history to the past and present operation of the law in this country'.¹² He had not wasted his university's travel funds in going to these archival deposits around the country. The best parts of the book rely heavily on archival material. This time, he began to question the assumption that the Australian colonies were 'settled'. The short book does not contain a separate chapter on Aborigines, but it does include political, historical and other contextual material. The overall story Alex tells is of an early, rough frontier period in which English law was applied only loosely, gradually giving way to closer attention to English formalities. This did not always come automatically however. This book also begins to provide analysis of the struggle for trial by jury and other traditional rights of British people, later analysed in much greater detail by David Neal.¹³

The *Introduction* was a more sophisticated piece of history than the 1963 article, and includes material on Forbes' views on the date of reception of law. In it, Alex was now connecting his knowledge of American and Australian colonial legal history. That was also apparent in his chapter on reception of statutory law. Although it, like the chapter on the reception of judge-made law, was clearly based on the 1963 article, the book shows greater awareness of the possibility of conflict over the test to be applied. *Macdonald v Levy* now made an appearance in Alex's work. There was also fresh material on the foundations of judicial review of legislation, when the law-making powers of the governors were subjected to the principles of English law. Alex had become as much a historian as a lawyer. In this book, we began to read about the foundation of a different, if dependent, legal culture.

Four years later, Alex published an important article on the first two constitutional cases in Australian history.¹⁴ In 1824, Forbes CJ in Sydney declared that when the *New South Wales Act*, 1823 was properly interpreted, it provided for trial by jury in the intermediate criminal courts, the Courts of Quarter Sessions. His counterpart in Van Diemen's Land, Pedder CJ, declared precisely the opposite a year later.¹⁵ As Alex points out, this was a result of differing judicial styles and politics between the

¹¹ A C Castles, *An Introduction to Australian Legal History* (1971).

¹² *Ibid Introduction*, v.

¹³ D Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991).

¹⁴ A C Castles, 'The Judiciary and Political Questions: the First Australian Experience, 1824-1825' (1975) 5 *Adelaide Law Review* 294.

¹⁵ *R v Magistrates of Sydney*, 1824 (www.law.mq.edu.au/scnsw) and *R v Magistrates of Hobart Town*, 1825 (*Hobart Town Gazette*, 22 July 1825).

two. Forbes was always willing to look to grand constitutional provisions while adapting English principles to colonial needs, while Pedder (like Burton) was much more pedantic. Forbes' decision appealed to the emancipist party, who were pressing for the introduction of full British liberties in the colony, while Pedder became renowned for his attachment to conservative causes. Ironically, Forbes had the high ground here, so far as attachment to English institutions was concerned. When his liberalism required it, he could appear more English than those who were otherwise more wedded to strict Englishness. A few years later, the same applied to the differing reactions of the two Chief Justices to their governors' press laws. In the hands of Forbes, attachment to England was sometimes a tool as much as it was a heart-felt cause.

Alex's most important book, *An Australian Legal History*, was published in 1982. Even now, many of us still keep a copy on our desks to use as a general reference book. It serves that purpose very well, but it is much more than a collection of facts and rules. In it, Alex went further into uncovering the nature of Australian legal culture and its ambiguous relationship with that of England. It is a major piece of scholarship. The preface states his explicit aim to place the growth of law and legal institutions in the context of 'local political, economic and other factors'. Alex hoped that readers would no longer need 'to refer to English texts to understand the way in which important features of this system were transplanted in Australia'. He mentioned the growth of Australian legal history in the universities, and particularly acknowledged the work of John Bennett. In 1979, John and Alex published *A Sourcebook of Australian Legal History*, which included some extracts from newspaper accounts of cases on the reception of English law.

The 1982 book contains a richer account of the relationship between England and its Australian colonies than the *Introduction*. Even more archival, newspaper and secondary sources joined the lawyers' tools of cases and statutes. The analysis of technical reception cases was also much richer, and there was a new chapter on Australian statute law making. Alex began to muster evidence for judge-made law and colonial statute law going in opposite directions. As the judges became more deferential to England from the mid-nineteenth century onwards, the colonial parliaments became more adventurous in areas such as mining and land law, even if some of the impetus was lost late in the nineteenth century, and the imperial whip continued to be cracked over Australian colonial parliaments as late as the last decade of the century.

The final chapter of *Australian Legal History* contains one of the first extended treatments of the legal position of Aboriginal peoples in Australia. Its footnotes show that there had been little written on the subject before 1982, and that this chapter was based on a thorough reading of primary source material. Here was the great other, the main alternative to English law as the source of law in Australia. Were Aboriginal laws received into, or at least recognised by, the body of white law in Australia? A decade before *Mabo*, Alex pointed out that it was not until the middle of the nineteenth century that Aborigines were finally, if only theoretically,

recognised as British subjects and that this was urged by officials in London. Until then, the question of their status was subject to judicial debate in the colonies. Recent archival work¹⁶ has reinforced this conclusion about the ambiguous legal status of the peoples who were progressively displaced by both law and popular practice. In this chapter, Alex openly criticised the law and its role in perpetrating social injustice. The failure to recognise Aboriginal law was a failure of nineteenth century imagination, he argued. Alex was not openly influenced by such people as Doug Hay and Morton Horwitz, whose mid-seventies books had accelerated both the social history and critique of law, but this chapter showed the increasing decline of positivism in Australian legal history.

Between 1988 and 1992, Alex published a regular column in the *Australian Law Journal*, called 'Now and Then'. The journal is published monthly, and Alex's column appeared on average every two or three months. These short articles were an eclectic bunch, as we might expect, and some of them were on the reception of English law. In (1989) 63 ALJ 122, for instance, Alex discussed whether Magna Carta was law in Australia, including comments on such authorities as Alex's favourite *R v Magistrates of Sydney* (1824),¹⁷ AP Herbert's absurd inventions of the many cases called *R v Haddock*, and some very recent case law. Fittingly, the liberal Forbes CJ won the prize for the first recognition of Magna Carta in Australia. In other columns, we see Alex's keen interest in Australian law-making. In (1989) 63 ALJ 35, he discussed the poor state of formal law reporting in the colonies, but noted the significance of newspaper reports: as a result of the uncovering of this material, he noted, we may need to revise the view that our judges relied only on English precedents. 'From 1788 onwards,' he concluded, 'geographical, political, social and economic factors may have long made the ordering of legal affairs in this country much more indigenous in character than we may have comprehended'.¹⁸ He returned to the theme later in 1989, noting with some satisfaction that s 80 of the federal *Judiciary Act* 1903 now referred to the 'common law in Australia'.¹⁹

The growing importance of Aborigines in Alex's work is shown by their place in his next book (with Michael Harris), *Lawmakers and Wayward Whigs* (1987)²⁰ which is a history of law in South Australia. The ambiguities of British law's attitude to Australian Aborigines were now in chapter 1, where they were joined by a direct statement of the contents and fate of Aboriginal laws. Despite initial official concern that Aborigines be protected by English law and subject to it, and that their lands be preserved for them, South Australia was soon in the same position as the older colonies. Indigenous people in South Australia suffered the same patterns that

¹⁶ See *R v Lowe* 1827, *R v Ballard*, 1829, and *R v Murrell and Bummaree*, 1836, all at www.law.mq.edu.au/scnsw.

¹⁷ It appears again in (1990) 64 ALJ 507.

¹⁸ (1989) 63 ALJ 35.

¹⁹ (1989) 63 ALJ 490.

²⁰ A C Castles and M C Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia 1826-1986* (1987).

prevailed in New South Wales and Van Diemen's Land. South Australia's Cooper CJ wanted to recognise Aboriginal autonomy, like Forbes CJ and Willis J of the Port Phillip District, but the jealousy of the common law in guarding against its rivals, and popular opinion would not stand for it. Only three years after Adelaide was founded, two Aborigines were hanged for the murder of a shepherd. Once again, Aborigines appeared much more often as defendants than as the beneficiaries of English law.

Lawmakers and Wayward Whigs is much lighter in tone than Alex's other books, and much more like the kinds of amusing and fascinating conversations many of us have had with him. Like his ABC radio programs, 'New Law in an Old Land' (1991) it shows a much greater willingness than his previous written work to criticise the absurdities and complexities of English law. Chapter three touches on reception of English law, noting that the most important early judge in South Australia, Cooper, lacked the imagination to do more than apply the rules of English statutory and common law. This book is less concerned with the details of case law than with the broad structures of South Australian government and law. It contains a deliberate attempt to show the character of South Australian law, and its differences from both England and the other Australian colonies. Among those differences was the destructive impact of the self-righteous Boothby J. To Benjamin Boothby, even the slightest variation from English law led to the repugnance and thus invalidity of South Australian statutes. Despite this, the colony's legislature was particularly innovative in land law.

Alex's next focus of attention was Tasmania. In 1991, he delivered an Eldershaw Memorial Lecture on 'The Vandemonian Spirit and the Law'.²¹ In it, he argued that Van Diemen's Land people had their own distinctively independent, cynical character, and that this was closely linked to its law. Until 1825, Van Diemen's Land was legally part of New South Wales, under a double colonial bind, but Alex told his audience that its laws and legal institutions were more independent than might have been expected. He showed a new character in this speech, in his emphasis on departure from what the law was meant to be. In New South Wales, he said, criminals were executed for serious crimes, but the Court of Criminal Jurisdiction did not visit Van Diemen's Land until 1821, so an entirely separate, quite informal criminal law was developed. Only the most serious offences caused their perpetrators to be sent to Sydney for trial. A local custom was developed by the local magistrates, based on flogging and the pillory rather than the hanging and transportation that could only have been ordered by a superior court. The civil court showed similar customary practices, including imaginative devices to get around its £50 jurisdictional limit, orders to pay judgment debts in wheat, and allowing women a greater role than the common law provided. While some of these practices

²¹ A C Castles, 'The Vandemonian Spirit and the Law' (1991) *Papers and Proceedings of the Tasmanian Historical Research Association* 105.

had their parallels in other places and so were not as unusual as he implied,²² Alex argued that frontier attitudes to law lasted longer in Van Diemen's Land and became more deeply entrenched than elsewhere. They became part of the expectations of the community. Governor Arthur and Pedder CJ tried to impose their versions of law, but found that they could not eradicate the Vandemonians' independence, cynicism and resistance.

The Vandemonian speech is vastly different from the 1963 article. In just under 30 years Alex moved from positivism to a much richer cultural analysis of law, and, with it, from an emphasis on the formal legal position to a concentration on the distinctiveness of the Australian legal experience even when the rules of law were similar to those of England.

Alex has always been very generous in sharing his discoveries. One distinctive characteristic of his work is his determination to search out sources and make them accessible to others. Alex was not the first to use archival material, as the work of Evatt, Bennett and Currey show, but he has the broadest knowledge of it and is the most willing to share it. That culminated in his *Annotated Bibliography of Printed Materials on Australian Law* (1994). The most obscure texts are listed there, often with extensive commentary. His work on Tasmania has led to a very extensive database on its case law from 1824 onwards. This is Alex's personality in written form: he is always immensely enthusiastic and helpful, always offering a suggested reading or reference. And very often very amusing about law.

What was crucial was his opening up of legal culture, his part in the shift from legal professional to academic legal history, and from there to a richer understanding of law. He is not simply nationalist in looking for the distinctive nature of Australian law. The intellectual atmosphere of positivism, the formal imperial rules on reception, and the law's version of cultural cringe led most lawyers of his generation to look uncritically at the reception. In looking at Australian law making, by contrast, Alex eventually encouraged us to look at the kind of resistance that Said talked of in *Culture and Imperialism*. Alex showed us that imperialism was a dialogue, not simply the command of a British sovereign.

²² These practices concerning debt recovery and, apparently, women, were not, in fact, unique to Van Diemen's Land. See B Kercher, *Debt, Seduction and Other Disasters: the Birth of Civil Law in Convict New South Wales* (1996) chs 3 and 8.