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THE RECEPTION OF BRITISH LAW ABROAD

By B. H. McPherson,
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The author's preface dubs his work 'a short account of a very large subject'.[1] Given the physical dimensions of this substantial volume, that characterisation might seem unduly modest. But there can be no doubting the magnitude of the topic explored by Justice McPherson, for doctrines and institutions of law and government have proved to be Imperial Britain's most durable export to the rest of the world. English language and literature might run them close, but then the influence of English/ British law in, say, India, Hong Kong, Nigeria, New Zealand, or the Northern Territory hardly requires the populations in question to be literate in English, or any other language. This process of legal dissemination and reception, extending over many centuries and a very large portion of the globe's surface, is plainly a major theme in the history of the British Empire or, more broadly, that 'British World' which existed from the 16th to the late 20th century. But it has yet to attract anything like its due share of attention from the new generation of Imperial and Commonwealth historians, notwithstanding the remarkable revival over the past 15 or so years of scholarly interest in British colonial and Imperial history. The 18th-century volume of *The Oxford History of the British Empire* unfortunately exemplifies this general pattern by devoting separate chapters to migration, trade and commerce, religion, seapower, and warfare, whereas law and legal institutions receive no such distinct and generous treatment.[2]

Hence McPherson's study may justly claim to be filling a major historiographical gap, insofar as it provides a comprehensive account of exactly how English law migrated to 100 or more jurisdictions peopled by around a third of the human race. What all those people and places had or have in common is that, at some point between 1172 (when Henry II invaded Ireland) and 1997 (when Hong Kong returned to Chinese sovereignty), they or their ancestors came under English, British, or (occasionally) American rule. But the manner in which the common law

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1 B. H. McPherson, *The Reception of British Law Abroad* (2007) vii.

2 *The Oxford History of the British Empire*, W. R. Louis (ed), Volume II *The Eighteenth Century*, P. J. Marshall and A. Lowe (eds) (1998). The index provides a series of scattered page references under the general heading 'law'; perhaps we should not attach too much significance to the fact that Sir William Blackstone, who rates only three mentions in the entire 600 pages, appears somewhat confusingly under the headwords '(navigator and Governor) (lawyer)'.

was received — whether in North America, Australasia, the Caribbean and Pacific Islands, India, South East Asia, Cyprus, Palestine, or much of Africa — varied considerably. It is in recounting how and explaining why and to what extent these different modes of reception occurred that this book excels.

As the extensive introduction points out, transplanting English law involved complex and various transactions between metropolis and periphery. Because the theoretical distinction between conquered and settled colonies 'became something of a fiction by the effluxion of time',[3] it provides little help towards elucidating that process. Likewise, although the popular 'birthright' theory (that English laws and liberties travelled in the baggage of the original settlers and were thence transmitted to their descendants, and indeed to all other inhabitants of a given colony), gained authoritative status by virtue of a Privy Council ruling in 1722, most jurisdictions owe the 'Englishness' of their laws today to positive legislative enactment, whether by colonial assembly or (more rarely) Imperial Parliament. So legal doctrine in itself cannot furnish a full or reliable guide to the process of reception as it occurred during the four centuries after the establishment in 1607 of the first permanent English settlement at Jamestown in Virginia. Instead what is needed, and provided here, is a painstaking account of the major component elements in that process, starting with the extra-English lands and territories, and the powers or sovereignty exercised over them, both by original inhabitants and colonial dispossessors.[4] McPherson then proceeds to survey the main institutions of English/British colonial government;[5] the structures of colonial self-government;[6] colonial concepts of nationality, allegiance and protection;[7] the laws and liberties claimed as a colonial birthright, and the ramifications of those claims;[8] the various forms of legislative enactment of English law;[9] the geographical extension of English law from the original 13 colonies and the United States of America to the second British Empire, including India and South East Asia;[10] modes and formulae of reception at common law and by statute, including statutes as common law;[11] limits to, restrictions on, and exclusions from reception on grounds of unsuitability, etc.;[12] the judicial machinery which administered the received laws, of which it was itself a part;[13] and the means by which colonial practitioners gained knowledge of those laws.[14]

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3 B. H. McPherson *The Reception of British Law Abroad* (2007) 15.
4 See Ibid Chapter 2.
5 See Ibid Chapter 3.
6 See Ibid Chapter 4.
7 See Ibid Chapter 5.
8 See Ibid Chapter 6.
9 See Ibid Chapter 7.
10 See Ibid Chapter 8.
11 See Ibid Chapter 9.
12 See Ibid Chapter 10.
13 See Ibid Chapter 11.
14 See Ibid Chapter 12.

The result is an authoritative, wide-ranging, well-organised and clearly written work of reference. Although presented in conventional legal format (complete with numbered sections and table of cited cases and statutes), *The Reception of English Law Abroad* also constitutes a fine example of the now regrettably unfashionable genre of constitutional history, albeit presented within an international rather than merely national framework. The author's approach is generally abstract and analytical, according little prominence to individual human agents. This occasionally imparts a somewhat monumental flavour to his book, notwithstanding the far from stodgy prose in which it is written. For example, it would have been at least interesting to learn more about Richard West, the first permanent counsel to the Board of Trade, and some of his distinguished successors, among many other characters who appear only as names. But there is little impenetrably technical language, even if non-lawyers might encounter some difficulty with 'proceedings in court for *scire facias*'[15] or 'the form of habendum'.[16] Readers of all persuasions will be fascinated by some of the oddities scooped up in McPherson's capacious historical trawl, such as the judicial system of early 19th-century Barbados, where 'some fifty judges conducted ten or more distinct civil courts',[17] and the contemporaneous constitution of Liberia, which provided 'for the application, subject to local conditions, of the common law as set forth in Blackstone's *Commentaries* ...'.[18]

They will also surely appreciate such pithy observations as 'in England the law of land was the law of the land',[19] and '[n]othing so surely focuses the mind on a topic as having to teach it to others'.[20] A powerful evocation of the realities of 'judicial appointments to small communities in remote colonies' is worth quoting at some length:

> Lacking the constraints inherent in larger and more collegiate institutions, while at the same time combining all the status and powers of the courts and judges of Westminster Hall, sole judges in far-off places sometimes fell victim to delusions of their own grandeur. While unwilling to interfere with fines for contempt imposed abroad, the Judicial Committee [of the Privy Council] remained conscious of the need to keep a check on the arbitrary exercise of court powers, and to supervise intemperate use of judicial authority produced by frayed tempers on steamy afternoons. The common law somehow succeeded in surviving its traducers as well as the worst of its ministers abroad.[21]

15 Ibid 61.
16 Ibid 68.
17 Ibid 417-18.
18 Ibid 317.
19 Ibid 58.
20 Ibid 487.
21 Ibid 471.

Although some 'judicial heroes and villains' are identified in passing, the common law — difficult to define but, like the proverbial elephant, easy to recognize — is the central character of this book.

The Supreme Court of Queensland Library must be commended for producing a volume both handsome in appearance and largely free from typographical error. However, it is unfortunate that the index contains no entry for Sir Elijah Impey,[22] while the 'Supplement' to Book I of Blackstone's *Commentaries* was surely published in 1766, not 1769.[23] One might also regret that the author did not allow us the benefit of a concluding chapter or afterword, which could have helped tie together some of the various themes developed at earlier points in his survey. But these mere quibbles in no way detract from the permanent value of this massive contribution to a missing chapter in the history of the English/British, and their laws, in all the places where those laws are still to be found today.

22 Ibid 349.

23 Ibid 371; See C. S. Eller *The William Blackstone Collection in the Yale Law Library* (1938) 2.