Book Reviews

Bruce Kercher, ***Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales,*** Sydney, Federation Press, 1996.

I like legal storytelling - it takes a case from the mundane sphere of tedious legal doctrine and principle and dumps it straight in, the much more immediate and interesting, sphere of viciousness, stupidity, dishonesty, gullibility, good and evil which is a fair representation of the human condition. For an instant and graphic example, one can do little better than examine the decision of the High Court of Australia in *Louth* v *Diprose* (1992) 175 CLR 621 and the articles by L Sarmas (1994) 19 *Melbourne ULR* 701 and P Heerey, (1996) 1 (3) *Newcastle LR* 1, which followed hard upon it, to see what I mean! Bruce Kercher, in this vastly entertaining and informative book, has provided all of us who are truly interested in the human condition with a substantial array of legal stories, all of which are documented, and which touch on that greatest of all mysteries. As regards the stories told by Professor Kercher, I can do little better than regress to my undergraduate studies in Tort law when I remember that distinguished scholar, and (not long after) my friend, Gerald Fridman saying that, were someone to include the facts of *Behrens* v *Bertram Mills Circus* [1957] 2 QB 1 in a film or novel, it would have been instantly dismissed as incredible! Many of the stories to be found in this book definitely fall into that category.

As Kercher points out in the preface to *Debts etc*, most of the material is gathered from court records and the *Sydney Gazette*, all, even for the times, sober and responsible documents. The book, as is likewise noted in the preface, had its genesis as a Ph D thesis in the School of History, Philosophy and Politics at Macquarie University and the author acknowledges his debt to his supervisor and the examiners of the thesis. As someone who has, many times, undertaken these tasks, I can only wish that I had been faced with such a wonderful tapestry of tales to read, analyse and comment upon. This brief review must, perforce, suffice.

But, finally, to the stories themselves: the book is divided into nine chapters including an introduction as well as a bibliography and index. Although I am tempted to analyse the book and its stories comparatively chapter by chapter, that would be a substantial exercise and would, most probably, amuse the reviewer more than it would the readers (or editors) of this journal. Hence, I will seek to examine particular topics as they

present themselves. The aim of the book, as set out in the introduction (p xix) is the examination of the development of civil law in mainland New South Wales from 1788 until 1814 - it, thus, follows that there are some fine and entertaining stories to be found in its pages.

Given some interesting instances in modern New South Wales law (see R Watterson (1993) 67 *ALJ* 811), a useful start is provided by an instance from defamation law. Richard Atkins had been appointed as Judge Advocate on a somewhat fragmented basis from 1796. He was, in Kercher's own words, "... the most important of the early judge advocates, the longest in office, the most deeply involved in political and constitutional disputes, and the most creative in the in the making of civil law." As might have been expected from the times, he had no formal legal, or other professional, education and had left England largely to evade creditors. Despite his apparent industry, he was stridently criticised by his contemporaries culminating, in 1807, by Governor Bligh's describing him as, "... a disgrace to human jurisprudence." He brought a defamation action based on an allegation, not by Bligh, that he was a swindler. However, though he was successful, his reputation after the action would have certainly been worse than it had been before and, most certainly, exposed the extent of his indebtedness. As Kercher rightly notes (at 34) it is all but impossible, from contemporary evidence, to assess the extent of Atkins's deficiencies. Although he might have been (at 32) an alcoholic who knew little law and was in constant debt trouble, there is equally no doubt that he had a vision of law and its administration which might not be out of place today. The function of the legal system was, he said, in 1792, "To silence the voice of deception, to shelter the weak and innocent from detestable attacks of fraud and calumny; to protect the poor and defenceless [*sic*] from the fatal influence of the rich and the great. In a word to render the law, the certain clear and disinterested safeguard of the honour, fortune and lives of mankind, is a glory, which a good citizen cannot purchase at too dear a rate."

Inevitably, again, in such early times, defamation actions could, as the author points out (at 99), be both deeply personal and just as revealing of social attitudes. That is instantly represented by the case of *Lewin v Thompson* (1799-1800) which was based on gossip that the plaintiff's wife was a whore. In the event, the action was successful, with £30 being awarded by way of damages. Since the claim was, in essence, a moral one and there was no allegation of special damage, the matter, as Kercher notes (at 100) was not truly justiciable at common law. Kercher's view of the case is that it demonstrates, that, "... sexual reputation and the dignity of social position were important in a place as libidinous as Sydney..." From a more contextual standpoint, the *Lewin* case seems to be a part of such primal defamation actions as *Marshall* v *Chickall* (1661) 1 Sid 30, where, like *Lewin*, the charming phrase, "pocky-ars'd whore" was held, *inter alia*, to give rise to liability. It is of course, text-book mythology that vulgar abuse will not give rise to liability in defamation; in more recent

times, the decision of the English Court of Appeal in *Cornwell v Myskow* [1987] 2 All ER 504 is sufficient contradiction of that view, even though the abuse of an alleged musician was both particularly personal and personally abusive!

Yet there was more to the law of torts, even in early New South Wales, than the law of defamation. Chapter 5 of the book is appositely entitled, "Pigs, Storms and Fires." The first section deals, as the title suggests, with animals (often pigs) roaming out of control. It is clear, as the author comments (at 111) that popular custom carried with it more effect than official law. Legal responses to animal behaviour is a continuing problem for, as R E Megarry (*A Miscellany at Law*,1955, at 281) puts the matter, "... the animal world has its athletes and delinquents." Fortunately, perhaps, the usual problem which the lawyer and, indeed, the policy maker, is faced today is not rampaging pigs or cattle but dogs. If Kercher is to be credited, dogs had not yet given rise to the besetting problems which now seem to attract public attention. (See D Lester, "Who Me?" *Good Weekend*, May 10, 1997). From the perspective of the legal historian, one is well reminded of Eliot J's comment in *Filow's Case* (1520) YB 12 Hen 8, Trim., pl 3, fo. 3 at 4 that, "Chien est un vermin." (The writer of this review is allergic to dogs.)

Given the nature of the society which Kercher describes, it would have been surprising had not Judge Advocate Atkins, in *Lord* v *Fitzgerald* (1804) not imposed a very strict kind of liability in respect of fire causing damage. After all, as *Proverbs* XXVI, 17-18, states, "He that passeth by, and meddles with strife belonging not to him is... [a] mad man who casts the firebrands, arrows, and death." At common law in England, liability for damage by fire was more than a little unclear: in *Collingwood* v *Home and Colonial Stories* [1936] 3 All ER 200 at 203, no less a figure than Lord Wright MR had suggested that the *Fires Prevention (Metropolis) Act* 1774 changed the law from imposition of strict liability. On the other hand, in *Tuberville* v *Stampe* (1697) 1 Ld Raym. 264, Holt CJ seemed to have assumed that liability was based on negligence. But, in that context, what is negligence? Kercher (at 114) observes that the word was first used in a civil case, *Marsh* v *Julian*, in 1810, a case which was an action between two women over the death of a mare which had died after having been improperly put to a stallion by the defendant's servant. The claim was described as an action on the case for negligence and the plaintiff was awarded £80 by way of compensatory damages. As regards liability in respect of damage caused by fire, the author writes that, "This was not strict liability much less than the almost absolute liability which insurers undertake, but it was a high standard of obligation. In an industrial setting it would have required the whole workplace to be kept safe even against trespassing children, though only in places where lawful visitors might go." These cases, as I have long thought, help to demonstrate that more can properly be ascertained about the nature of particular societies from the operation of the so-called "core" subjects - *Contract, Tort, Crime*

and Property - than from courses in *Law and Society, Sociology of Law* and so on.

As regards property, the great social historian R.H. Tawney (*The Acquisitive Society*, 1921, ChV) comments that, "Property is the most ambiguous of categories. It covers a multitude of rights which have nothing in common except that they are exercised by persons and enforced by the state." More directly legally, Oliver Cromwell is reported as having described the English Law of Real Property as a "tortuous and ungodly jumble". How seriously one takes either or both of the statements must essentially depend on one's ideological standpoint as recent disputes over the *Mabo* and *Wik* decisions clearly demonstrate. Chapter 6 of *Debts etc* is entitled, "Chaotic Land Titles, Strange Currencies and the Failures of the Autocrats." and the author notes (at 123) that all of the early Govenors' attempts to regulate the sale of land failed, and (at 125) that there were at least four interacting views of the legitimacy of conveyancing in early New South Wales. It appeared (at 126) that judge advocates regularly and frequently ignored Gubernatorial Orders for registration of title. Kercher suggests that the reason for this state of affairs was that custom had become entrenched and could not easily be overturned and it was not until 1817 that it was held that registered interests in land took priority over previous unregistered titles. It should be said that observations of this kind are by no means unique to Australia : as R.E. Megarry,(*A Second Miscellany of Law*, 1973 at 290), notes, the City of Oxford in the American State of Georgia conveyed in 1929 to an ancient tree the 1, 256 square feet of land on which it stood, together with a house built on the land. The tree, a large oak thought to be 200 years old, owned itself, assuming the conveyance to be valid. At English (and, presumably, Australian) law, the conveyance would not be valid (see *Lord Paget's Case* (1859) 1 Leon. 194 at 195 *per* Manwood C.B.). Because of the uncertainty of legal titles Kercher notes (at 129) that much of the land in early New South Wales had little value. He also (at 130) interestingly comments that, "The colony's land titles were just as confused as those in England, but for entirely different reasons. Where tradition and aristocratic interests combined to create a labyrinthine land law in England, the obscurity of titles in New South Wales was based on an egalitarian approach in land law. Land which had only a low value was dealt with casually, and bought and sold as easily as a horse, and sometimes much more cheaply. This combined with high levels of illiteracy, the lack of a large-scale legal profession and a willingness to disregard official Orders, led to local ways of doing things."

From land, both then and now, it is an easy step to the regulating of currency and, immediately in his consideration of the issue, the author (at 131) points to the failure of the early State Governors to regulate the issue of promissory notes. The system developed, of course (at 132), because there was insufficient currency in early New South Wales to provide for its rapidly developing trade, the main sources of sterling

being bills drawn on the British territory and regimental agents in London. The promissory note system was based, Kercher emphasises (at 133), on the honesty and creditworthiness of the convicted criminals of New South Wales. A particular difficulty was caused by forgery, as might well have been expected. Inadequate record keeping has long led to legal problems, peculiar litigation and just as peculiar solutions. Most evidentiary presumptions (marriage, regularity, legitimacy etc.) were derivative from necessarily uncertain record keeping. The crime of forgery has, of itself, caused curial difficulty, particularly where government instrumentalities are involved both directly and indirectly (see *Welham* v *D.P.P.* [1961] A.C. 103, and the cases referred to therein).

All unnatural societies have their own unofficial currencies: in prison, as anyone who has seen the Ronnie Barker series *Porridge* will know, the currency is cigarettes ("snout") and, at the strange private school this reviewer attended, it was file paper. In early New South Wales, Kercher notes (at 143*ff*) that many bargains were settled by an exchange of goods (see *Jenkins* v *Lambe*, 1807). One matter of interest referred to by the author (at 144) was that rum was not an important item of currency in early New South Wales and very few promissory notes enforced by the Court of Civil Jurisdiction were payable in alcohol. The main use of alcohol as currency was as *part* (reviewer's emphasis) of the wages of workers. Nothing much is new; in 1618, a motion that "un draught de beer" could be regarded as satisfying an award of half a farthing's damages in respect of a trespass failed (*Marsham* v *Buller* (1618) 2 Rolle 21)

In Chapter 7, Kercher examines "The Birth of Contract" in early New South Wales and comments on the case of *McArthur* v *Thompson* (1806) which, he writes (at 148), was an important step towards a general laissez faire theory of contract law. Yet this case, which represented a struggle between two visions of New South Wales - one of capitalist traders and the other of small farmers seeking a fair price for their crops, once again tells us (above) that one can learn significantly about the interstitial nature of society from a study of daily legal transactions and litigation. As Kercher states (at 151), "Speculation became the colony's great commercial game, the value which bound people together..." The major thrust of this chapter is the development of *expectation damages*, which were one of the key indicators of the model of contract law in the colony. Surprisingly perhaps, in view of Kercher's statement in the previous chapter (above), many of the cases involved the level of alcohol consumption on ships. At the same time, notions which later became traditional in the common law of sale can be seen to be developing.

Contract law was relevant to social status and Kercher (at 161) states emphatically that early New South Wales law was biased against workers. Unpaid workers were the least successful in pressing their claims, as opposed. In the ordinary (if such then existed) employment situation, work contracts, like land contracts, were all too often not in writing. A graphic example is provided by *Bartlett* v *Quinn* (1812) where the

representative of a deceased worker lost an action for work done because he was illiterate and had kept no books. The memorial of account had been acknowledged by the worker's wife who herself was illiterate and the Court held that that was insufficient. Perhaps *Bartlett* v *Quinn* might properly be regarded as the precursor of Sankey L.J.'s comment on illiteracy in *Thompson* v *L.M. and S. Railway Co* [1930] 1 K.B. 41 at 56! Although that sad decision ought now to be of historical, rather than practical, significance one wonders if, in the present socio-economic climate, it may well not rear its vicious and condescending head again. Inevitably, as Kercher points out (at 169), sellers of goods won their actions whereas workers lost. The first reason was the rule that parties to litigation could not give evidence in their own cases and the second was the product of the first: shopkeepers and merchants normally kept account books and employed people who were able to give evidence in Court, whereas workers did not. Yet again, and this unhappy fact is being increasingly replicated today (despite the heartening stances of Nicholson C.J. and Sackville J., who, as might be anticipated, have been roundly reviled in the pages of the appropriate press), the men who made those decisions (at 170) were merchants and traders themselves. Kercher states (at 171) that judicial bias was not the sole explanation for the difference between the work and goods decisions of the civil court - but, it was a factor!

On the general issue of contract law in early New South Wales, Kercher (at 179) states that it was in a transitional state, begin influenced by a mixture of paternalistic and laissez-faire attitudes which sent a favourable, though not undiluted, message of support to traders. Even more telling, perhaps, is his concluding comment that, "Rather than standing outside the market, the law was an integral part of it. There can be no market without law; the market was as much constructed by law as by commercial practices. Capitalism emerged very early in the history of New South Wales and the law was an integral part of its development." That statement, of itself, must surely go some way towards explaining later New South Wales history.

Chapter 8 is entitled "Debt and Debtors' Prisons" and begins with the telling statement (at 180) that, from the beginning of European law in Australia, "... wealthy debtors have often managed to get around apparently punitive debt recovery laws, while poor ones have been treated harshly." The existence of the Fleet and Marshalsea prisons in London in contemporary times as well as, in more recent Australian history, the exploits of such as Bond and Skase suggest strongly that the period which Kercher describes and analyses is part of a readily observable *continuum*. It is not surprising, though, that Kercher deals, first, with the harsh regime which New South Wales had inherited from England, even though (at183) English bankruptcy laws were not applicable in New South Wales.

However, one matter is clear: conditions in the New South Wales

Debtors' Prisons were much more bureaucratic than those in England, even though legal procedures were generally very much slacker. It, *ipso facto*, followed, in Kercher's words (at 187) that, "Debt recovery laws were a key site for the struggle between two visions of the colony: whether it would be a place of encouragement for emancipated farmers or one dominated by trade". In that context, Kerchers examines the detention of debtors, the enforcement of judgments and the insolvency of debtors. The longest of these discussions relates - perhaps, not unsurprisingly - to the enforcement of judgments. In that context, particular note should be taken of the "flexible" approach of early New South Wales Civil Court, which can be vividly contrasted with the strictly mechanistic approach (at 192) of the English courts at the same time. The aim of the New South Wales procedures was to try to ensure that debtors were kept out of prison without necessary cause. Yet that policy was not to last long: by 1800, some 109 judgment debtors had been immediately imprisoned out of a total of 233 relevant cases. This was, as the author (at 195) notes a remarkably high figure, given that, it was at the time, the population of the colony was only a little over 3,000. At the same time, it was also clear that only (surprise, surprise!) the poor who were being imprisoned and something of a reversion to the earlier practice occurred in the following year. However, English practice was reintroduced by Ellis Bent in about 1814 and Kercher comments that (at 198), though it might have been a legally orthodox position to take, it could not truly be seen as a neutral one as between the parties. Bent, states Kercher, showed two preferences: for English orthodoxy and for creditor autonomy. Although the present Commonwealth government would not express themselves in those terms, the philosophy would not seem to be too foreign.

The final chapter is entitled "Transferring Law to the Bush" and, initially (at 214-5) outlines the eight distinctions which existed between English and New South Wales civil law at the relevant times. But, even so, the author is at pains (at 216) to point out that it is important not to exaggerate the distinctive nature of New South Wales law. In other words, New South Wales was a largely dependent legal culture, even though it was impossible by reason of material and social conditions, to reproduce English law in New South Wales. "It is," Kercher writes (at 217), "as productive to compare New South Wales law with that of other frontier societies as it is to compare it with English rules: it was part of a broad pattern of frontier law". Without knowing it, frontier judges across new worlds reacted to similar experiences in similar ways. However, each frontier society had its own unique blend of laws. No other judges faced quite the same combination of legal and social problems as those in the Australian penal colonies." Two matters arise from that statement: first, unless one seeks to compare like with reasonable like, the whole existence of comparative law is called into question. Some years ago, I referred, (1981) 14 *C.I.L.S.A.* 259, to an exercise which I designated as

contrastive law, where comparison is attempted between legal systems whose societal origins are so different as to make any comparison meaningless. Kercher is surely right to emphasise the relationship between frontier societies although, second, I am far from certain that the last sentence is wholly apposite. I wonder whether the legal histories of, say, Louisiana, Texas and Quebec would not have as many, though different, combinations of legal and social problems.

The book concludes by seeking to draw together the elements in two key areas: the limits of official power and commerce and law. As regards the first, he considers (at 219) that the meaning of "law" was subjected to a largely unarticulated debate between the Govenors, the judge advocates and the people of the colony. In particular, Ellis Bent had taken the Imperial view; that is, that it meant the law of England. This had the effect, Kercher suggests (at 219) of the loss of locally developed and explicit policies which had favoured small landholders and convicts. The narrow view adopted by Bent inherently involved a preference for an exclusive and wealthier group. In his own words, "For those near the bottom of the social structure, the coming of a more English legal system was a shift away from freedom rather than towards it as they lost the paternalistic protection they had come to expect."

In the area of commerce and law, Kercher concludes that the frontier period (*i.e.* up to 1814) was no golden age for the poor, with all but the wealthiest debtors being required to pay everything they owed. However, the bourgeoisie, Kercher argues, did not, except in cases involving workers, act in a nakedly biased fashion. The relationship between law and commerce was complex and could not be explained solely either in terms of a reflection of commercial requirements and local conditions or as being a transplant of English principles and doctrine. As Kercher comments (at 221), although commerce and law, "... reflected and influenced one another, neither was simply caused by the other. Despite being a part of the same interlocking system, they fell out of step on occasions. Markets sometimes boomed despite apparently hostile laws, and laws were sometimes retained despite changing social conditions."

Yet, social forces notwithstanding, there is yet another great imponderable in any historical study - that is, the role of human beings themselves. Kercher roves around Governors and judge advocates as he must, but it is the role and origins of the individual members of the legal profession which flit in and out of the narrative. By far the most interesting of these individuals is George Crossley. Crossley arrived in Sydney in 1799 having been transported. As Kercher comments (at 60), he showed something of his character on the voyage to Sydney : though he was being transported as a convict, he brought a large quantity of goods from a merchant at the Cape of Good Hope, drawing on the credit of a London pauper whom he claimed was a wealthy merchant. After this illustrious beginning, Crossley can be found advising both Bligh and Atkins and appearing generally for people of substance. As one of the colony's most

"dishonest and overcommitted" debtors, he managed totally to avoid prison (at 205) and so George Crossley's saga continues. It does seem to me that this extraordinary career is worth a significant biography, at least more substantial than the journal articles to which reference is made in the bibliography. Perhaps Bruce Kercher could next turn his significant talent to such an enterprise!

It will be readily apparent that this reviewer found *Debt, Seduction and Other Disasters* to be quite fascinating. It deals with a period of Australian history of which, hitherto, little had been systematically collected. I found it intriguing, pellucidly written and well documented - it is hard to say more about a work of legal history. Bruce Kercher is to be warmly congratulated!

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