BOOK REVIEWS

PROBLEMS OF CODIFICATION, *edited by S. J. Stoljar* (Australian National University, Research School of Social Sciences, 1977), pp.i-iv, 1-150.

The title "Problems of Codification" could mean either the difficulties one would face in bringing about a codification, or the difficulties that have shown up in codification already achieved. This book deals mainly with problems of codification in the second sense; and in particular with the experiences of the German, French and Swiss codes.

The German, French and Swiss codes! "Good Lord!" the ordinary Australian lawyer would exclaim—if he had got as far as this in reading this review—"what a book to put before me! That's not going to help me much in defending someone in the magistrate's court or in drawing up a will or in nutting out some problem of our constitution." And he would not consider looking at it. That would be a pity. This is a very readable, very clear, very enlightening book.

It is true to say, surely, that most (almost all?) practising Australian lawyers know little of legal systems other than their own. It is true that most, if they think about the code systems at all, wonder how on earth they can work (no case law, no precedents and all that—or so they think). I believe that quite a lot of us are sometimes a little uneasy in our ignorance, feeling in varying degrees that if we know nothing of any system but ours, then we can be too narrow and can lose a good deal which the experience of other ways of thinking and of practising could give us. But we find it all too heavy to start reading about, and we are too busy anyway. (There are, of course, many also who are so deeply down in their narrow rut that they care for nothing else.)

This book is written for the non-academic reader. The editor, it seems, stood with a whip over the contributors, thundering, "Be clear! Be readable!" And his voice must have been formidable, because clear and readable the contributions are. Their clarity and readability are not consistent throughout, but a very high average is maintained. Let us look at the articles in a little more detail.

The editor himself, Professor Stoljar, begins with "Codification and the Common Law". The pros and cons of each, the different minds that lie behind them, the different work that judges in each system do, the identification of the real difference between the two—these are all very well done. A good many commonly believed-in bubbles are pricked. The biggest such bubble is the assumption that code and case-law are mutually exclusive and must belong to opposing systems. "The real question no longer is whether we are to have either codes or cases, it is rather in what form, systematized or not, case-law is to go on." (p.12) And:

> ". . . there is no fundamental opposition between the two; on the contrary they can perform complementary roles in that case-law constitutes the main preparation for a code just as it continues it, even makes it survive . . . while case-law, in its turn, cannot in the long run do without some codifying work being done on it." (pp.13-14)

The ultimate distinction between the two "seems to arise mainly from the fact that there may be areas of law which we think could and should be clarified rather more instantly or more quickly than they would otherwise be and so clarified by a concentrated and concerted effort of experts in the field" (p.14).

If the reader had time to choose only one of the articles or wondered where he should best begin, then I would advise him to turn to "An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries", by Professor Coing of Frankfurt. A somewhat forbidding title, perhaps; but the essay is not hard to read, and the reader will be the wiser afterwards. The history is very gently presented, but all a beginner needs to know is there. One could single out much for comment, but I will make only one point. The author shows how the most important and most successful codes have grown out of the experiences of their past, both legal and social, with all the richness and wisdom that can bring; and yet can thereby stand in danger of being fixed in that past and of trying to hold to that past in a fast moving world. Constant legislative amending of the code would do more harm than good, would rigidify in fact rather than render adaptable. The answer lies in giving the judges a guided freedom of adaptation in those areas where this is suitable.

> "An adaptation of codified law by judicial case-law will be possible as long as the basic values on which the code rests remain accepted in the society concerned, however much social conditions may otherwise change . . . However things become very different where there occurs a complete change in the moral or social convictions in a society. For if such a fundamental change does occur, the point is reached where it becomes impossible for the judge to respond to new demands by case-law. At this point, indeed, it will be necessary for the legislator to step in. . . ." (p.27)

The title of the third article, "System and Language of the German Civil Code, 1900", might also lead the ordinary reader to think that this is not for him. But it will well repay reading by anyone. It fits in well with the matter presented in the two preceding articles. A number of comparisons are made with our own system—see especially pp.45-46. Comparisons are made also between the two authors' own German Civil Code and the Swiss Code, with the prize on the whole being given to the latter for its fresher language and the greater creative freedom it allows to judges.

The "French Experience" is well presented by André Tunc of Paris in the fourth essay. It makes many of the general points that the others do. The writer emphasizes that the test of a code is whether it leaves the law flexible (pp.69-70); "codification does not freeze the law" (p.74).

Next comes an article on the particular problems of including commercial law and family law in a civil code. These are obviously less general questions and may be of less interest to many readers; but they are real and living questions, and personally I found that article very interesting. One can note here again the overall problem raised by the other writers:

> "The only danger of a code is that we may buy legal certainty at the price of too much restriction on development, but that seems

> the price of every code, indeed of every statute with some claim to comprehensiveness. Nor should this danger be overrated, provided we have capable courts. Even in England, it has recently been said, the courts spend already most of their time interpreting statute law: 'In truth an English judge is already almost in like case with his continental brothers whose function is to interpret and apply enacted law'." (p.122)

The collection concludes with a short article on the Swiss Code. I will touch on only two of the points presented in it. First, a doctrine of the limited force of precedents is firmly established in Switzerland (p.143). Secondly, Article 1(2) of the Swiss Code of 1912 contains the bold declaration, well known in Europe but novel and perhaps startling to most of us, that if no provision covering a case can be found in the code (statute), the judge shall decide according to customary law; and if that too is lacking, then according to the rules which he would establish if he were legislator.

All the modern codes seem to have learnt well from the sad fate of the famous Prussian Code of 1794, which tried to legislate for everything in the most minute detail and soon proved unworkable. It had 19,000 provisions, governing all possible contingencies. Samples: "Spouses may not refuse each other their marital duties" (the law permitted an exception to this if health would be adversely affected). "A healthy mother is required to suckle her child herself. The father is to decide, however, how long the child is to be suckled." "Statues and other such objects which serve only decorative purposes are not appropriate articles for a library. Globes, maps, drawings and engravings, which may be bound or unbound, are, however, appropriate for such a library." The library concerned was one's personal, private library. These examples are quoted on. p.126. Many other gems could have been selected from this Code, *e.g.*, that it is for the man of the house to decide what form family prayers will take; and that what clothing belongs in a wardrobe is defined in detail. Is that spirit entirely dead among our Australian regulation-makers?

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CREDIT AND SECURITY IN AUSTRALIA: THE LEGAL PROBLEMS OF DEVELOPMENT FINANCE, *by David E. Allan, Mary E. Hiscock, Leigh Masel and Derek Roebuck* (University of Queensland Press and Crane Russak & Co. Inc., 1977), pp.i-xliv, 1-330, plus index.

The joint investment, by the Asian Development Bank and the Law Association for Asia and the Western Pacific, in the research for and publication of the series of which this book forms one of eleven may well produce a valuable return if, as the editors of the series hope, Governments, bankers and lawyers recognise the need for reform of the law and the institutions relating to the raising of finance and the giving of credit for the purposes of business. It is the implicit belief of the authors that the illogicalities, uncertainties, complexities and inadequacies of the Australian law and institutions in this field substantially inhibit

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the supply of credit and finance in Australian trade. Their purpose is by exposure of the weaknesses of our laws to awaken a recognition of the need for reform. They have certainly succeeded with this reviewer: the practicality, detail and extent of any reform is, however, another question, which the authors have not examined in depth, no doubt because the book would have become too long for its intended public.

A further purpose of the book is the education of, principally, lawyers and businessmen in the purposes for which lenders take security and the factors which induce lenders to give credit to traders. The authors are surely correct in stressing that the traditional consideration of the ratio of forced-sale value of secured asset to amount of indebtedness to lender is now, in many transactions, not as important or ought not to be as important as the prior reasonable satisfaction of the lender, after investigation, that the loan and interest will be repaid. Lenders will now principally examine past and projected cash flows and order books, projected liabilities and commitments of the borrower for debts, dividends and expansion, the likelihood of Government intervention and policies affecting the borrower's activities and income, the industrial record of the borrower's workforce and the quality of the borrower's executive personnel. They will seek to ensure that those senior executive directors whose efforts and concern for the borrower's fortunes are regarded as related to the ability of the borrower to repay have an incentive to continue such efforts and concern in a personal guarantee of the loan. One of the functions of lawyers in development finance may therefore be not only the drafting of the conventional mortgage, guarantee and debenture but also the devising of "carrots" such as superannuation schemes, staff loans and the like which will make it financially unrewarding for such executives to leave, given that neither a lender nor an employer can specifically enforce a service contract or recover substantial damages for its breach. The function of security in creating a reasonable belief that the loan will be repaid the authors term the psychological level, a somewhat inapt term when applied to bankers and other lenders who would deny that security in such transactions bears any relation to their subconscious. The authors incidentally suggest that bankers and other lenders are not sufficiently well versed in the techniques and use of feasibility and profitability studies when investigating possible loans and are therefore doing both themselves and potential borrowers a disservice. The traditional consideration referred to is part of what is termed the collateral level of security, and the ability of the borrower to withdraw his loan and the pressures on the developer to repay are termed the commitment level. The first preliminary chapter in which these matters are discussed closes with a helpful list of the criteria to be adopted in evaluation of the adequacy of current forms of credit and security. The authors suggest, *inter alia,* that it is essential that the borrower should be readily able to identify the title to the collateral offered; that the formalities relating to the creation of the security should be simple, cheap and permanent; that there should be provision for registration of the security, questions of priority of security interests being determined according to the time of registration or the time of taking possession; that the borrower should have power to create further securities over the same collateral although there would be nothing to prevent him contracting with his lender not to do so; that securities should be able to attach to a changing collateral as a floating charge; that the same security should be able to

secure further advances without further registration; that the law should recognise the borrower's equity in the collateral and his right to possession of the collateral; that the means of realizing the security should be speedy and effective and should not involve a court application, and that taxation and other regulatory laws should apply uniformly to all forms of security interest throughout Australia. It is difficult to disagree with these objectives.

The authors then proceed to examine the principal features of securities over land, goods and rights and of securities given by and credit given to companies. The sub-title of the book is "The Legal Problems of Development Finance", but securities over land are found to meet most of the criteria posited for securities generally, at least with Torrens system land.

The legal problems of development over goods and rights are more numerous. The authors highlight the unnecessary technicalities of the bills of sale and the hire purchase legislation. (Incidentally although the authors at p.101 refer to the repeal in this State by the Consumer Transactions Act, 1972-1973 (S.A.), of the Hire Purchase Agreements Act, 1960, as amended, in the footnotes of the text they continually refer to the latter Act as though it were still in force). They argue that the technicalities are inhibiting to development finance and that consumer-oriented legislative protection is not necessary for development financiers and development borrowers. The differences in the bills of sale legislation between the States, especially in the effects of registration and non-registration, are inexcusable. The authors' principal plea is for a uniform and comprehensive Australian system of registration of all mortgaged goods, allied with the availability to the public in every State of the information registered. No doubt there will be practical problems about the description for registration of certain mass-produced goods of high mobility and convertibility, and no doubt there will be substantial expense (although the authors believe the expense would only be "limited") in creating the new registries, especially the electronic data processing, interstate computer link-ups and microfilming of the registered information which would be required. Nevertheless, a simple, readily accessible system of registration over chattels would remove an illogical area of security which in practice involves a considerable amount of lawyers' time in advising on intractable problems of priorities between chattel mortgages, the place where a chattel mortgage should be registered and the like. Such a system would certainly not inhibit lending, and one can only agree that the expense of implementation would be justified.

There are however some legal problems in these areas, mentioned by the authors as part of their overall criticism of the legal system, which are worth noting, but which may not be susceptible to reform. Some problems do not admit of any easy solution. Instances are the problem of goods subject to a hire purchase agreement becoming affixed to realty or having accessories added, where the solutions of the hire purchase legislation and/or the law on fixtures are reasonably logical and well understood; and the problem of the differing formalities for the assignment of legal, equitable and future debts, where again any complexities arising out of the difference in nature of the debt (the historical reasons for which are admittedly not of concern to the lender) are fairly well known, and where in any case most security transactions will be for valuable consideration which reduces the problems of formalities. The defects of taking security

over insurance policies and shares in limited companies are referred to (although perhaps the radical difference in role as security of public company shares compared to proprietary company shares should also be mentioned), but these are also familiar to lawyers, bankers and others, possibly because they arise from the nature of the rights themselves.

The authors doubt the ability of the existing law and courts satisfactorily to deal with a novel, apparently anomalous form of security such as the trust receipt, the document against which a banker will release shipping documents for goods to an importer in advance of payment by the importer, and which contains acknowledgements by the importer that he holds the shipping documents and goods in trust for the banker, that he will not sell or encumber them without the bank's consent, and that he will hold the proceeds on trust for the bank. However, the banker's expectation that he has security in the goods and the proceeds of sale against the importer's trustee in bankruptcy, execution creditors and purchasers of the goods with notice of the trust receipt, even if the goods are admixed with other goods to make a new product and even if the proceeds are paid into a mixed fund, would probably be fulfilled in England: in *Aluminium Industrie Vaassen B.V.* v. *Romalpa Aluminium Limited* ([1976] 1 W.L.R. 676) the Court of Appeal upheld a supplier's claim against the receiver of a company who sold goods received on credit from the supplier under a contract of supply which reserved title to the goods and to the proceeds of sale. These and other cases show that the equitable tracing remedy established as long ago as 1880 (*Re Hallett's Estate* 13 Ch.D 696) and indeed the common law remedy (see Professor R. M. Goode, (1976) 92 *L.Q.R.* 360, 528), have useful though neglected applications today. Until there is a system of registration of such trust receipts and other mortgages, it does not seem unfair that the normal equitable rules of priority, giving preference over the equitable interest to the *bona fide* purchaser of the legal estate for value without notice, should govern. There is however a case for an equitable doctrine such as relief against penalties (*e.g.*, minimum rental clauses in leasing agreements) not being applied in commercial contexts as being productive of too much uncertainty where there is approximate equality of bargaining power.

A separate chapter is devoted to the special ramifications of lending to companies. A large part consists of a helpful collection and restatement of fundamental principles of company law as applicable to securities to companies, and attention is drawn to lacunae in legal solutions to quite fundamental problems arising frequently in practice. Some such problems are the extent to which subsequent debenture-holders and mortgagors are bound by restrictions against further creation of charges in a debenture, the time of crystallization of a floating charge (can it crystallize *ipso facto* on the happening of a stipulated event such as default in payment of interest, or does the debenture holder have to perform some overt act, such as appointing a receiver, before the charge is crystallized?), and the effect of an order extending the time for registration of a charge not registered within 30 days from the date of creation and the consequent priorities of subsequent mortgagees with and without notice, unsecured creditors who have extended credit on the faith of the lack of registration and the liquidator. Attention should also perhaps be given to the plight of a cautious lender, part of whose security consists of mobile assets, who is in effect required to incur the expense of registering the debenture in

all States of Australia where the assets might possibly be situated, due to the lack of an Australian Register of Charges. The brief mention on p.158 of s.67 of the Companies Act is only a restatement, and the problems which arise when the share capital of a company is purchased with finance secured on the assets of that company and the illegalities of the methods commonly used to avoid s.67 should have been adverted to.

One criticism which could perhaps have been made and which applies both to mortgages of land and to financing of companies generally relates to the remedy of receivership. The authors praise the usefulness of the remedy of receivership, with justification, but there is room for improvement. Many aspects of the law relating to receivers are uncertain, in part because the remedy has only comparatively recently begun to be exercised with any frequency. Unresolved questions include the fiduciary duties of a receiver; his rights and duties on being discharged from office; the preferential rights of the Crown in right of the Commonwealth for Group Tax; the personal liability of receivers of a company for debts incurred by him in the course of his receivership (it may not be correct (*cf.* p.188 n.102) that s.188 of the Uniform Companies Acts makes a receiver personally liable for such debts, since the receiver may only be liable if he has entered into possession personally and not as agent for the company, and most debenture deeds provide for the receiver in all cases to act as the agent for the mortgagor-company: see *Australian Mutual Provident Society* v. *Geo. Myers & Co. Ltd. (in liqu.)* (1931) 47 C.L.R. 65, 82); and the ability of a receiver to conclude formal documents using the company seal after liquidation (for a recent example of this uncertainty, see *Sowman* v. *David Samuel Trust Limited* [1978] 1 W.L.R. 22). These uncertainties reflect no credit on the law. They involve matters fundamental to the value of the remedy of the appointment of a receiver and should be resolved. It may be that the first need is for a comprehensive up-to-date text book dealing with receivers for companies. More generally, it may be doubted whether there is a need to appoint an independent accountant as receiver. An accountant will, for his trouble, properly deduct from monies which would otherwise be payable to the debenture holder his fees for realising the security. The need to appoint a separate person as receiver arose from the desire of mortgagees to avoid the heavy obligation to account consequent on entering into possession of the mortgaged premises. Someone other than the mortgagor or mortgagee was therefore appointed as the agent of the mortgagor. Mortgagees and debenture holders may feel that the obsolete rules which require the appointment of an independent receiver should be abolished, thus enabling them to enter into possession personally and thereby increase their return from the proceeds of the receivership.

There is much of great value in the final two chapters on Term Lending for Development, that is, the law, practice and considerations which affect loans for a duration of one to five years, and on the Financing of Exports. These chapters contain compressed but clear accounts of the capital market in Australia; the emergence of the Australian Bill market; the operation of exchange control and control of foreign takeovers; the sources of overseas finance most readily available to Australian developers; the means of payment of Australian exporters by foreign buyers; the means of finance of Australian exporters; the role and practice of export payments insurance; methods of preshipment finance, and a

detailed examination of the financing of exports by short-term credit. The essential law and practice in each area are briefly stated. The authors' critical reappraisal of the law, practice and institutions in the light of the three levels of security already mentioned provides new insights for the reader and an understanding of the need for reform. The authors as part of their criticism of the law draw attention to the legal fictions needed to enable the drawer-payee of a bill to sue a surety-endorser who is necessarily a party subsequent to the drawer; the complicated circumstances in which an acceptor to an accommodation bill has on payment rights of action against the party accommodated; the doubts about the validity, apart from the *ultra vires* doctrine, of guarantees given by limited companies if not in the interests of the company; the status and assignability of participation certificates where a consortium of lenders lend to a developer, and the effect, against the liquidator of the borrower and the trustee in bankruptcy of the borrower's creditor, of an agreement whereby that creditor subordinates its debt to the lender's and acknowledges that it holds in trust any dividends to be received by it from the liquidator of the borrower. The authors remind lenders that in casting the borrower's obligation to pay interest at rates related to the rates at which the lender can itself from time to time borrow the monies outstanding in the various money markets they run the risk of being met with an argument that the promise to repay is void for uncertainty in the fundamental obligation and for being an illusory bargain. Many of the assumptions of lenders and lawyers about these issues remain untested. In a major financial collapse, borrowers, guarantors and their advisers would look carefully at the documents and practices of lenders with the same critical eye as the authors. Following the collapse of the secondary banking system in England coupled with the dramatic decline in property values in 1973 there was a flurry of litigious activity which resulted in many changes of practice and alterations of standard clauses in long-hallowed standard form documents.

A penetrating summary of the provisions commonly found in term loan agreements, the reasons for their insertion and the legal issues arising out of such clauses is a helpful feature of these chapters. One may however doubt whether the clause, set out in an Appendix containing certain standard clauses in term loan agreements, providing for increase in interest payable by the borrower if the interest rates payable by the Bank change as a result of the requirement of keeping a statutory reserve of deposits, does not itself exhibit the vice of uncertainty in the definition of the extra cost to the Bank produced by such a requirement.

It is a further criticism by the authors that much that is relevant to developers and lenders in exporting and financing for exports depends upon the inherently unsettled administrative practices and procedures of Government departments such as the Export Development Grants Board, the various departments which license exports, the Reserve Bank, the Foreign Takeovers Board and the various departments which administer Government aid for the establishment of industries and expansion in Australia and for the export by established industries to certain overseas countries. For this reason alone, it is difficult not to disagree with one of the authors' principal recommendations that there should be established training and research centres where these practices could be recorded by those experienced in them for the benefit of those not so experienced. Such a centre would, it is suggested, also be a convenient place for the

investigation of reform of the legal problems, and indeed of the legal attitude to problems of security.

At such a training centre this wide-ranging and well-written book would be essential preliminary reading, and it could now be read with profit by those who are concerned in any way with development finance.

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