THE RECEPTION AND STATUS OF ENGLISH LAW IN AUSTRALIA

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Constitutional principles, which began to evolve in the earliest years of Britain's colonial expansion,[1] made English law the foundation of the Australian legal system. The operation of these principles provided for the transfer of a vast body of English law to each of the Australian States and ensured that the heritage of English law would be shared in Britain's Australian possessions. 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.

By the beginning of the eighteenth century English law had developed well settled rules for determining the laws which should apply in territories which were newly acquired. Sometimes these territories were conquered by force of arms, occasionally they were ceded to Britain by another power, often they became British possessions by peaceful colonisation. The courts came to make a distinction between those colonies on the one hand that were "conquered" or "ceded" and those colonies on the other hand which were settled by peaceful colonisation.[2] In the case of "conquered" or "ceded" territories the general rule was, that if there was a well established system of civilised law prevailing in the territory, this would continue in operation until changed by the conquering power.[3] As a result, for example, Roman-Dutch law continued to apply in the former Boer Republics of Orange Free State and Transvaal after their conquest in the Boer War. In Ceylon, too, Roman-Dutch law, together with special customary laws which applied to various racial groups in the country, were maintained

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1. It is one of the strange quirks of English constitutional development that the first major case on the application of English law overseas was *Calvin's Case,* 7 Coke 2a; 77 E.R. 377, decided in 1608. The case was not directly related to overseas territories, but concerned the right of a Scot to sue in English courts.
2. *Blankard* v. *Galdy* (1692) 4 Mod. Rep. 215; 2 Salk 411; *Case* 15.—*Anonymous* 2 Peere Williams 75; *Campbell* v. *Hall* (1744) 1 Cowp. 204. For later references to the distinction see: *Fabrigas* v. *Mostyn* (1773) 20 St. Tr. 181; *R.* v. *Picton* (1802) 30 St. Tr. 225; *Sammut* v. *Strickland* [1938] A.C. 678.
3. *Campbell* v. *Hall,* op. cit.; *Fabrigas* v. *Mostyn,* op. cit.; *Union Government Minister of Lands* v. *Whittaker's Estate,* [1916] App. Div. (S.A.) 203; O. Hood-Phillips, *The Constitutional Law of Great Britain and the Commonwealth,* 2nd edition, Sweet and Maxwell, Ltd., London 1957, at pp. 608-611.

in force after the British takeover of that country from the Dutch. As defined by the courts, a "settled" colony was a territory, which at the time of its occupation by the British, was uninhabited or inhabited by a primitive people whose laws and customs were considered inapplicable to a civilised race.[4] In such a colony the general rule of English law was that British settlers took with them as their "birthright",[5] as the great eighteenth century jurist Blackstone once described it, a body of the laws of England both statutory and unenacted which could operate in the colony.

Australasian Settled Colonies

In each of the Australian States, Papua and New Zealand[6] English law became the legal foundation of these colonies because they were initially treated as "settled colonies" or came to be recognised as such. In South Australia and Western Australia English laws applicable to the circumstances of the infant colonies became part of the law of these States on the date of their original settlement. English law has operated in Papua under ordinances applying to the Territory.[7] As far as the other Australian States and New Zealand were concerned, however, certain doubts had to be resolved before it was made clear that these colonies, too, were to be treated in much the same way as ordinary settled colonies.

For some years after its settlement it was not clear whether New South Wales was to be treated on the same basis as a "settled colony" for the purposes of applying English law. As New South Wales was founded as a penal settlement, with the early Governors exercising almost plenary powers over all of the inhabitants, it could be argued that the colony could not be treated as a settled colony under English law.[8] English criminal law was imported into the colony from the first settlement, under Letters Patent issued in 1787,[9] but doubts remained on the application of other English laws in the colony. It would seem that in actual practice, however, English laws, other than those related to criminal causes, were applied in the colony.[10] The situation was

4. *Case* 15.— *Anonymous*, op. cit. *Blackstone's Commentaries*, see post.
5. See post, Footnote 17.
6. For the position with respect to New Zealand see *The British Commonwealth, The Development of its Laws and Constitutions, New Zealand*, Volume 4, at pp. 1-8.
7. See: The Courts and Laws Adopting Ordinance (Amended) of 1889, No. 6 of 1889, in particular sections 3 and 4.
8. T. P. Webb, *A Compendium of the Imperial Law and Statutes in Force in Victoria*, at pp. 12, 36 ff; G. W. Paton, *The British Commonwealth, The Developments of its Laws and Constitutions, Volume II, Australia*, at p. 4.
9. J. V. Barry, G. W. Paton, G. Sawer, *An Introduction to the Criminal Law of Australia*, London 1948, at p. 2; Webb, op. cit. at pp. 9, 12, 13.
10. *The British Commonwealth, The Development of its Laws and Constitutions, Volume II, Australia* at p. 4.

finally cleared up when the British Parliament passed "an Act to Provide for the Administration of Justice in New South Wales and Van Diemen's Land" in 1828.[11] Section 24 of this enactment stated: "That all Laws and Statutes in force within the Realm of England at the Time of the passing of this Act . . . shall be applied in the Administration of Justice in the Courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said Colonies." This provision made it clear that New South Wales and Tasmania, which had been separated from the "mother colony" in 1825, were to be placed on the same footing as settled colonies, as at July 28, 1828.

This Act also provides a starting point for the application of English law to Victoria, which was separated from New South Wales in 1851. Queensland, too, dates its reception of English law back to July 25, 1828, following that State's separation from New South Wales in 1859.[12] As far as South Australia is concerned, this State was originally part of New South Wales. But subsequent enactments and decisions of the Supreme Court of South Australia and the High Court of Australia have confirmed that the application of English law to that State is to be considered "as if this province never had any association with the mother colony".[13] The application of English law to South Australia applies as at December 28, 1836, which has been legislatively defined as the State's date of settlement.[14] The Interpretation Act of Western Australia provides that June 1, 1829, is the date on which that State "shall be deemed to have been established", for the purpose of determining the application of English statutory law.[15]

As South Australia and Western Australia were "settled colonies" within the meaning of the common law and New South Wales and Tasmania were virtually treated as such in the 1828 Act, each of the Australian States directly inherited a vast body of English law. This included statutes which had been passed by the English Parliament

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11. 9 Geo. IV, c. 83. For the history of this enactment see: Webb, op. cit. at p. 24. See also: IV *Bentham's Works* at p. 260.
12. This position was statutorily acknowledged by the Queensland Legislature in the Supreme Court Act of 1867.
13. *White* v. *McLean* (1890) 25 S.A.L.R., 97 at p. 100 per Boucaut J. See also: *Winterbottom* v. *Vardon* [1921] S.A.S.R. 364, in particular at p. 368; *Delohery* v. *Permanent Trustee Company of New South Wales* (1904) 1 C.L.R. 283, in particular at p. 297.
14. The legislative declaration of South Australia's date of settlement was first made in Ordinance No. 2 of 1843. This provided that "In all questions as to the applicability of any laws or statutes of England to the Province of South Australia, the said province shall be deemed to have been established on the 28th day of December 1836". A modified version of this ordinance is now to be found in section 48 of the South Australian Acts Interpretation Act.
15. Interpretation Act, 9 Geo. V, No. XX, section 43. "The Reprinted Acts of the Parliament of Western Australia", Volume 6 (1954).

up to the creation of the British Parliament, and subsequent enactments passed by the Parliament at Westminster, following the Act of Union with Scotland in 1706. In addition, the general principles of unenacted law, which had been developed by English courts over the centuries, were also received as part of the law of the colonies.

The principles under which these laws were to be applied to "settled colonies" had become well defined by the first part of the eighteenth century. A Privy Council Memorandum of August 9, 1722,[16] set out these principles in much the same form as Blackstone's Commentaries, which are generally regarded as containing the classical exposition of the law to be applied to settled colonies. In his Commentaries, Blackstone states:

> "It hath been held that if an uninhabited country be discovered and planted by English subjects all the English laws then in being, which are the birthright of every English subject are immediately in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their new situation and the condition of the infant colony, such, for instance as the general rules of inheritance and of protection from personal injuries. The artificial distinctions and refinements, incident to the property of a great and commercial people, the laws of police and revenue (such as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them and therefore are not in force. What shall be admitted and what rejected, at what times and under what restrictions, must in cases of dispute be decided in the first instance by their own provincial judicatuer, subject to the decision and control of the King-in-Council; the whole of their constitution being also liable to be newly modelled and reformed by the general superintending power of the legislature of the mother country."[17]

Two main propositions which have been adopted and elaborated upon in a number of judicial decisions, emerge from Blackstone's summary of the principles guiding the application of English law to settled colonies. Firstly, colonists carried with them to a new British possession "so much of the English law as is applicable to the new situation and condition of the infant colony". Secondly, the colonists were still subject to the "superintending power" of the British Parliament, which could, if it saw fit to do so, legislate for the settled colony.

This first general proposition makes it clear that there was no legal vacuum when settlers arrived at a "settled colony". They took with

16. Referred to above as *Case* 15.— *Anonymous*, 2 Peere Williams, 75.
17. 1 *Comm.* 107. (Introduction, section 4.)

them, as their "birthright" English laws applicable to their circumstances. As Blackstone indicated, however, the question of what particular laws might apply to the colony would not always be free from difficulty. As there was no wholesale transfer of English law to a "settled colony" courts could be called upon to determine which English laws were suitable to the situation and condition of the colony. In some circumstances, too, it might be up to the British legislature to decide finally on the particular application of English laws to such a colony.

The principles summarised by Blackstone provided the foundation for the reception of English law in each of the Australian States. In South Australia and Western Australia they were regarded as *the* authority for many English laws applying in those States.[18] In the remaining States, to which the Act of 1828 applied, the principles operated, under the terms of this enactment, as at July 25, 1828. As early as 1831 Chief Justice Forbes of New South Wales had acknowledged that the 1828 Act was declaratory of the common law position expressed by Blackstone.[19] In *Cooper* v. *Stuart*,[20] the Privy Council affirmed that New South Wales was to be treated as a settled colony and Blackstone's principles were to be called in aid in considering the application of the rule against perpetuities in that State, under the 1828 Act.

The application of these principles falls under two main headings. Firstly, there is the examination of the reception of the unenacted law in each of the Australian States. Secondly, we must look to the transfer of English statutory laws to Australia.

Reception of Unenacted Law

It will be recalled that Blackstone was well aware of the difficulties which could arise in applying the principles he summarised. As far as the reception of unenacted law in settled colonies was concerned, the experience in Britain's American colonies had clearly demonstrated, by the time that Blackstone wrote his Commentaries, that complicated issues could arise in this context. Doubts were sometimes raised on the application of common law doctrines when these had not been the

18. The sections in the South Australian and Western Australian Acts, referred to above in footnotes 14 and 15, assume the operation of the common law principles, and merely define the date of settlement. As far as South Australia is concerned this was judicially acknowledged by Poole J. in *Winterbottom* v. *Vardon* [1921] S.A.S.R. 364 at p. 368, where His Honour stated that the application of English law in the State depended "upon the silent operation of constitutional principles with the date of commencement of operation fixed by the local statute".
19. *R.* v. *Farrell, Dingle and Woodward* (1), (1831) 1 Legge 5, at p. 10. His Honour considered that the Act of 1828 was "merely declaratory of what the law was before".
20. (1889) 14 App. Cas 286, at pp. 291-293.

subject of judicial decision at the date of settlement or at later dates when English common law was received.[21] In some States, such as Massachussetts, for example, the early settlers found certain familiar doctrines of the common law distasteful to them and set about developing their own local customary laws.[22] As Story J. pointed out in the United States Supreme Court decision of *Van Ness* v. *Pacard*,[23] in 1829, the early British settlers in American colonies did apply generally the principles of the common law, but not without certain reservations and exceptions, based upon local attitudes and conditions.

In Australia, on the other hand, the same difficulties did not manifest themselves to anything like the same extent. Problems did of course arise on the application of English unenacted law and statutory laws in the Australian colonies; Sir Harrison Moore once recorded that more than a quarter of the 300 cases reported in Legge's "Selection of Supreme Court Cases in New South Wales", which cover the years 1825-1862, dealt with the application of English law to New South Wales.[24] Unlike the situation which sometimes prevailed in the American colonies, however, it was accepted that the *general* principles of unenacted law did apply in each of the Australian States.[25] No great weight was placed upon the demarcation line of the "date of settlement" in applying unenacted law. Nor did attempts to make unenacted law yield to special conditions in the Australian colonies meet with judicial encouragement. The maintenance of uniformity between English and Australian decisions on common law questions generally was aided, too, by the fact that final appeals could be taken from all Australian States to the Privy Council. In addition, Australian courts themselves have always placed great weight on the precedent making authority of decisions of the higher English courts.[26]

This emphasis on the unity of the unenacted law in England and Australia has meant that in one important respect a distinction must be drawn between the reception of English statutory law and unenacted law in each of the Australian States. As far as English statutory law is concerned, particular importance is attached to the actual day on which English law was made applicable to the colonies. As will be shown later in this article only those English statutes applicable to the circumstances of an infant colony at that time are

21. *Delohery* v. *Permanent Trustee Co. of New South Wales* (1904) 1 C.L.R. 283, at p. 311, per Griffith C.J.
22. J. Goebel Jnr., "King's Law and Local Custom in 17th Century England, 31 *Col. Law Rev.* 471. J. Goebel Jnr., *Cases and Materials on the Development of Legal Institutions*, at pp. 267-272.
23. 27 U.S. 187 at p. 144; 7 Law Ed. 374 at p. 377.
24. Harrison Moore, "A Century of Victorian Law", 16 *Jnl. of Comp. Legis. and Int. Law* (3rd series) 174 at p. 178, footnote 4.
25. Ibid. at pp. 181-182.
26. For a more detailed consideration of these factors see post.

received under the common law as part of the "birthright" law of such colony. The common law principles, set out by Blackstone, make no provision for incorporating into the law of a settled colony later amendments and alterations made to this received statutory law by the British Parliament. In dealing with the general body of unenacted law, received under these principles, however, the courts have not laboured under the same technical limitations.

Under the common law principles on the reception of English law it is clear that the general principles of unenacted English law were received by settled colonies. These included the vast bulk of the unenacted law of inheritance, torts, criminal law, mercantile law, private international law, real and personal property and equity. Where the unenacted law on such subjects was not related to artificial requirements peculiar to England they became part of the English law received by the Australian States.

If the cases reported in Legge's selection of New South Wales Supreme Court decisions are a true indication, little difficulty was experienced in applying the English common law. Almost all of the cases on the application of English law in these reports relate to the reception of English statutory law under the 1828 Act. It was assumed, virtually without question, that the unenacted law of libel[27] and real property,[28] for example, was part of the law of New South Wales. It is clear, too, that it was generally accepted that no inquiry need be made to ascertain if common law principles were suitable to the conditions of the colony at the time English law was made applicable.[29] The case of *Fitzgerald* v. *Luck*[30] seems to be decisive authority on this point, at least as far as New South Wales is concerned. Three judges of the Court unanimously agreed that the mercantile law principles relating to sales in market overt were part of the common law which had been received into the colony under the 1828 Act. In 1839, when this case was decided, however, no public markets had been established where the doctrine could operate. The judge indicated that when public markets were established in the colony the doctrine of

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27. *Allan* v. *Bull* (1836) 1 Legge 70; *Brady* v. *Cavanagh* (1839) 1 Legge 107.
28. *R.* v. *O'Connell* (1839) 1 Legge 117.
29. An interesting statutory acknowledgement of this situation is to be found in the South Australian Statutes. Ordinance No. 2 of 1843, referred to in footnote 14, provided that the legislatively defined date of settlement was relevant in determining both the application of English *statutory law* and *unenacted laws* in the Province. Later re-enactment of this provision in section 38 of the South Australian Acts Interpretation Act deletes all references to unenacted law, and defines the date of settlement only with reference to the reception of statutory law in the State. The Western Australian provision in the Interpretation Act, referred to in footnote 15, likewise deletes all reference to unenacted laws.
30. (1839) 1 Legge 118.

market overt would become relevant to sales conducted at such establishments.

Clearcut acknowledgement that the unenacted general principles would be subsequently attracted to a settled colony, even though such principles might not be suitable to the condition of a colony in its infancy, was made by Lord Watson, delivering the opinion of the Privy Council in *Cooper* v. *Stuart*.[31] One of the issues dealt with in this case was whether the rule against perpetuities applied in New South Wales. In referring to Blackstone's classical statement His Lordship said:

> "Blackstone in that passage was setting right an opinion attributed to Lord Holt, that all laws in force in England must apply to an infant colony of that kind. If the learned author had written at a later date he would probably have added that, as the population and wealth of the colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it, and that the powers of remodelling it, belongs also to the colonial legislature."[32]

Cooper v. *Stuart*, in dealing with the application of the rule against perpetuities in New South Wales, exemplifies the practical operation of the rules on the reception of the common law. In holding that the rule did apply in New South Wales Lord Watson stated:

> "The rule against perpetuities, as applied to persons and gifts of a private character, though not finally settled in all its details, until a comparatively recent date, is, in its principle, an important feature of the common law of England. To that extent, it appears to be founded on plain considerations of policy, and, in one shape or another, finds a place in most, if not all, complete systems of jurisprudence. Their lordships see no reason to suppose that the rule, so limited, is not required in New South Wales by the same considerations which have led to its introduction here, or that its operation in that colony would be less beneficial than in England."[33]

Two other important cases which demonstrate the process of adoption of the unenacted law in settled colonies are *Municipality of Pictou* v. *Geldert*[34] and *Delohery* v. *Permanent Trustee Company of New South Wales*.[35] In the first of these cases, the Privy Council applied a special doctrine of the common law relating to the duty of a public corporation to repair roads and bridges. This common law principle was held to apply in the settled colony of Nova Scotia, even

31. (1889) 14 App. Cas. 286.
32. Ibid. at p. 292.
33. Ibid. at p. 293.
34. [1893] A.C. 524.
35. (1904) 1 C.L.R. 283.

though it was clear that such a rule in the strict sense would have been inapplicable to the circumstances of the infant colony at its date of settlement. *Delohery's* case concerned the operation of the English law of prescription as to ancient lights in New South Wales. The High Court of Australia held that such prescriptive rights could be created in the State under the 1828 Act. Griffith C.J. in his judgment pointed out that in New Brunswick it had similarly been held by the Supreme Court of that Canadian Province[36] "that the law of prescription as regards ancient lights is part of the common law introduced into that province on settlement".[37]

As briefly indicated previously in this chapter the liberal interpretation of Blackstone's principles, which is perhaps most clearly exemplified in Lord Watson's reference to "subsequent attraction" in *Cooper* v. *Stuart*, was not the only reason why a strong sense of unity was maintained between the unenacted law of England and Australia.

Firstly, in the main, there seems to have been a general disinclination on the part of Australian courts to take into account special local conditions in deciding whether the general principles of unenacted law should apply. On some occasions no doubt, as exemplified by the majority decision of the Supreme Court of New South Wales in *R.* v. *Farrell*,[38] judges felt constrained to look to special local conditions and were influenced by them in reaching their conclusions on the application of English law. In that case Stephen and Dowling JJ. held that a "convict attaint" could be a competent witness in the colony although this was not strictly in accord with the English common law on the subject. Dowling J. pointed out that in applying the laws of evidence to ex-convicts who had been transported to the colony reference must be made "to their peculiar condition, and to the necessities of the place in which they were inhabiting, arising from the gradual emancipation of individuals from penal restraint".[39] Apart from such limited exceptions, it would seem that by the second half of the nineteenth century it was generally accepted that little judicial encouragement was given to attempts to make unenacted law yield to special conditions in a colony. Sir Harrison Moore in his examination of a "Century of Victorian Law",[40] lists several important instances in which a good case could have been made out for modifying or refusing to apply English unenacted law in Victoria. On each occasion, however, the courts rejected the contention that local con-

36. *Ring* v. *Pugsley* (1878) 18 New Br. 303.
37. (1904) 1 C.L.R. 283 at p. 313.
38. (1831) 1 Legge 5.
39. Ibid. at p. 17.
40. 16 *Jnl. of Comp. Legis. and Int. Law* (3rd series) 175.

ditions could limit the application of the general principles of English law.[41]

Secondly, uniformity was to a large extent promoted by the fact that the tribunal of ultimate resort for each of the Australian colonies was the Privy Council. Admittedly, there were occasions as instanced by the Privy Council decision in *Victorian Railway Commissioners* v. *Coultas,*[42] in which English and Australian unenacted law diverged, because the Privy Council opinion differed from English precedents. But overall, even a cursory examination of Privy Council Appeals from the Australian States in the nineteenth century demonstrates that precedent making authority, based on English judicial decisions, was continually injected into the case-law of the Australian States.

Thirdly, even aside from the precedent making authority of the Privy Council, the Australian judiciary, to this day, places great weight on the authority of decisions handed down by the higher English courts. Such High Court decisions as *Sexton* v. *Horton*[43] and *Piro* v. *Foster*[44] clearly show the high persuasive authority of English judicial decisions in the Australian hierarchy of courts. In *Sexton* v. *Horton,* for example, Chief Justice Knox and Starke J. pointed out that the High Court rendered an "abiding service to the community" if it accepted decisions of the English Court of Appeal, "particularly in relation to such subjects as the law of property, the law of contract and mercantile law".[45]

For these three reasons, added to the liberal interpretation of the constitutional principles related to the reception of unenacted law in settled colonies, the general principles of non-Statutory English law are closely woven into the fabric of the legal systems of each of the Australian States. Before turning, however, to the application of English statutory law in Australia under the common law, two questions with respect to the present-day status of the received unenacted

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41. Ibid. at pp. 181-182. One example given by Sir Harrison Moore is the refusal by the Victorian Supreme Court to modify the rule of "once a mortgage always a mortgage" with respect to the gold mining industry. As the author points out: "The speculative nature of the gold-mining industry was not allowed to oust the rule 'once a mortgage always a mortgage', and create a new rule for this species of property, though in the particular case *Niemann* v. *Weller* (1863) 3 W.W. and B 125 (E) the merits appeared to be strongly against the mortgagor." Other cases to which Sir Harrison Moore referred were: (1899 25 V.L.R. 464; *Garibaldi Co.* v. *Craven's New Chum Co.* (1884) 10 V.L.R. 233; *Brooks* v. *Bedford* (1856) 1 V.L.T. 101; *Bruce* v. *Atkins* (1861) 1 W. and W. 141 (E); *Campbell* v. *Kerr* (1886) 12 V.L.R. 384.
42. (1883) 13 A.C. 222. For contrary English authority see: *Coyle* v. *John Watson Ltd.* [1915] A.C. 1, at p. 13.
43. (1926) 38 C.L.R. 240.
44. (1943) 68 C.L.R. 313. See also: *Waghorn* v. *Waghorn* (1942) 65 C.L.R. 289.
45. Op. cit. at p. 244.

law in Australia remain to be considered. Firstly, can it be said that the reception of unenacted English law into what became six separate political communities means that there are at least six bodies of unenacted law in this country? Secondly, is there a separate "common law of the Commonwealth" relating to the Crown in right of the Commonwealth and the federal government created under the Australian Constitution?

Status of Unenacted Law

As far as the first of these questions is concerned, there is a dictum of Griffith C.J. in *The King* v. *Kidman*,[46] which suggests that there has never been six separate bodies of unenacted law in Australia. In referring to the received common law in each of the Australian States His Honour expressed the view that it did not "become disintegrated into six separate codes of law, although it became part of an identical law applicable to six political entities".[47] Quick and Garran,[48] on the other hand, were inclined to the view that there were six State systems of common law. At the same time, however, they pointed out that insofar as the substantive principles applied in each of the States were virtually the same, there could perhaps be said to be a unified "common law" in Australia.[49] A more recent commentator, Dr. Wynes, is more emphatic on the position. In his volume on *Legislative, Executive and Judicial Powers in Australia* he says: "the High Court administers the common law in hearing appeals from the several States, but this is the common law of the several States."[50]

The fact there has been no definitive judicial ruling on this issue would seem to be a good indication that the question whether or not there are six separate bodies of common law in the States is of little, if any, practical importance. The emphasis on the unity of the common law by the Australian courts in the nineteenth century, aided by the Privy Council, tended to maintain uniformity. If anything, this process has been strengthened since the creation of the High Court of Australia as a general court of appeal from each of the Australian States,[51] in addition to the Privy Council.[52] Unlike the position in the United States, where for most practical purposes the highest courts

46. (1915) 20 C.L.R. 425.
47. Ibid. at p. 435.
48. Quick and Garran, *Annotated Constitution of the Commonwealth of Australia*, at p. 785.
49. Id.
50. Wynes, *Legislative, Executive and Judicial Powers in Australia*, 3rd ed., at p. 76.
51. Australian Constitution, section 73.
52. As to the present situation with respect to Privy Council Appeals see: Castles, "Limitations on the Autonomy of the Australian States," [1962] *Public Law*, 171, at pp. 185 ff.

of a State can finally determine the common law principles applying within their State jurisdiction,[53] the highest judicial tribunals in the Australian States have always had their decisions subject to further review by higher courts, common to them all.

In the process of reviewing cases as a national court of appeal, it may be said that there is a "common law" of the Commonwealth in the sense that the High Court, subject to the Privy Council, has not only the right but perhaps the "duty" of "independent interpretation" of the common law in all appellate cases that come before it.[54] But there still remains the question whether there is a separate and distinct federal common law which came into existence on the creation of the federal Parliament and government in 1901. Are there, for example, common law powers adhering to the Crown in right of the Commonwealth which are independent of the grants of power to the federal government under the Australian Constitution? As yet no conclusive answer can be given to such questions. The cases which have discussed the issue give no clearcut guide.

In *R.* v. *Kidman*, Griffith C.J. supported the view that there was a common law of the Commonwealth, applicable to the execution of federal powers under the Australian Constitution.[55] Higgins J. expressed some uncertainty on the situation but stated: "I do not like to commit myself prematurely to any dogma with regard to what is called 'the common law of the Commonwealth'; but I concur with the Chief Justice in thinking that the cases in the United States Courts which reject the existence of a common law of the United States are —to say the least—inapplicable to our Constitution".[56] Isaacs J., on the other hand, considered that there was a "peace of the Commonwealth", but this did find its source in a special common law of the Commonwealth. In his Honour's view "obstruction to the King in the exercise of his Commonwealth powers is, at common law, an offence with reference to the Constitution".[57]

Later cases which have dealt with this question, would seem to indicate that there is no general body of federal common law adhering to the exercise of Commonwealth powers. Common law principles, however, may be called in aid to supplement the exercise of Commonwealth powers under the Australian Constitution. In *Kidman's* case, for example, it was acknowledged that there could be a common law

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53. On the appellate jurisdiction of the U.S. Supreme Court see: *The Constitution of the United States of America* (ed. Corwin), at pp. 614 ff.
54. *Quick and Garran*, op. cit. at p. 785.
55. (1915) 20 C.L.R. 425, at p. 435.
56. Ibid. at p. 454.
57. Ibid. at p. 445.

offence of conspiracy to defraud the Commonwealth.[58] As Latham C.J. once pointed out: "The Commonwealth of Australia was not born into a vacuum. It came into existence within a system of law already established."[59] The prerogative of the Crown and its powers with respect to the Commonwealth as a political entity, for example, cannot be fully understood under the Constitution without reference to common law principles.[60] In the exercise of Commonwealth legislative powers over such matters as patents, trade marks and copyrights, too, common law doctrines may have to be called in aid to fully understand the operation of these laws. As Fullagar J. pointed out in *In re Usines de Melle's Patent*,[61] a rule of the common law on such a subject seems to be part of a common law of the Commonwealth, arising under the exercise of powers vested in the Commonwealth Parliament under the Constitution.

Reception of Statutory Law

In practice, the application of English statutory laws to the Australian States under the common law principles relating to "settled colonies" proved to be fraught with more difficulties than the reception of the common law. In theory, the principles were well settled by the nineteenth century. Firstly, the common law provided a "settled colony" with a body of statutory law which was applicable to the "situation and condition of the infant colony". Such statutes, dating from the dawn of Parliamentary history in England, became part of the "birthright" law of a settled colony under the common law. Secondly, the common law acknowledged the political reality that the sovereign British Parliament could pass laws which applied by *paramount force* in any British overseas possession.[62] British statutes, which named "plantations"[63] or colonies, either generally or specifically, as being subject to such laws, were automatically assumed to apply in these overseas possessions. So, too, were British statutes which could be construed as applying to colonies in general, or specific colonies, by "necessary intendment" of the British legislature.

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58. *See also*: *Chanter* v. *Blackwood* (No. 2) (1903) 1 C.L.R. 121; *R.* v. *Sharkey* (1949) 79 C.L.R. 121 at p. 163, per Webb J.; *Australian Communist Party* v. *The Commonwealth* (1950-1951) 83 C.L.R. 1 at p. 193, per Dixon J; G. W. Paton, *Liability of the Crown in Tort in Australia*, (1944) 22 Can. Bar Rev. 731; Wynes, op. cit. at pp. 75-78; D. Kerr, *The Law of the Australian Constitution*, Chapter IV "The Common Law in Force Throughout the Commonwealth"; *Barry, Paton and Sawer*, op. cit. at pp. 4-6.
59. *In Re Foreman and Sons Ltd.; Uther* v. *Federal Commissioner of Taxation*, (1947) 74 C.L.R. 508 at p. 521.
60. *Wynes*, op. cit. at p. 76.
61. (1954) 91 C.L.R. 42.
62. It will be recalled, for example, that Blackstone referred to the "general superintending power of the legislature of the mother country" over settled colonies.
63. A former term for colonies: *The Dictionary of English Law*, at p. 1349.

The difficulties which arose in Australia on the application of English statutory law mainly occurred in the context of applying those statutes which were received under the common law and did not apply by paramount force. As far as the statutes which applied by paramount force were concerned, it was beyond dispute that the British Parliament had an inherent right to make and unmake law in British overseas possessions.

Under the common law principles relating to the reception of English statutory law, which did not apply in a settled colony by paramount force, particular importance was attached to the date of settlement. Only those British statutes in force on the date of settlement, deemed to be applicable to the "situation and condition of the infant colony", were received under the common law. Amendments to such statutes or even their repeal by the British Parliament, subsequent to the date of settlement, did not affect their operation in a colony unless the British Parliament made special provision to incorporate these changes in the law of the overseas possession. Similarly, new legislative enactments of the British Parliament after a colony's settlement did not apply to it unless the British legislation operated in the colony by paramount force.[64]

In Britain's American colonies before the revolution this position was not always accepted with equanimity. Frequent criticism was levelled against the British Parliament for failing to apply new laws to the American colonies. Such statutes as the Habeas Corpus Act, which increased the rights of the subject, for example, were not stated to apply to overseas possessions, and this proved irksome to the American colonists. Even attempts by local colonial legislatures to incorporate post-settlement British statutes into their own law sometimes foundered because of the opposition of the British government. The general position of the colonists was that beneficial statutes, whether passed before or after settlement, should apply to them.[65]

There are recorded instances where colonial courts applied British statutes passed after settlement.[66] In 1783, in *Respublica* v. *Mesca*,[67] for example, Chief Justice M'Kean of Pennsylvania pointed out that some statutes had been applied by long usage in that State for almost a century and were so accepted as part of the law of the State. A limited recognition of this practice is to be found in Chalmer's "Colonial Opinions".[68] In 1729 Attorney-General Yorke's opinion on

64. Blackstone, 1 *Comm.* 107, Case 15.— Anonymous, 2 Peere Williams 75.
65. Goebel, *Cases and Materials on the Development of Legal Institutions*, at pp. 280-281.
66. Ibid.
67. 1 Dallas 73 at p. 75; 1 Law Ed. 42 at p. 43.
68. George Chalmers, *Opinions of Eminent Lawyers on various points of English Jurisprudence chiefly concerning the Colonies, Fisheries and Commerce of Great Britain;* Burlington, G. Goodrich and Co., 1858.

the application of British Statutes to Maryland acknowledged that certain British statutes had been received in the State "by long uninterrupted usage or practice, which may import a tacit consent of the Lord Proprietor and the people of the colony, that they should have the force of law there".[69] A Statute of the British Parliament, passed in 1752 for the American colonies, also gave some recognition to usage as the basis for applying post-settlement British statutes.[70] It legislated to re-inforce the customary use of British statutes in America, dealing with wills and codicils.[71]

As a general rule, however, the attitude of the British government, and of the courts, was that no post-settlement British statute could apply in an overseas possession unless it operated by paramount force or by an act of a local colonial legislature. The main opinions of the Law Officers of the Crown in Chalmers[72] and the decisions of American and British courts are in accord with position as stated in the Privy Council Memorandum of 1722 on the law to be applied in settled colonies. On this question, the memorandum stated quite categorically, "that after such country is inhabited by the English, acts of parliament made in England, without naming the foreign plantations, will not bind them".[73] This position was clearly accepted by the Supreme Court of the United States in *Scott* v. *Lunt's Administrator*.[74]

As far as the Australian States were concerned the official view expressed in the Privy Council Memorandum of 1722 generally prevailed. The Privy Council and the Australian Courts looked only to the body of enacted British law at the date of settlement or when it became clearly applicable to New South Wales and Tasmania under the 1828 Act.[75] Statutes which could be construed to apply to the

69. Ibid. at 208.
70. 25 Geo. II, c. 6.
71. Ibid., section 10.
72. Ibid. at pp. 209-232.
73. Referred to above as *Case* 15.— *Anonymous* 2 Peere Williams 75.
74. (1832) 6 Peters 349, 8 Law Ed. 423.
75. There are at least three cases which indicate that there may have been exceptions to the acceptance of this principle. In *Ex Parte Nichols* (1), (1839) 1 Legge 123, Dowling C.J. and Willis J. were prepared to overrule a decision which affected the "fundamental personal rights of British subjects" on the basis that the decision had been statutorily reversed by a post-1828 British Statute: The Prisoners' Counsel Act. As Stephen J. pointed out, however, this British statute could be considered *declaratory* of the law, which had been uncertain, and on this basis the court could apply this "declaration" of the common law. In both *Wilson* v. *Terry* (1849) 1 Legge 505; *Glasson* v. *Egan* (1866) 6 S.C.R. (N.S.W.), 85, there is dicta which may be construed to the effect that long usage of a statute in New South Wales might show that it was operative in that State. In each case post-1828 British Statutes were referred to, but on both occasions the cases were basically concerned with issues related to pre-1828 statutes. The post-1828 statutes were not applied. A reading of these two cases indicates that the post-1828 statutes were almost certainly referred to for assistance in understanding the operation of pre-1828 statutes and the common law.

States at this time, under the common law principles became part of the law of the colony. Subsequent repeal or amendment to these laws by the British Parliament did not affect their operation in Australia, unless special legislative provision was made by the British Parliament or a colonial legislature to do this. As was shown in *Scott* v. *Cawsey*,[76] the British Sunday Observance Act of 1780,[77] for example, continues to apply in Australia in its unmodified form unless changes have been made to the terms of the enactment by State legislation. The Victorian Imperial Acts Application Act of 1922[78] lists British statutes going back to the earliest years of Parliamentary history, which could be construed to be part of the received statutory law of each of the Australian States today, even though post-settlement British amendments and repealing legislation may have made many of these legislative provisions no longer applicable in Britain itself.

The date set for the reception of British statutes is not only important because it delimits the class of enactments, which can be applied under the common law, to those in force in Britain at that time. The same date looms large in the practical application of the common law principles to concrete situations. Unlike the reception of the common law, British statutes in force at the date of settlement could not be subsequently attracted if they were unsuitable to the circumstances and condition of a colony at the time English law was received. As Stephen J. pointed out in the New South Wales Supreme Court in 1829:

> "The question whether any particular statute is in force, may be determined, as I apprehend, with reference to the date of the New South Wales Act alone. I cannot conceive that we are to determine the question, by nice enquiries, from time to time, as to the progress made by the Colony in wealth or otherwise . . . there seems to be no ground for holding, that the question of applicability was to have reference to the future. On the contrary, the meaning seems to me plain; that those laws only should compulsorily be applied, which *then*, at the passing of that Act, be applied. For the future, as I conceive, a local legislature was created; by which, statutes not then capable of application, were thereafter to be introduced either wholly or in part, as that body might determine."[79]

Not unexpectedly, considerable difficulty was often experienced in determining whether British statutes were suitable to the conditions and circumstances of an infant colony at the time English law was

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76. (1907) 5 C.L.R. 132.
77. 21 Geo. III, c. 49.
78. 13 Geo. V, No. 3270. Reprinted in "The Victorian Statutes" 1929 Volume II, but inexplicably left out of the 1958 Victorian Consolidated Statutes.
79. *Ex Parte Lyons, in re Wilson*, (1839) 1 Legge 140 at p. 153.

received. Legge's selection of New South Wales Supreme Court cases decided between 1825 and 1854 abounds in examples dealing with the application of British statutory law to that State. Uncertainty on the body of British statutory law prevailing in Victoria, under the common law principles, led to the passing of the Victorian Imperials Acts Application Act, which regulates the operation of these Statutes in that State.

In determining the applicability of British statutes at the time of the reception two main considerations had to be taken into account. Firstly, the courts had to examine a particular British statute to ascertain its general suitability to overseas possessions. Secondly, even if such a statute might generally be suitable for overseas possessions the question still remained whether such a statute was suitable to the circumstances and conditions prevailing in a colony at the time of the reception of English law.

As Blackstone had recognised in his Commentaries, not all British statutes could become part of the "birthright" law of a settled colony. Statutes which contained "artificial distinctions and refinements", specially referring to British conditions, such as the "laws of police and revenue, the mode of maintenance for the established clergy, the jurisdiction of spiritual courts" might well be "neither necessary nor convenient" for a settled colony. In such instances the statutes could not be received into a colony under the common law.[80]

Several leading cases demonstrate the basic approach of the courts in dealing with the suitability of British statutes for settled colonies. One of the most important of the nineteenth century decisions is the case of *Whicker* v. *Hume*.[81] One of the questions raised before the House of Lords in this case was whether the Mortmain Act, which had been passed in the reign of George II, applied in New South Wales. Their Lordships held that this Act was not part of the received statutory law of New South Wales. The Judgment of Lord Cranworth most clearly set out the considerations taken into account on this occasion to reach this result. His lordship said:

> . . . with regard to this Statute of Mortmain, ordinarily so called, I cannot have the least doubt that that cannot be regarded as applicable to the colonies. One thing that the Act required is, that the deed is to be enrolled in Chancery within six months. When that statute was passed, I believe people would have thought it very chimerical to imagine that they could get from the antipodes to this country and back again to the antipodes in six months. It might possibly have been done, but it would have been thought a remarkably good voyage; and to suppose that an Act of Parliament is to be held

80. Op. cit.
81. (1858) 7 H.L.C. 124.

> to be in force which requires something so difficult to be performed, as applied to those distant colonies, seems to me very chimerical. But, besides that, there is the exception in favour of the Universities and the Colleges of Eton and Winchester. It is absurd to suppose that any enactment of this sort could be meant to apply to those distant possessions of the Crown. And more particularly there is no evidence whatever that the evil which that statute was meant to remedy, namely the increase of the disherison of heirs, by giving property to charitable uses, was at all an evil which was felt or likely to be felt in the colonies. I think it therefore quite clear that that statute does not apply in New South Wales.[82]

Other examples of cases in which it has been held that British statutes were not received under the common law, because the statutes themselves were related to particular problems or circumstances in Britain, included *Jolly* v. *Smith*[83] and *Winterbottom* v. *Vardon*.[84] In the first of these decisions the Full Court of the Supreme Court of Tasmania concluded that a British statute passed in the reign of George III, which required certain publications to have the name of the publisher printed on them, was not received under the 1828 Act. The Court pointed out that the object of this particular statute was to remedy a mischief local to Great Britain and Ireland. In *Winterbottom* v. *Vardon*, Poole J. of the South Australian Supreme Court held that the British Stamp Duties on Newspapers Act was one of local policy and therefore not in force in South Australia.

On the other hand, the Privy Council decision of *Attorney-General for New South Wales* v. *Love*,[85] gives an insight into the type of British statute which was received by the Australian States. It was held in this instance that the Nullum Tempus Act applied in New South Wales. This Act provided that the Crown could lose its right to recover land if it had been continuously in the possession of other persons for a period of 60 years. It was acknowledged by the Full Court of the Supreme Court of New South Wales[86] and confirmed by the Privy Council, that the statute was generally applicable to the Crown's rights with respect to land in Britain as well as the overseas possessions.

There are numerous examples of British statutes which have been held to be sufficiently general in their operation to have been received as part of the law of the Australian States. These include British

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82. Ibid. at p. 161.
83. (1899) 1 N. and S. 143, 10 Austn. Digest 497.
84. [1921] S.A.S.R. 364.
85. [1898] A.C. 679.
86. (1896) 17 N.S.W. C.R. 16. The Privy Council relied heavily on the judgments of the New South Wales Supreme Court in this case when the appeal against the State Court's decision was taken to London.

statutes of limitation,[87] Sunday Observance laws,[88] statutes dealing with the criminal law and police offences,[89] lotteries,[90] land legislation,[91] Statutes of Distribution[92] and laws dealing with Master and Servant Relationships.[93]

Problems in Applying Principles

As the cases on this issue have demonstrated, however, problems on the applicability of British statutes can arise if the Statutes contain general provisions as well as others which are particularly related to special British conditions. The weight of judicial opinion would seem to favour the view that the whole of a British enactment need not be applicable before it can become part of the received statutory law of an overseas possession.[94] The situation in this regard was perhaps best summed up by Chief Justice Griffith in the High Court cases of *Quan Yik* v. *Hinds*[95] and *Mitchell* v. *Scales*.[96] In the first of these cases the Chief Justice stated that if the general provisions of a British statute were not unsuitable to the conditions of the Colony, "the mere fact that some minor or several provisions could not come into operation owing to local circumstances is not sufficient reason for denying the applicability of the Statute as a whole. On the other hand, if the general provisions of a Statute were inapplicable, it would seem to follow that it is not competent to select a particular provision of the Statute which if it stood alone might be applicable, and to say that it is therefore applicable".[97] In *Mitchell* v. *Scales* His Honour re-asserted that an isolated provision could not be extracted from a British statute and applied in Australia, if the main structure of such an enactment

87. See for examples: *Griffith* v. *Bloch* (1878) 4 V.L.R. (L) 294; *Attorney-General for N.S.W.* v. *Love* [1898] A.C. 679; *White* v. *McLean* (1890) 24 S.A.L.R. 97; *South Australian Company* v. *City of Port Adelaide* [1914] S.A.L.R. 16.
88. See for examples: *Ronald* v. *Lalor* (1872) 3 V.R. (E) 98; *Garton* v. *Coy* (1873) 4 A.J.R. 100, 10 Austn. Digest 506; *Scott* v. *Cawsey* (1907) 5 C.L.R. 132; *Walker* v. *Solomon* (1890) 11 N.S.W. L.R. 88; 6 W.N. 167; *Cox* v. *McAllister*, [1962] N.S.W.R. 1429.
89. See for examples: *R.* v. *Black Peter* (1863) 2 S.C.R. (N.S.W.) 207; *R.* v. *Packer* (1864) 3 S.C.R. (N.S.W.) 40; *R.* v. *Wood* (1862) 1 W. and W. 371.
90. See for examples: *Mutual Loan Agency Ltd.* v. *Attorney-General for New South Wales* (1909) 9 C.L.R. 72; *R.* v. *De Baun* (1901) 3 W.A.L.R. 1; *Attorney-General for Victoria* v. *Moses* [1907] V.L.R. 130.
91. See for examples: *Cannon* v. *Keighran* (1843) 1 Legge 170; *A'Beckett* v. *Matthewson*, (1861) 1 W and W (c) 29.
92. *Skeeles* v. *Hughes* (1877) 3 V.L.R. (E) 161; *Re Kinderlin* (1861) 1 W. and W. (I.E. and II) 11; In *Will of Ryan* (1881) 7 V.L.R. (1. P and M) 38.
93. *Bilby* v. *Hartley* (1892) Q.L.J. 137; *Walsh* v. *Kent* (1862) 1 Q.S.C.R. 44.
94. In addition to *Quan Yik* v. *Hinds* and *Mitchell* v. *Scales*, cited below see: *R.* v. *Colan* (1878) 1 S.C.R.N.S. (N.S.W.) 1; *Anderson* v. *Ah Nam* (1904) 4 S.R. (N.S.W.) 492.
95. (1905) 2 C.L.R. 345.
96. (1907) 5 C.L.R. 405.
97. Op. cit. at p. 364.

showed that it was unsuited, when read as a whole, for overseas possessions.[98]

The courts did not, however, limit themselves to ascertaining whether a British statute was sufficiently general in its terms to be suitable for settled colonies. They looked, too, to determine whether such a statute was suitable to the conditions and circumstances of a colony at the time set for the reception of English law. In *M'Hugh* v. *Robertson*,[99] for example, three judges of the Supreme Court of Victoria finally upheld the application of a particular British Sunday observance law in that State on the ground that it was suitable to the circumstances and condition of New South Wales in 1828. The Western Australian Supreme Court decision of *R.* v. *De Baun*[100] also demonstrates the working out of this principle. The question at issue in this case was whether an English statute forbidding lotteries was applicable. In holding that the statute had been received in Western Australia in 1829, Chief Justice Stone pointed out that when the State was first settled by a small number of people, lotteries would be just as injurious to them as to any larger number.

In most cases the fact that a British statute was in its nature general meant that such a law would be suitable to an infant colony. Dr. S. H. Z. Woinarski, in a doctoral thesis, "An Introduction to the History of Legal Institutions in Victoria",[101] has claimed that there were in fact two theories on the application of British statutory law to settled colonies. One puts the emphasis on English law and endeavours to distinguish between what is general and what is merely of local significance. The other puts the emphasis on the circumstances in a colony at the reception of English law and by that test determines whether the particular law is applicable. In Dr. Woinarski's view both of these theories are "equivalent in substance" however their form may differ. Dr. Woinarski concludes that: "Laws in their nature general are suitable to an infant colony: laws suitable to an infant colony are not the artificial requirements peculiar to England."[102]

It would seem that in Dr. Woinarski's view the key question to be asked on the reception of English statutory law is whether a statute as a whole or particular provisions of a British statute are artificial requirements peculiar to England. Undoubtedly, in many instances the

98. Op. cit at p. 411. The application of this dicta was raised in *Winterbottom* v. *Vardon* [1921] S.A.S.R. 364, where Poole J. of the South Australian Supreme Court showed that not all cases had accepted Chief Justice Griffith's view. In the circumstances of this particular case, however, Poole J. did not find himself constrained to give a definitive answer on this question.
99. (1885) 11 V.L.R. 410.
100. (1901) 3 W.A.L.R. 1.
101. Cited in *The British Commonwealth, The Development of its Laws and Constitutions, Vol. 2, Australia,* at pp. 3-4.
102. Ibid. at p. 4.

generality or otherwise of British statutory provisions will determine whether or not the law was received, no matter whether either or both of the "theories" referred to by Dr. Woinarski is applied to a particular law. With respect, however, it is submitted that this approach to the question of the reception of British statutory law oversimplifies the matter.

The generality or otherwise of British statutory provisions must always be taken into account to determine their reception under the common law. But the authorities show that generality alone is not the only criterion which finally determines the application of particular British statutory provisions. In *M'Hugh* v. *Robertson*, Acting Chief Justice Molesworth recognised that the Sunday Observance Act of 1780, although general in its terms might not be suitable for every settled colony. One of the factors that his Honour looked at, before finally upholding the reception of this Statute in 1828, was whether the proportions of the numbers of various religious sects in New South Wales in that year varied significantly from the religious groupings in England when the Act was passed in 1780.[103] His Honour went on to indicate that this statute could only be received in colonies where the population at the reception of English law was "generally British and Christian". The absence of machinery appropriate to the enforcement of general provisions of a British statute might also lead to it being inapplicable. The appellant in *Quan Yik* v. *Hinds*[104] was charged under an Act passed in the reign of George IV[105] which made it an offence to sell tickets in a lottery not authorised by that or some other Act of Parliament. Griffith C.J., Barton and O'Connor JJ., the three High Court Justices who heard the appeal, agreed that the particular section under which Quan Yik was charged was not unsuitable to the conditions in New South Wales when the 1828 Act was passed. They found, however, that the machinery for enforcing the particular section did not exist in New South Wales in 1828, and therefore the particular statutory provision was not reasonably applicable to New South Wales in that year. It can hardly be doubted, however, that if the laws and judicial institutions of the Colony had been more like their British counterparts in 1828, the law would have been received. If, for example, Courts of Quarter Sessions had been in existence in New South Wales in 1828, the appeal procedure allowed in the British lottery law, under which Quan Yik was charged, might have been followed. But as Griffith C.J. pointed out in this case, Quarter Session Courts were not set up in New South Wales until 1830. Therefore one of several important parts of the machinery

103. (1885) 11 V.L.R. 410 at p. 429.
104. (1905) 2 C.L.R. 345.
105. 4 Geo. IV, c. 60.

necessary for enforcing the particular lottery law was absent at the time of the reception of English law in New South Wales.[106]

As shown by many of the cases dealing with the reception of British statutory law in Australia the applicability of British enactments to a settled colony at a particular point in time may be fraught with many problems. A British statute which may apply must be carefully examined to test its suitability for overseas possessions. In addition, the circumstances and condition of a particular colony at the time of the reception of English law may also have to be taken into account.

The "Repugnancy" Crisis

In the nineteenth century one other major problem manifested itself with respect to the received law in the Australian States. The development of new legislative institutions in the Australian colonies, beginning with the creation of a Legislative Council in New South Wales in 1824[107] led to difficulties relating to the power of local legislatures to pass laws which conflicted with the British statutes and unenacted law. As to be expected, as the local colonial legislatures were progressively given more power and representative government came and then gave way to responsible government,[108] the likelihood grew of conflicts between local statutes and the "birthright" law of the colonies.

Although it was clearly acknowledged that a colonial legislature was subordinate to the British Parliament and bound by British legislation which applied by paramount force[109] doubt surrounded the power of colonial legislatures to alter or repeal the English law which had been received under the common law.[110] At least two nineteenth century commentators suggested that laws in a Crown colony must not be repugnant to the common law.[111] In Lower Canada the validity of local statutes dealing with land tenure had been challenged as being in conflict with received English law. This situation was only cleared up after British legislation ratified the legislation passed in Canada.[112] With respect to the received statutory law Stephen J. of the New South Wales Supreme Court in *Ex Parte Lyons, In re Wilson*,[113] hinted at problems which could arise in this context, too. In referring to British

106. Op. cit. at p. 365.
107. *Quick and Garran*, op. cit. at pp. 36-37.
108. For a summary of the development of legislative institutions in the Australian States see: *Quick and Garran*, op. cit., Part III, at pp. 35 ff.
109. *Ex Parte Lyons, In re Wilson*, 1 Legge 140.
110. Ibid. at p. 153.
111. Tarring, *Law Relating to Colonies*, 2nd ed., at p. 144; Stephen, *History of the Criminal Law*, ii, at p. 58.
112. 1 William IV, c. 20. "An Act to explain and amend the Laws relating to Lands holden in Free and Common Soccage in the Province of Lower Canada."
113. 1 Legge 140.

statutory law which applied in New South Wales under the 1828 Act he expressed the view that once it had been determined that a British statute applied in the colony "the Colonial Legislature can have no power to repeal, even if they had to amend it. So long as there remains a doubt whether a particular statute extends here, the Council may modify, and alter or reject at discretion. But the section appears to me to show that if there be no doubt that such statute does extend, their legislature functions are then at end."[114]

By the end of 1856 responsible government, with bicameral Parliaments, vested with ostensibly wide legislative powers, had been created in New South Wales,[115] South Australia,[116] Victoria[117] and Tasmania.[118] As a result of events in South Australia, soon after the attainment of responsible government in that State, the question whether the new legislatures could enact laws contrary to the Statutes and unenacted law which had been received in Australia became a pressing issue.

The focal of the controversy was Judge Benjamin Boothby who had been appointed to the Supreme Court of South Australia by the British government in 1853.[119] It was said that when Boothby's appointment was placed before Queen Victoria for approval she asked: "Why on earth does he want to go to South Australia?" To which the Duke of Newcastle replied: "Ma'm he has nine sons to provide for." A biographer has summed up Boothby J. in the following way: "Mr. Boothby's career at the bar, although in no way exceptional, had been meritorious, and he had attained a respectable standing. His learning, if it was neither as deep as a well, nor as wide as a Church door, was at least as extensive as that of the average barrister who was a candidate for a colonial judgeship."[120]

For almost ten years the judgments of Boothby J. threatened to frustrate many of the legislative endeavours of the South Australian Parliament. Although frequently opposed by Chief Justice Hanson, Boothby J. was often joined by Gwynne J., the other judge on the Supreme Court Bench, in striking down local enactments. Three separate grounds were called in aid to test the validity of South Australian legislation. Firstly, Boothby J. sometimes claimed that the

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114. Ibid. at p. 153.
115. *Quick and Garran,* op. cit. at pp. 44-5.
116. E. G. Blackmore, *The Law of the Constitution of South Australia,* at pp. 80 ff.
117. *Quick and Garran,* op. cit. at p. 57.
118. Ibid. at p. 61.
119. The following biographical material on Boothby J. is taken from two unpublished manuscripts in the South Australian Archives by Mr. R. M. Hague of the South Australian Crown Law Department. One manuscript if a full-scale biographical study of Boothby J. The other is his *History of the Law in South Australia.*
120. Ibid.

South Australian Parliament had exceeded its specific powers under its own Constitution and British statutes which applied in the Province by paramount force. Secondly, he argued that some Acts were void because the Governor had failed to reserve the local legislation to England to obtain the Royal Assent. Thirdly, he often asserted that legislation was repugnant to the law of England, and should be struck down on this ground.[121]

To be fair to Boothby, there was substance in the claim that each of these three grounds were recognised as possible ways in which colonial legislation could be struck down. Indeed, there are occasions even today when these grounds may be used to nullify State enactments.[122] But even after taking into account the vituperative partisanship of his critics, who were many, it is hard to deny that Boothby J. went considerably further than his contemporaries in denying power to a colonial legislature. His concept of repugnancy in particular, sometimes meant that local laws would be struck down even if there were only minor technical differences between South Australian enactments and the received statutory and unenacted law.[123]

One historian has recorded that Boothby J. was "an obstinate and uncompromising dogmatist".[124] It was said that he "sincerely regarded himself as the champion of English standards and never mitigated his abhorrence of colonial crudities and the impertinent suggestion of those who had never eaten dinners in the Inns of Court 'that rules formulated by the finest English minds and buttressed by centuries of tradition should be set aside for antipodean convenience' ".[125] After the Real Property Act, which introduced the Torrens system to South Australia, was partly negatived by Boothby J., aided by Gwynne J., the actions of His Honour claimed much[126] of the attention of the South Australian Parliament.[127]

In 1861 the South Australian legislature appointed a Select Committee to investigate Boothby J.'s decisions, but His Honour refused to appear before it.[128] One Ministry collapsed on the Boothby issue[129]

121. Ibid. In particular chapter V of the *History of the Law in South Australia.*
122. Castles, "Limitations on the Autonomy of the Australian States", 1962 *Public Law* 175, at pp. 182-196.
123. Most of these cases are unreported in regular Law Reports. Contemporary newspapers, particularly "The Register" contain the best extant reports of these decisions which are often referred to in detail by R. M. Hague's works, which are cited above. For a reported instance of an examination of repugnancy by Boothby J. see: *Dawes* v. *Quarrel,* Pelham's Reports of Cases argued and determined in the Supreme Court of South Australia, 1. See also: Pike, "Introduction of the Real Property Act in South Australia", 1 *Adelaide Law* Rev. 169 at pp. 185-186.
124. Pike, op. cit. at pp. 184-185.
125. Ibid. at p. 185.
126. Ibid. at pp. 186-189.
127. G. D. Combe, *Responsible Government in South Australia* 94.
128. Id.
129. Id.

and another was formed with one specific object in view, to finalise consideration of a motion calling for His Honour's removal.[130] Addresses were adopted by both Houses, praying for his removal, but the British government of the day refused to accede to this request.[131]

By 1863, "there seemed no limit to the laws declared invalid through careless drafting or through repugnancy".[132] Governor Daly wrote despairingly to the British government in 1865 that "no one can tell under what laws he is living or what will, in any given instance, be the decision of the Supreme Court".[133] But relief was in sight. Communications passed between South Australia and the British government on the need for remedial legislation to clarify the situation and finally a bill, which became the Colonial Laws Validity Act 1865, was sent from London to Adelaide. The bill was approved by the South Australian government and was returned to England where it was enacted by the British Parliament.[134]

Although the Colonial Laws Validity Act[135] was passed because of the controversial situation that had developed in South Australia in the preceding decade, this Statute was made expressly applicable to all "colonial laws" with the exception of those made in the Channel Islands, the Isle of Man and "such territories as may for the time being vested in Her Majesty under or by virtue of any Act of Parliament for the Government of India".[136] The judicial interpretation of sections 2 and 3 of this Statute soon made it clear that colonial legislatures, such as the South Australian Parliament, were to have much more extensive powers of amending or repealing received English law than Boothby J. would have been prepared to accord to them.

Before turning, however, to the status of English laws in Australia, following the Colonial Laws Validity Act, some mention must be made of the situation in South Australia immediately following the passing of this enactment. Despite the fact that the 1865 Act would seem to have clarified the situation, Boothby J. continued to be a thorn in the side of the South Australian Parliament. In June 1866, the South Australian Parliament was called together mainly to consider the conduct of His Honour, who was persisting in striking down local legislation.[137] Both Houses adopted addresses praying for Boothby's removal from office. Amongst other things the addresses alleged that "Judge Boothby had persistently refused to administer laws duly

130. Ibid. at p. 95.
131. Id.
132. Pike, op. cit. at p. 189.
133. Daly to Cardwell, the Colonial Secretary, No. 42, 26-vii-1865; quoted by Pike, op. cit. at p. 189.
134. Pike, op. cit. at p. 189.
135. 28 and 29 Vict. c. 63.
136. Ibid., section I.
137. *Combe*, op. cit. at p 98.

ment".[142] As a result of this and other decisions[143] which have interpreted sections 2 and 3 of the Act, "repugnancy" can only arise as a ground for invalidating a "colonial statute" when the local statute is "repugnant" to British laws which apply to the overseas possession by express words or necessary intendment. Subject to two provisoes, this meant that such statutes which could apply to South Australia and Western Australia at their dates of settlement, and those Statutes which were made applicable to the other States under the 1828 Act, could be freely amended or repealed by State Parliaments. The first proviso was that local legislation could not exceed the powers vested in a State Parliament under its own Constitution. Secondly, under the Colonial Laws Validity Act, local laws were void if they were repugnant to English statutes which applied to a State by paramount force. A good example of a statute which expressly applied to the Australian States is, of course, the Colonial Laws Validity Act itself. State legislatures were not permitted under the terms of the Act to pass laws "repugnant to the laws of England", and they were also subject to the limitation of "manner and form" contained in section 5, relating to the local alteration of their own constitutions.

At the time of its passing the Colonial Laws Validity Act was looked upon as one of the charters of colonial legislative independence, "next in importance to the famous Declaratory Act, 18 Geo. III, c. 12, in which the British Parliament, profiting by the lessons of the American rebellion, renounced its intention to again tax the colonies. It removed all doubts as to the powers of colonial legislatures to alter or repeal the general mass of English law, such as the law of primogeniture, inheritance etc., not made operative, by Statute, throughout the Empire."[144] Viewed in the perspective of the nineteenth century, and indeed the early part of the twentieth century, too, this statement accurately sums up the generally held view of the Colonial Laws Validity Act at that time. By 1931, however, the passing of the Statute of Westminster[145] acknowledged that the residual power still vested in the British Parliament to legislate for overseas territories under the Colonial Laws Validity Act was no longer acceptable to the peoples of many British possessions.

Following the enactment of the Colonial Laws Validity Act the

142. Ibid. at pp. 20, 21.
143. See for examples: *Smiles* v. *Belford* (1887) 1 Ont. Appeals 436; *White* v. *Lake* (1890) 7 W.N. (N.S.W.) 47; *See* v. *The Australian Agricultural Company* (1910) 10 S.R. (N.S.W.) 690; *Nadan* v. *The Queen* [1926] A.C. 482; *Hume* v. *Palmer* (1926) 38 C.L.R. 441; *Woolworths Limited* v. *Wynne*, [1952] N.Z.L.R. 496; *Thornton* v. *The Police* [1962] 2 W.L.R. 1141.
144. *Quick and Garran*, op. cit. at p. 348.
145. 22 Geo. V, c. 4 Section 2 (1) specifically provided that Dominions which adopted the Statute of Westminster would no longer be subject to the Colonial Laws Validity Act after such adoption.

status of English law in Australia could be defined with reasonable clarity. On the one hand, subject to their own constitutions and the 1865 British Statute, the Australian states could repeal or amend the British statutes and unenacted English law which had been received under the common law constitutional principles. On the other hand, the States were still bound by British statutes, passed before or after 1865, which applied to them by *paramount* force.

As far as the laws which were received under the common law are concerned many of these have now been completely repealed or amended by State legislation. But with the notable exception of Victoria, it is still difficult to ascertain the content of British statutory law which still prevails in the Australian States. Unless a court has had occasion to consider whether a particular British statute was received under the common law, it may still be a matter of conjecture whether a British statute was ever received into the law of an Australian State. In Victoria, the situation has been greatly clarified by the enactment of detailed local legislation dealing with this problem. After years of patient and erudite labour, Sir Leo Cussen, a former judge of the Victorian Supreme Court, took the leading part in drafting what became the Victorian Imperial Acts Application Act.[146]

Sir Leo Cussen pointed out to the Statute Law Revision Committee of the Victorian Parliament in 1922 that much of the basic British statute law which applied in that State was "not readily available in Victoria except to those within the reach of large libraries". This statute law, he said, was "not characterised by any formal marks which readily distinguish it on the one hand from legislation so obviously arising out of purely English condition as not to be applicable here". He went on to argue that the Victorian legislature should determine for itself which British Statutes, over which the legislature had power to continue in force, amend or nullify, should continue to be part of the law of Victoria.[147]

The Imperial Acts Application Act is "the most exhaustive attempt in Australia to deal with the problem of the reception of statutory law".[148] As Sir Leo Cussen told the Victorian legislators in 1922, those British statutes which had not been considered by the courts, to determine whether they were applicable to the state, had "been carefully examined with a view to ascertaining by the application of judicial tests" whether they became part of the received law of New South Wales in

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146. 13 Geo. V, No. 3270. See also Footnote 78.
147. Statement to the Victorian Statute Law Revision Committee, August 11, 1922.
148. *The British Commonwealth, Vol. II, Australia,* op. cit. at p. 5.

1828.[149] This Act systemises the operation of received English law in Victoria.

Under the Victorian legislation four classes of British statutes have been defined. Firstly, certain statutes, such as the Sunday Observance Acts of 1677 and 1780, have been directly transcribed, insofar as they are applicable to Victoria, into the Victorian statute itself. These Acts no longer apply in Victoria under the common law, but under the authority of the Victorian Parliament itself.[150] Secondly, other British statutes were examined and have been placed in the appropriate places in the general consolidation of Victorian statute law.[151] Thirdly, a series of British statutes are named in the second schedule of the Imperial Acts Application Act. These do not apply under the authority of the Victorian Parliament. Their application remains to be determined under the common law principles on the reception of British statutory law.[152] Fourthly, with very limited exceptions, all other British Statutes, which were not mentioned or dealt with in the Act, are repealed.[153]

In the absence of similar legislation in the rest of Australia, this Victorian statute is undoubtedly a guide for assisting in the determination of the types of British legislation which may apply in the other States, too. As Sir Leo Cussen pointed out in his appearance before the Victorian Statute Law Revision Committee, he had applied "judicial techniques" in deciding whether British legislation had become part of the law of Victoria. The "opinions" of this famous Victorian judge, applying "judicial techniques", are surely of high persuasive authority.

In the Australian States today, the position with respect to British statutes which apply by paramount force remains as it was in the nineteenth century. For the first 41 years of its existence, too, the Commonwealth Parliament was bound by the provisions of the Colonial Laws Validity Act.[154] Until the adoption of the Statute of Westminster by the Commonwealth Parliament in 1942, with retrospective operation to September 3, 1939, Commonwealth laws were sometimes struck down as being "repugnant" to the laws of England within the

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149. Op. cit. See also: Explanatory Paper to the Imperial Acts Application Bill, "The Victorian Statutes 1929", Vol. II, at p. 1219.
150. Imperial Acts Application Act, op. cit., section 4.
151. See Explanatory Paper, op. cit. See also later amendments to and inclusions from transcribed statutes in the Act as reprinted in the 1928 Victorian Consolidation, Volume II, at pp. 1152-1213.
152. Imperial Acts Application, op. cit., section 6.
153. Ibid., section 7.
154. When the Commonwealth was created in 1901 it was generally assumed that the Colonial Laws Validity Act would apply as a "matter of course" to the Commonwealth Parliament. *Quick and Garran*, op. cit. at p. 350.

meaning of sections 2 and 3 of the Colonial Laws Validity Act.[155] Even today, Commonwealth statutes, passed before September 3, 1939, may be voided on the ground of "repugnancy".[156] Unlike the Canadian Provinces, however, no provision was made in the Statute of Westminster to include the Australian States within its terms. As a result, the States are still legally subordinate to the British Parliament; they are bound by British statutes which extended generally to colonies before 1931, or to any British enactment which expressly deals with the Australian States or a particular State.[157]

Politically, it can hardly be doubted that the British Parliament would not pass legislation for the Australian States today without the advice and consent of the States themselves. But there are still a number of British statutes, passed in an era when the present day concept of the Commonwealth was unknown, which apply in the States. In addition to such Statutes as the Colonial Laws Validity Act,[158] which order the constitutional structure of the States, these include the British Merchant Shipping Acts,[159] the Colonial Marriages Act,[160] the Fugitive Offenders Act[161] and a number of other Statutes. In some instances British laws may no longer apply in the States because the Commonwealth Parliament has exercised its power over the subject matter of British laws which would otherwise apply by paramount force in the States. But where the Commonwealth Parliament has no constitutional power to do this, British laws still apply by paramount force.

Although the general meaning of "repugnancy" under the Colonial Laws Validity Act has been well settled since *Phillips* v. *Eyre*,[162] the question whether particular statutes are in fact repugnant to the law of England, and to what extent, may still cause difficulties. Various

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155. For the application of the Colonial Laws Validity Act to Commonwealth legislation see: *Chia See* v. *Martin* (1905) 3 C.L.R. 649; *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (1915) 20 C.L.R. 148; *Union Steamship Co. of N.Z. Ltd.* v. *The Commonwealth* (1925) 36 C.L.R. 130; *The Commonwealth* v. *Kreglinger* (1926) 37 C.L.R. 393; *Hume* v. *Palmer* (1926) 38 C.L.R. 441; *Frost* v. *Stevenson* (1937) 57 C.L.R. 528; *R.* v. *Bevan* (1942) 66 C.L.R. 452.
156. Castles, "The Paramount Force of Commonwealth Legislation Since the Statute of Westminster", 35 *A.L.J.* 402 at pp. 402-3.
157. Castles, "Limitations on the Autonomy of the Australian States", 1962 *Public Law* 175 at pp. 182-3.
158. See also for examples: The Australian States Constitutions Act 1842, 5 and 6 Vict. c. 76; The Australian Constitutions Act 1850, 13 and 14 Vict. c. 59; The Australian Colonies Act 1861, 14 and 25 Vict. c. 44; The Australian States Constitution Act 1907, 7 Edw. 7 c. 7.
159. See: "Limitations on the Autonomy of the Australian States", op. cit. at p. 192.
160. 28 and 29 Vict. c. 64. Reprinted in South Australian Statutes, 1837-1936, Volume 8 at p. 785.
161. See: *Ffrost* v. *Stevenson*, op. cit., footnote 155.
162. (1870) L.R. 6 Q.B. 1.

attempts have been made to define "repugnancy" with some degree of precision, but they have not been particularly successful.

In *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth*,[163] Higgins J. stated that he was "strongly inclined to think that no colonial Act can be repugnant to an Act of the Parliament of Great Britain unless it involves, either directly or indirectly or ultimately a contradictory proposition—probably contradictory duties or contradictory rights".[164] Isaacs J. in another High Court decision affirmed that "repugnancy" was equivalent to "inconsistency or contrariety".[165] On occasion, the "covering the field" test, which has been used to determine the meaning of inconsistency between State and Commonwealth legislation under section 109 of the Australian Constitution, has been called in aid to ascertain if repugnancy existed under the Colonial Laws Validity Act.[166]

In this century there have been few cases where State laws have been struck down for repugnancy. Most cases dealing with the operation of sections 2 and 3 of the Colonial Laws Validity Act have concerned the validity of Commonwealth legislation passed before the Commonwealth Parliament's adoption of the Statute of Westminster.[167] This fact, however, does not mean British statutes applying by paramount force in the States have been quietly forgotten. Actually, most statutes which apply in the States by paramount force were passed in the nineteenth century and by 1901 such British Acts as the Merchant Shipping Acts and the Fugitive Offenders Act were generally accepted as part of the legal framework of each of the Australian States, as indeed they are today.

163. (1915) 20 C.L.R. 148.
164. Ibid. at p. 178.
165. *Union Steamship Co. of N.Z.* v. *The Commonwealth* (1925) 36 C.L.R. 130 at p. 148.
166. *Hume* v. *Palmer* (1926) 38 C.L.R. 441. See also comments of Dixon J, *Ex Parte McLean* (1930) 43 C.L.R. 472 at p. 483; "The Paramount Force of Commonwealth Legislation Since the Statute of Westminster", op. cit. at pp. 404-406.
167. "Limitations on the Autonomy of the Australian States", op. cit. at 183-184.