

THE RECEPTION OF ENGLISH LAW AS A MODERN LEGAL PROBLEM

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ABSTRACT

The reform of English law received is a matter of some importance today when the volume of law, particularly statute law, has created difficulties in determining what the law is in respect of a particular field of interest. The reception of English Law problem is stated within the British Columbia framework, but it is neither new or unique to British Columbia. It is timely, in that the Courts have occasion to refer to it with reasonable frequency on matters of some concern to individuals and to the public generally. It is timeless, in that it is a factor in the founding of the colonial empire of England and the evolution and development of colonies as independent nations.

The primary consideration in this thesis is to state the problems relative to reception and to present their resolution by the Courts and by academics. What emerges is a pattern of fragmentary statement without definite parameters. Much of what is presented is relative not only to British Columbia but also to any other common law jurisdiction where reform has not already been accomplished. History is one parameter, but the problem is not historical. The primary thrust of the reception problem is to determine the impact of English Law in any jurisdiction and what English Law remains in force there. This is a modern legal problem, complicated in Canada by the complexities of the Federal jurisdiction.

Part I states the questions that have arisen as to

reception and the legislative history of the Province of British Columbia.

Part II considers the reception of English law, as it has been developed by judicial reasoning and the interpretation of academics. Primarily, cases which affect British Columbia have been considered, particularly when they are at variance with the generally accepted position. The problems which remain unanswered and the conflicts presented in the various decisions are postulated with a view to establishing the need for legislative reform.

Part III considers and summarizes the reform of the English Statutes and the reforms which have been effected in other jurisdictions. Their achievements and methods are referred to in order to assess the options for reform presented and their value as authority in another jurisdiction. Much scholarship has been devoted to this problem in other jurisdictions, particularly in Australia and in Africa. In Africa, emerging nationalism has focused the attention of the legislatures on the problems associated with reception which are not generally politically attractive. Relatively little has been done in Canada to assess the impact of English Law and to effect such reform.

The Conclusion recommends reform legislation.

TABLE OF CONTENTS

Part I - Introduction

PAGE

I.	<u>THE RECEPTION PROBLEM TODAY</u>	
1.	The General Impact of English Law in British Columbia	1
2.	Problems of the reception of English Law	4
3.	Reform of Reception Provisions	6
4.	Prospectus for Reform	7
II.	<u>PROVISIONS FOR CONTINUITY OF LAW IN BRITISH COLUMBIA</u>	9
1.	Legislative history of British Columbia	
	(a) Vancouver Island (formerly Vancouver's Island)	9
	(b) British Columbia 1858 - 1866	12
	(c) Stickeen territories	15
	(d) The United Colony of British Columbia 1866 - 1871	15
	(e) Union with Canada	16
2.	Special legislative provisions for reception in British Columbia	17
	FOOTNOTES (Part I)	19

Part II - The Reception
of English Law

III.	<u>GENERAL RULES FOR RECEPTION AND APPLICABILITY OF ENGLISH LAW</u>	24
------	---------------------------------------------------------------------	----

III. GENERAL RULES FOR RECEPTION AND APPLICABILITY OF ENGLISH LAW

1.	The Royal prerogative	24
2.	How is English Law received?	
	(a) By conquest	25
	(b) By settlement and plantation	28
	(c) By charters and statutes	29
	(d) By extension of the boundaries or by separation from a Colony	31
	(e) By establishment of Courts	31
3.	Legislation in force <u>proprio vigore</u>	
	(a) Background	32
	(b) Colonial sovereignty before the Statute of Westminster, 1931	33
	(c) Colonial sovereignty after the Statute of Westminster, 1931	35
4.	What parts of English Law are received?	
	(a) Statutes	38
	(i) Is there a cut-off date?	39
	(ii) Which English Statutes are received?	39
	(b) Common Law	40
	(i) Is there a cut-off date for reception of common law?	41
	(ii) Judicial Development limiting general acceptance of common law	43
5.	What special parts of English Law are received?	49
	(i) Equity	49
	(ii) Ecclesiastical Law	52
	(iii) Legislation other than Acts of Parliament	53
	(iv) Constitutional Law	54
	(v) Admiralty Law	56
	(vi) Law Merchant	58
	(vii) Practice and Procedure	58

PAGE

IV. <u>JUDICIAL INTERPRETATION AS TO RECEPTION OF ENGLISH STATUTE LAW</u>	
1. Applicability	59
(a) Time to test applicability	59
(i) in England	60
(ii) in the Colony	60
(b) What is a statute of general application?	65
(i) a law of local policy	66
2. Local circumstances in the Colony	
(a) Different physical and social conditions	68
(b) Is the double negative phrasing as to local circumstances a decisive parameter for British Columbia?	69
(c) Inapplicability due to procedural problems	70
(i) applicability within the existing local machinery	72
(ii) applicable but dormant	73
(iii) second substantive provision and procedure inapplicable	75
3. Problems inherent in a Federation	76
(a) Is the Province of British Columbia justified in providing for a matter of Federal jurisdiction on the argument that the Federal government, having jurisdiction, has not made provision?	76
(i) Is the case of an English act in force by virtue of the reception statute different?	78
(b) Is a valid law in force in British Columbia before Federal legislation was enacted, and supergeded by Federal legislation, revived upon repeal without re-enactment by the Federal authority?	80
(i) An Act in force by the operation of the English Law Act	
(ii) An Act in force as <u>proprior vigore</u> legislation	81

PAGE

(c) Limitations of extra-territoriality	82
(i) Historical Background	
(ii) Provinces limited as to extra-territoriality, before and after 1931	83
(iii) Federal Provincial conflict	85
4. The role of the Courts	87
(a) Justification	
(b) Are the Courts the appropriate body to provide for the matter?	89
FOOTNOTES (Part II)	91

Part III - Statute Law Revision and
Legislative Reform

V. <u>IMPERIAL STATUTE LAW REVISION AND REFORM</u>	115
1. Historical	
(a) The need for reform	
(b) The impetus for reform	116
(c) Statute law reform	117
2. Methods of Statute Law Reform	119
(i) Revision	
(ii) Indexing	
(iii) Expurgation	120
(iv) Consolidation	122
(v) Codification	123
3. The Law Commission Act, 1965	126
4. "Forgotten amendments" to the Canadian Constitution	127
VI. <u>THE REFORM OF PROVISIONS FOR RECEPTION OF ENGLISH STATUTES BY LOCAL LEGISLATION</u>	128
1. Incomplete reform: consolidation and listing	129

	<u>PAGE</u>
(a) British Columbia	129
(i) R.S.B.C. 1911	
(ii) Subsequent reform	132
(iii) Law Reform Commission	
(b) Ontario	132
(i) 1902 Revision	134
(ii) Further consolidation	139
(iii) Ontario Law Reform Commission	139
2. Codification	141
(1) Codification of particular aspects of law	141
(2) The American colonies	
(a) North Carolina: general provision with a non-statutory list authorized by the legislature	142
(b) New York: the revision-repeal method	144
(c) Repeal without complete statutory revision	148
3. Lists of Statutes	149
(a) Alberta: Institute of Law Research and Reform	150
(b) Bahamas: Statutes expressly declared in force	151
(c) Gibraltar: Statutes declared in force, with specific provision to alter	
(d) Ghana (formerly Gold Coast): Statutes specifically excluded	152
(e) Application of English Law Ordinance, Hong Kong	152
4. Complete Reform	152
(a) Western Nigeria	153
(b) Victoria (Australia)	154
(c) The legacy of the Victorian legislation	162
(i) Report of the Law Reform Commission of New South Wales on the Application of Imperial Acts in New South Wales (L.R.C. 4) November, 1967	162

(ii)	Report of the Law Reform Commission of the Australian Capital Territory and Supplementary Report, 1973	169
(iii)	An unpublished report on English Statutes in Papua New Guinea by Professor R. O'Regan, Professor of Law, Queensland University, formerly of the Monash Law Faculty	175

FOOTNOTES (Part III)	176
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VII. <u>CONCLUSION: CAN THE IMPACT OF ENGLISH LAW BE ASSESSED?</u>	192
--------------------------------------------------------------------	-----

BIBLIOGRAPHY	201
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APPENDIX A

I	The evolution of the <u>English Law Act</u>	209
II	The boundaries of the Province of British Columbia	212
III	Provision for the administration of Justice	215
IV	<u>British North America Act, 1867</u>	221
V	<u>The Interpretation Act, British Columbia</u>	223
VI	Imperial Legislation enlarging or defining the sphere of Colonial legislation generally	
	1. <u>Colonial Laws Validity Act, 1865</u>	225
	2. <u>Statute of Westminster, 1931</u>	

APPENDIX B

VII	Western Nigerian Statute	228
VIII	Bahamas Statutes , 1799	229
	1957, Schedule	231

VITA

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THE RECEPTION OF ENGLISH LAW AS A MODERN LEGAL PROBLEM

Part I - Introduction

I. THE RECEPTION PROBLEM TODAY

1. The General Impact of English Law in British Columbia

British Columbia as we know it today was organized in 1866 by Imperial Act.¹ Two former Crown Colonies were joined in one Colony: Vancouver Island and the mainland colony, British Columbia. The Stickeen territories and various other British lands lying west of the Rockies not previously granted colonial status² had been previously attached to the mainland colony. This history will be developed in Chapter II. In 1867, the British Columbia Legislative Assembly enacted as law in all parts of the Colony "the civil and criminal Laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable ...".³ In effect, this enactment continued the provision which had been made for the mainland colony of British Columbia at the time of its establishment by the November 19, 1858 Proclamation of Governor James Douglas. Substantially the same provision is in force today as the English Law Act.⁴

A body of law takes many years to develop, unless it is taken from a system already operating in another country. To avoid a vacuum in a colonial situation and to continue the familiar law of the parent nation, it was the practice of England to extend its law to new lands settled by it. In the case of a settled colony,

it was established as a rule of law at an early date that an Englishman going abroad took so much of the Law of England as at the date of settlement was suitable for the new land. A body of case law and legal interpretation was immediately available and could be drawn upon to govern or guide as required. In the case of a conquered land, the law in statu quo continued, subject to the conquering sovereign conferring only certain English Law, principally in the interest of uniformity and relating to commercial and criminal matters.

In some cases the colonial jurisdiction itself adopted English Law at a particular date. Such extension or adoption has been a common factor of the development and evolution of so called "common-law jurisdictions" associated in the British Empire and Commonwealth and in their emergence as independent nations, either associated or independent of Empire and Commonwealth. British Columbia adopted English Law by statute. The Civil and Criminal Laws of the parent nation at a precise date, 19 November, 1858, then formed the basis for the colonial development, subject to alteration by the law then in force in the Colony, which included law in force by virtue of settlement and colonial legislation.

The English Law Ordinance, 1867,⁵ preserved the existing law in each portion of the Colony. Existing law was different for each of the areas involved in accordance with their divergent history and the different laws previously enacted in each jurisdiction. The 1867 Ordinance also defined English laws suitable

for the new land with the words "... so far as the same are not from local circumstances inapplicable ...". English case law and the case law of the various colonial jurisdictions has developed interpretive rules to determine the precise meaning of this and of similar phrases in other reception statutes and their effect on the precise determination of what portion of English Law was actually applicable and received. These matters will be dealt with in Chapters III and IV.

In addition to English Law received and applicable by the provisions of the English Law Act, there is a body of Imperial legislation which is applicable proprio vigore. These enactments are made by the supreme Parliament at Westminster for a particular colony or colonies and may apply in England; they are applicable whether or not they satisfy the provisions made in the reception statute or interpretative rules with regard thereto. They may be received and applicable in a colony whether or not the colony was known at the date of enactment and, until the Statute of Westminster, 1931,⁶ overbore repugnant provisions of local legislation. These Imperial statutes will be discussed in Chapter III.

The English Law Ordinance, 1867, and proprio vigore legislation of the Imperial Parliament provide a foundation for the law of the Province of British Columbia. The Legislature of British Columbia and, after British Columbia's union with Canada in 1871, the Parliament of Canada have enacted a large body of statutory law. Some of this legislation is simply a re-enactment of English statutory law, or an adoption of English Law by reference,⁷ but often it is entirely

innovative, and independent.

2. Problems of the reception of English Law

The apparently facile provisions as to the reception of English Law in a colony are in keeping with the common law tradition of adaptability. Rigidity is avoided but precision is sacrificed. The practical application of these provisions raises the problems germane to reception. Their resolution by the courts on an ad hoc basis as cases arise, provides a reception statement in force today which is far from satisfactory. To analyze the law in force as to reception, key issues the courts have already decided must be determined and associated problems postulated.

First, a determination must be made as to whether the colony is a settled or conquered colony,⁸ and then of the actual date of reception. Even where the date has been fixed by the Imperial or colonial authority, as provision is usually made preserving colonial law in force on that date, the actual settlement date may remain material and "settlers' law" may be in force and be different from law received pursuant to the reception statute.⁹

Second, for British Columbia, a determination must be made of "the Civil and Criminal Laws of England" as at a particular date, 19 November, 1858. Questions have arisen as to whether equity, as well as the common law was included therein, and is received law, and as to the actual date of the formulation of a common law principle. Special branches of law which once were separate, such as

commercial and ecclesiastic law, present distinct problems.

Statute law presents its own problems. Parliament at Westminster legislated in two capacities: for England; and for the colonial empire. Legislation in its capacity as the supreme legislating body of the Empire (or of a specific colony), is in force in a colony proprio vigore and was part of the law unaffected by the tests and body rules formulated with respect to the reception of English Law. However, the reception statute, or the common law provisions as to reception, dealt with legislation made for England and in force in England. It is possible to compile a list of English statutes in force at a precise date. From the statutes of this group must be excepted those of a purely domestic nature, having no general applicability outside England, leaving for reception general laws equally applicable to any country governed by English Law.

Third, a determination must be made as to applicability in the colony. In the case of British Columbia, the phrase "not from local circumstances inapplicable" may be a decisive parameter distinguishing British Columbia from other jurisdictions where a positive and not a double negative phrasing is used. Received English Law must be suitable to the circumstances in the new land. It is modified by the legislation in force in the colony, provided such legislation is not repugnant to the Law of England. What criteria for suitability will be applied and will it be a uniform standard for all English Law? Time is a crucial parameter: at what date is the determination of the circumstances in the new land to be considered:

the reception date, or the date at which the issue before the court arose?

The courts have been called on to reconcile the often rudimentary state of the colonial judicial system and social organization at the time of reception. The simpler colonial state has created interpretive questions requiring judicial ingenuity to make the whole system work and appear logical, within the needs of the particular case being considered by the court.

The development of the colonial state, its evolution toward independence, and the federal form of union used in several colonial jurisdictions, particularly Canada and Australia, has created additional problems. The legislative hierarchy created in the federated colonies introduced yet another legislative authority. In Canada, the union is not strictly in accordance with the federal principle and co-operative federalism¹⁰ has evolved effecting a working compromise in respect of the division of legislative jurisdiction between the federal and the provincial jurisdictions, made by the British North America Act, 1867.¹¹ The division itself has given rise to interpretative problems as to jurisdiction and overlapping jurisdiction which further complicate the English Law question. This aspect of Canadian federalism will be referred to in Chapter IV.

3. Reform of reception provisions

The problems of reception in British Columbia are neither

new nor unique. As early as 1542, the Irish Parliament had petitioned the King to print a collection of Irish statutes, proposing an examination of statute law, the repeal of obsolete enactments and the printing of the remainder.¹² However, it was not until the nineteenth century that a great deal of statute reform was undertaken in England. This will be referred to in Chapter V.

Legislative refinement and revision has been proceeded with in many jurisdictions, either upon severing their ties with the Imperial Parliament and emerging as an independent nation, or as a law reform measure. For example, the American colonies on separation did not attempt to do away with English Law but adopted limited sections of it in various ways. The several Australian states, while remaining within the Empire, have undertaken substantial revisions, the most outstanding of which was the work of Sir Leo Cussen in Victoria, which found expression in the Imperial Acts Application Act 1922.¹³ Today, in Canada, Law Reform Commissions are investigating the problem and academics are stimulating reform action in the interest of legal precision. A summary of what has been accomplished in several other jurisdictions and of their methodology is set out in Chapter VI. The considerable achievement of these other jurisdictions should not be disregarded insofar as it is relevant in British Columbia.

4. Prospectus for reform

It is proposed to examine what English Law is applicable and is received in British Columbia by virtue of the reception statutes.

British Columbia's history, judicial interpretation and legal opinion relating to the subject will be presented.

The determination of applicable and received law, as a matter of some complexity, was foreseen by Lord Cranworth in 1858, the year the Colony of British Columbia was established. He said in Whicker v. Hume,

"Nothing is more difficult than to know which of our laws is to be regarded as imported into our colonies ... Who is to decide whether they are adapted or not? That is a very difficult question..."¹⁴

This question remains today to challenge the courts. Blackstone indicated an answer when he said,

"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 judicature, subject to the revision and control of the King in Council; the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature of the mother country." ¹⁵

The constitutional question has changed greatly in the intervening years and the question today being considered by this thesis is:

Can the problems relating to the reception of English Law be resolved by remedial legislation, without creating further interpretive problems for the British Columbia Courts?

Although such reform is not usually politically significant, defining and improving the applicable and received law of British Columbia is a substantial matter in view of the many conflicting views which will be presented.

II. PROVISIONS FOR CONTINUITY OF LAW IN BRITISH COLUMBIA

The determination as to whether particular English Law is received in British Columbia is made by considering the history and provisions of the particular law at issue and by considering the history of the area as a British colony. The legislative foundation of the colony is particularly important.

1. Legislative history of British Columbia

(a) Vancouver Island (formerly Vancouver's Island)

The Island was originally charted by Captain George Vancouver in connection with survey work undertaken in 1792 and 1794.¹⁶ In 1821 the Crown granted to the Hudson's Bay Company exclusive trade privileges in the north and north-west in British territories not included in Quebec. In 1838, the Grant was extended for a further twenty years.¹⁷ The Company's traders and those of Russia and the United States of America continued to trade in the area later known as British Columbia, and traded on Vancouver's Island. The expanding American frontier and the settlement of the boundary question at the 49th parallel in 1846¹⁸ prompted the Imperial authorities to regularize the situation on the Island where a Hudson's Bay post had been established at Victoria in 1843, by James Douglas.¹⁹

Settlement was to be the weapon used to prevent the thrust of "Manifest Destiny" and the possible loss of the western British territories. After considering establishing a Mormon colony and the

possibility of developing the Island as a penal colony, the Crown granted the Island to the Hudson's Bay Company. As settlement was of great importance in this period of American expansion, settlement was made a condition of the 1849 Grant.²⁰ The Island was made a Crown Colony and a Governor was appointed. Governor Richard Blanchard arrived in Victoria in March 1850 and resigned in November of that year.²¹ He found no settlers who were not affiliated with or employed by the Company and their de facto allegiance was to the Company and not to the Queen's Governor. In September, 1851, Governor Douglas was named to succeed Blanchard.²² The Company still administered the Island and held all revenues.

The land grant to the Hudson's Bay Company was continued for a further five years in 1853 and during this second period the first Legislature convened and continued in office until the Grant was terminated.²³ Years of negotiation followed to determine the indemnity figure payable to the Company, which had been provided for by the original Grant, and when the matter was eventually resolved, the Island was reconveyed to the Crown on 3 April, 1867.²⁴

Two Imperial statutes of 1803 and 1821 had originally provided for the administration of justice by the courts of Upper Canada in the Hudson's Bay territory. By Imperial statute in 1849, provision was made for Vancouver Island's own courts.²⁵ Of the first five appointees as justices of the peace, four were employed by the Hudson's Bay Company or its subsidiary, the Puget Sound Agricultural Company. The Legislative Council organized a Court of Petty Sessions

which proved inadequate when the commercial business of the Colony grew. The Council then set up a high court of justice, first designated a Court of Common Pleas and later, the Supreme Court of Civil Justice of Vancouver Island. This court was a permanent court of record, with appeals to the Governor and Council.²⁶ Its first Judge was David Cameron, who had been employed by the Hudson's Bay Company and was Douglas's brother-in-law. Petitions were filed in protest and in support of the appointment which was successfully defended to the Colonial Office by Douglas. Cameron later became Chief Justice of the Court. He is credited with compiling the first Rules of Court which were published in 1858, the first book printed on Vancouver Island.²⁷

No special provision was made in the 1849 Statute with respect to English Law. English Law had been introduced with settlement and remained in force as settlers' law until the English Law Ordinance, 1867,²⁸ enacted after the Colony joined with the mainland colony of British Columbia, proclaimed that English Law at 19 November, 1858, should be in force.

Vancouver Island is a colony in which it is difficult to determine the exact date of settlement. Although the Colony was founded in 1843, the precise date of settlement has not been agreed on by the courts, save for recognition that it was before 1858, and probably before 1855.²⁹ The 1849 Grant to the Hudson's Bay Company was made on condition that the Company should establish upon the Island a "settlement of resident colonists, emigrants from Our United Kingdom of

Great Britain and Ireland, or from other ... Dominions, and shall dispose of the land there as may be necessary for the purposes of colonization ...". It has been suggested that the consent of the Crown is necessary to constitute "settlement",³⁰ and that taking title to land is a factor.³¹ Both elements existed in the Island colony after the first land sale.³² Such problems in respect of settlement dates can be resolved by a reception statute which provides a definite date for reception. Such a statute resolved the matter for Vancouver Island when the English Law Ordinance, 1867, provided 19 November, 1858, as the reception date, continuing the provision made for the mainland colony of British Columbia.

(b) British Columbia 1858 - 1866

Martin, J., (as he then was) in 1906 gave the following brief history of the Colony:

"The Colony of Vancouver Island was founded in 1843 by the Hudson's Bay Company, with the erection of the Fort of Victoria, but long before that time the same company had many permanent establishments west of the Rocky Mountains in what is now the mainland of this Province; a list of them may conveniently be seen in the San Juan Boundary Arbitration Case, submitted to the German Emperor -- British Case (1873), 2nd Statement, p. xxv. Fort Langley itself, the first seat of Government of the new Colony of British Columbia was founded in 1827, and the dates of the founding of many other forts will be found in the British Columbia Year Book, 1897, p. 73. I mention these facts to shew that the question does not depend, ... upon the habits or customs of miners, for English law was brought here by the early settlers long before the discovery of the precious metals, for the various dates of which see 1 M.M.C., Historical Preface, p. v. ..." 33

When gold was discovered on the Fraser in 1858, Governor Douglas proclaimed the interest of the Crown and promulgated regulations with respect to revenue and maintaining order. This was done May 8, 1858, but his position was not regularized until the goldfields area, with other portions of the fur trading area known as New Cal- edonia, were granted the status of a Crown Colony. It was designated British Columbia, with Douglas as its first Governor.³⁴

For legal historians and those considering received English Law in British Columbia, the date 19 November, 1858, is salient. On that day the official documents creating the political entity were promulgated. The scene in Fort Langley on a rainy November day has been described many times and the various Proclamations listed: they are the foundation of the Province and of the English Law question as we know it today.

As the nearest representative of the Queen, Governor Douglas of Vancouver Island, swore Matthew Baillie Begbie, a Colonial Office appointee, as Judge. The new Judge then administered the Governor's oaths of office and allegiance for Douglas as Governor of British Columbia. The first act of Douglas as the Governor of British Columbia was to read the revocation of the exclusive Licence to the Hudson's Bay Company in respect of the Indian trade³⁵ and then read three key Proclamations:

Proclamation of An Act for the Government of
British Columbia; 336

Proclamation having the force of Law to indemnify the

Governor ... for acts done before the establishment of any legitimate authority in British Columbia; 37

Proclamation having the force of Law to declare English Law in force. 38

Judge Begbie is credited with the creation of the judicial system in the Colony.³⁹ Rules of Court were provided and the constitution of the high court of justice of British Columbia was promulgated by Proclamation of Governor Douglas, 8 June, 1859.⁴⁰ The Court was designated as The Supreme Court of Civil Justice of British Columbia, exercising jurisdiction in all cases, civil or criminal, and observing the forms and process of the common law then prevailing in England.⁴¹ Judge Begbie's situation was colourfully described in a memorandum to the Earl of Carnarvon, the Colonial Secretary, in 1866. It is a timely description of the "... local circumstances ... in all parts of the Colony of British Columbia ...":

"I shall venture to say that no English judge has perhaps ever been placed so utterly and entirely alone, with so many circumstances of physical and moral difficulty and irritation around him, for such a length of time, in the wildest vicissitudes of excitement and ruin. Secondly, that the criminal statistics of the colony appear highly favourable when placed beside those of any other gold producing country. Crimes of violence are extremely rare; highway robberies almost unknown; I think only 4 or 5 cases by white men since my first circuit in 1859. The express has for years travelled constantly over 500 miles of road, chiefly through mountainous or forest country. It carries from \$50,000 to \$200,000 -- protected I believe by two armed men -- I don't think it has ever once been attacked. Stabbing and pistoling, so common in the adjacent territories are almost unheard of on the British side of the line: although the population is composed of the same ingredients." 42

The area of British Columbia was gradually increased until it included all the British territories lying west of the Rocky Mountains, except the Crown Colony of Vancouver Island, which remained separate until 1866. The Stickeen territories were added in 1862⁴³ and further boundary revisions were made by Imperial Statute in 1863.⁴⁴

(c) Stickeen territories

These territories were settled lands which had not been granted separate Colonial status. They were however a distinct area, lying north from the mainland colony of British Columbia and were for a brief period provided with a separate reception date. By Imperial Order in Council dated 19 July 1862⁴⁵ it was provided:

1. that the administration of justice in the area should be under the jurisdiction of the Supreme Court of Civil Jurisdiction of British Columbia;
2. that the law in force in the said territories should be the Law of England as it existed on the 1st day of January, 1862; and
3. that the Stickeen lands should be annexed to British Columbia.

(d) The United Colony of British Columbia 1866 - 1871

The situation that prevailed of the two small colonies of Vancouver Island and mainland British Columbia with separate administrations, although they shared for some years the same Governor, was remedied in 1866 when the two were joined by Imperial Statute.⁴⁶ English Law in the whole Colony, including the Stickeen territories,

was provided for by the English Law Ordinance, 1867,⁴⁷ fixing the date at 19 November, 1858.

The administration of justice was complicated for the first years as there were two Courts and two Chief Justices. The Supreme Courts Ordinance, 1869,⁴⁸ provided for the creation of a new Supreme Court of British Columbia, for the whole Colony, to come into operation when one of the Chief Justices died or resigned. This solution was perfected when the Chief Justice Needham of the Island Court resigned in 1870 to become Chief Justice of Trinidad, and Chief Justice Begbie became Chief Justice for British Columbia.⁴⁹

(e) Union with Canada

Provision had been made by Section 146 of The British North America Act, 1867,⁵⁰ for British Columbia to join the Union as a Province. This was effected by Imperial Order in Council dated 16 May, 1871, effective 20 July, 1871. The division of jurisdiction in The British North America Act, 1867, now operated to deprive British Columbia of legislative jurisdiction specifically assigned to the Parliament of Canada which was supreme within the legislative ambit assigned to it by Section 91, and not assigned to the Provinces by Section 92.

Upon Union, Section 129 of The British North America Act, 1867, operated to continue in force all British Columbia laws as if Union had not occurred, subject to alteration by the appropriate jurisdiction, federal or provincial, according to the legislative

division of that Statute. The whole legislative context remained subject to proprio vigore legislation. The judicial system of British Columbia was preserved, subject to provision for the creation of a general court of appeal for Canada.⁵¹

Supplementing these Imperial provisions, the Federal government enacted legislation specifically deleting from the English Law Ordinance, 1867,⁵² the reference to criminal laws and applying Federal law to British Columbia within the legislative ambit of Section 91 of The British North America Act, 1867.⁵³ This legislation was passed in anticipation of British Columbia joining the Union as a Province.

2. Special legislative provisions for reception in British Columbia

In order to assess the impact of English Law in British Columbia, it should be noted that in addition to the general reception statute, the English Law Act, several other instances occur in the Provincial Statutes incorporating English Law by reference. These are as follows:

- (1) Rules promulgated under section 5 of the Replevin Act, particularly rule 13, provides that the Law of England as at 5 December, 1859 applies to the issue of capias in withernan in respect of distrained property. ⁵⁴
- (2) The Equal Guardianship of Infants Act, by section 3(1), confers on a guardian such powers as any guardian appointed by will or otherwise had on 19 May, 1917, in England under the Acts 12, Charles II, c. 24; c. 27, section 4; 55
- (3) The Attorney General Act, s. 3(e), provides that the Attorney General "is entrusted with the powers and ... duties which belong to the office of the Attorney General and Solicitor General of England by law or usage, so far as the same powers and duties are

applicable to the Province ...⁵⁶

Subject to at least these exceptions, the English Law Ordinance, 1867, fixed the date 19 November, 1858, as the crucial date at which to determine English Law for British Columbia.

English Law was also enacted as indigenous law when the legislature copied or modelled legislation on an English original or adopted as their own enactment an English act then in force. In many cases these are enactments which duplicate or are slightly at variance with English Law in force by virtue of the English Law Act, as successor to the English Law Ordinance, 1867. Probably the most peculiar example of this is the purported enactment in British Columbia, after Union, of the Divorce and Matrimonial Causes Act, 1857, of England.⁵⁷ The general rules for reception and applicability of English Law do not apply to such enactments.

FOOTNOTES (Part I)

- 1 29 & 30 Vict. c. 67 (Imp.), 6 August, 1866, An Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia, Appendix A II (iii).
Farris, C.J.B.C. summarizes much of the history in Reference re Ownership of the Bed of the Straight of Georgia and related areas, [1977] 1 B.C.L.R. 97 @ 99 ff.
- 2 25 Vict.: Order in Council, 19 July, 1862, (Imp.). Vide. Appendix A II (v), 26 & 27 Vict. c. 83 (Imp.) 28 July, 1863, An Act to define the Boundaries of the Colony of British Columbia, and to continue an Act to provide for the Government of the said Colony. v, Appendix A II (iv).
- 3 Douglas Proclamation, 19 November, 1858, British Columbia, A List of Proclamations, 1858-64, (New Westminster, 1858-1864), p.15. v, Appendix A I (i).
- 4 R.S.B.C. 1960, ch. 129, s.2. Although the form today is substantially the same as the English Law Ordinance, 1867, which replaced the Douglas Proclamation, the changes, particularly verb changes are material to the English Law question. The various enactments are set out in Schedule I, 1. and verb changes noted in block capitals.
- 5 The English Law Ordinance, 1867, No. 7 Laws of British Columbia, Columbia, 1867. v, Appendix I 1 (ii)
J. E. Côté, "The Reception of English Law" (1977, No. 1), 15 Alberta Law Review, p. 29 @ 92, raises the question of the validity of enactments after Union. cf. C.S.B.C. 1888, ch. 69, s.2, Appendix A I (iv).
- 6 22 Geo. V c. 4 (Imp.).
- 7 V, Chapter II, 2, p.17.
- 8 This distinction will be developed in Chapter III, 2, v, p.25 et.seq.
- 9 This argument is raised in any colony where the reception statute applies a date subsequent to actual settlement. It can be raised in British Columbia in respect of each of the different segments united to form the Province as we know it today.
- 10 Attorney General British Columbia v. Attorney General for Canada, [1937] A.C. 277, at p.389, where Lord Atkin rejected as beyond Parliament's jurisdiction an early attempt at co-operation. As to legislative cooperation: E.A. Driedger, "The Interaction of Federal and Provincial Laws" (1976), 54 The Canadian Bar Review, 695, p. 713.

- 11 30 & 31 Vict. c. 3 (Imp.), sections 91 and 92, v, Appendix A,
- 12 Northern Ireland, Her Majesty's Stationery Office, The Statutes Revised NORTHERN IRELAND, 1956. Foreword of the Lord Chief Justice of Northern Ireland, the Rt. Hon. Lord MacDermott. Preface p.vi. ff. lists Acts of Parliament not extended to Ireland, the others which affect Ireland are in Part 2 of the Chronological Table (from 1226 to 1800) and Part 3 thereof (those from 1801 to 1960). The Revision is being continued in separate volumes. p. lxxxix ff. as to criteria re Part 2 statutes. The determination was made by Dr. A.G. Donaldson of the Parliamentary Draftsmen's Office.
- 13 13 Geo. V. No. 3270 (Victoria).
- 14 (1858) 7 H.L.C. 124, at 161; 11 E.R. 50. The case finds the Statute of Mortmain (9 Geo. II c. 36 (Imp.) not applicable to New South Wales.
- 15 Blackstone, W., Commentaries, 23rd ed. (London, 1854) vol. I, p. 107, quoted and discussed, Cooper v. Stuart, (1889) 58 L.J.P.C. 93, Lord Watson.
- 16 Cicely Lyons, SALMON: OUR HERITAGE The Story of a Province and an Industry (Vancouver: Mitchell Press Limited, 1969), p. 11, 12, 25. Captain Vancouver was in the area to accept the return of the assets of John Meares at Nootka which had been seized by two Spanish warships. The incident is known as the Nootka Affair.
- 17 v, Preamble, 22 Vic.: Revocation of Hudson's Bay Company's Licence of 30th May, 1838 ... (2 September, 1858), Printed B.C. Ordinances 1858-1864 (n.3), p.6, and R.S.B.C. 1911, vol. IV (1913), p. 249. The description of British Columbia in the second paragraph of the Preamble, although it is similar to that in 21 & 22 Vict. c. 99 (v, Appendix I, 2 (i) is not a verbatim reproduction of the description.

Douglas MacKay, The Honourable Company: A History of the Hudson's Bay Company. Canadian Best-Seller Library (Toronto: McClelland and Stewart Limited, Second Edition revised by Shane MacKay, to 1966), p. 234 and p. 259ff. tells of the House of Commons Committee appointed 5 February 1857 "to consider the state of those British Possessions in North America which are under the administration of the Hudson's Bay Company, or over which they possess a Licence to trade," and at p. 273, of the Report from the Select Committee on the Hudson's Bay Company, 1857, reciting the necessity of better government for Vancouver Island.
- 18 Treaty of Washington, 1846, settled the Boundary. As to British Columbia boundary, all the judgments in the Strait of Georgia case, supra. n.1, particularly p.1, 135.

- 19 Lyons, op. cit., p. 54.
- 20 Leonard A. Wrinch, Land Policy in the Colony of Vancouver Island 1849-1966 (unpublished M.A. thesis, University of British Columbia, 1932) p. 6, 7 and 53.
12 Vict.: Letters Patent, Vancouver Island (13 January 1858) printed R.S.B.C. 1911, vol. IV (1913), p. 107ff, which recites the history of the Hudson's Bay Company in the area.

As to the theory of American expansion promoting nationhood, cf. Harold A. Innes, The Fur Trade in Canada: An Introduction to Canadian Economic History, Canadian University Paperbooks (based on Revised Edition 1956 by S.D. Clark and W.T. Easterbrook: University of Toronto Press, Printed Forge Village, Mass. The Murray Printing Company, 4th Printing, July 1967), Introduction by Robin W. Winks @ xiv, explains Innis' theory that Canadian nationhood arose because of her geography: "created by an east-west line of imperial communications, a line based on the St. Lawrence River, the Great Lakes, and the western waterways and trails, ...". v, Chapter III, at p.43, which considers the special legal considerations which were applied to these highways of navigation.
- 21 David M.L. Farr, "The Organization of the Judicial System in the Colonies of Vancouver Island and British Columbia, 1849-1871" (1967 No. 1) 3 U.B.C. Law Review, 1 @ 2; Lyons, op. cit. (n.16), p. 66.
- 22 R.G. Herbert, "A Brief History of the Introduction of English Law into British Columbia" (1953) II U.B.C. Legal Notes, p. 95.
- 23 22 Vict.: Revocation of Hudson's Bay Company's Licence, supra n.17.
- 24 30 Vict.: Reconveyance of Vancouver Island (3 April, 1867) Printed, R.S.B.C. 1911 vol. IV (1913), p. 276ff.
- 25 43 Geo. III c. 138 (Imp.) and 1 & 2 Geo. IV c. 66 (Imp.) were replaced by 12 & 13 Vict. c. 48 (Imp.) An Act to provide for the Administration of Justice in Vancouver's Island. v, Appendix A III, i, ii, iii.
- 26 Farr, op. cit., p. 7.
- 27 Loc. cit.
- 28 Supra n. 5.

- 29 Manson, J., R. v. Columbia Paper Co. Ltd. (1954) 111 C.C.C. 48, at 51; also cited as R. v. Crown Zellerbach Canada Ltd. [1955] 3 D.L.R. 399; Reynolds v. Vaughan, (1872) 1 B.C.R. 3 (prior to 1855); Wrinch, op. cit. (n. 20), p. 26 (at least one family had settled in 1851).
- 30 The quotation is from 12 Vict.: Letters Patent, Vancouver Island, to Hudson's Bay Company, printed R.S.B.C. 1911, vol. IV (1913), p. 107 @ p. 111, portions are reproduced Appendix A II (i) Wrinch, op. cit. (n. 20), p. 22 ff. as to extinguishing Indian land claims.
- 31 "Settlement", see Hoggan v. Esquimalt and Nanaimo Railway Company [1894] A.C. 429, 435 (P.C. on appeal from S.C.C., affirming Full Ct. B.C. which affirmed Walkem, J.)
- 32 Wrinch, op. cit., p. 76 ff. as to land sales; Proclamation re acquisition of land, 21 March, 1861.
- 33 West Kootenay Power & Light Co. v. City of Nelson (1905), 12 B.C.R. 34 @ p. 51. 33A v. Appendix II pp. 212-215.
- 34 21 & 22 Vict. c. 99 (Imp.) An Act to provide for the Government of British Columbia (2 August 1858). v. Appendix A II (iii). Wrinch, op. cit. (n. 20), p. 191, quotes Lytton to Douglas, 30 December 1858: "I cannot conclude without expressing my cordial approval of the manner in which you appear to have carried out the two objects which at the outset of such a colony should be steadfastly borne in view -- viz., a liberal and kindly welcome to all honest Immigrants and the unquestionable supremacy of British Sovereignty and Law." As to Governor, Martin, J. Sheppard v. Sheppard (1908) 13 B.C.R. 508, and his relation with Home Government.
- 35 Supra, n. 17.
- 36 British Columbia Ordinances 1858 - 1864 (op. cit.) (n. 3), p. 9.
- 37 R.S.B.C. 1911 vol. IV (1913) p. 251.
- 38 Supra, n. 3.
- 39 Farr, op. cit. (n. 21), p. 17.
- 40 Farr, loc. cit. John C. Bouck and Darrell W. Roberts, A Proposal for the Reform of the British Columbia Supreme Court Rules, 1961. Sponsored by The Foundation for Legal Research in Canada and The Law Foundation (British Columbia) (Vancouver: Price Printing, August 1972), p. 14.

- 41 Farr, loc. cit.
- 42 Farr, op. cit., p. 18. The phrase "local circumstances ... in all parts of the Colony of British Columbia" is taken from the English Law Ordinance, 1867.
Supra, n. 5.
- 43 Supra, n. 2, as to 25 Vict.: Order in Council, 19 July, 1862.
- 44 Supra, n. 2, as to 26 & 27 Vict. c. 83 (Imp.).
- 45 Supra, n. 43 and 2.
- 46 Supra, n. 1. 29 & 30 Vict. c. 67 (Imp.). In the case of British Columbia, the right to legislate had been delegated to the Governor and this was the situation until the Colonies were joined in 1866.
- 47 Supra, n. 5.
- 48 Printed 1877 C.S.B.C. c. 53 (Consecutive No. 318, R.S. 1971, No. 112). v. Appendix A III (viii).
- 49 Farr, op. cit. (n. 21), p. 25.
- 50 Supra, n. 11. Note: combinations of colonies were not always a union. c.f. Federal Council of Australasia, Oct. 1885 (48 & 49 Vict. c. 60 (Imp.)) which preceded by some years The Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12 (Imp.)).
- 51 British North America Act, 1867, 30 & 31 Vict. c. 3 (Imp.) v. Appendix A, p. 221, s. 101. v. Supreme Court Act, R.S.C. 1952, c. 259, as to Court of Appeal. A.-G. Ontario v. A.-G. Canada, [1947] A.C. 127, as to right to abolish appeals.
- 52 Supra, n. 5, amended by R.S.C. 1866, 49 Vict. c. 4, s. 5 (2).
- 53 Supra, n. 11.
- 54 R.S.B.C. 1960 c. 339.
- 55 R.S.B.C. 1960 c. 130.
- 56 R.S.B.C. 1960 c. 21.
- 57 20 & 21 Vict., c. 85 (Imp.) (proclaimed in force, January 1858); amended 21 & 22 Vict., c. 108 (Imp.) (in force, August 2, 1858), R.S.B.C. 1897, c. 62. The history of the enactment is given by Kerwin, C.J.C., @ p. 565, in Densmore Case infra n. 200, p. 108.

Part II - The Reception of English Law¹

III. GENERAL RULES FOR RECEPTION AND APPLICABILITY OF ENGLISH LAW

When the colonial period began, the common law formulated rules to govern the extension of the King's sovereignty and prerogative to new lands and the reception of English Law abroad. How the King acquired the lands was decisive.

1. The Royal prerogative

Common law accepted from medieval times that the King could confer those laws which he chose on his various subjects outside England. Each part of the United Kingdom had been treated differently: in Wales, English Laws replaced the Welsh laws; in Ireland, the legislation of the English and the Irish parliaments in different and overlapping periods applied; and in Scotland, Scots law prior to the Union was preserved with minor exceptions as to trade, and after Union, the United Parliament at Westminster legislated for both countries. The King maintained, even after he became the King in Parliament, that the Parliament of England had no authority over the Crown's possessions outside England, and he alone had power to declare what laws were to be in force and what the rights and duties of the conquered people were.² This prerogative right to legislate, without the concurrence of Parliament, survived the Restoration with respect to conquered countries but not in respect of settled colonies.³ The royal prerogative with respect to settled colonies was legitimized by the British Settlements Act, 1843.⁴

The royal prerogative was extended to non-British territories by the Foreign Jurisdictions Act, 1890.⁵

2. How is English Law received?

(a) By conquest

The position as to conquered or ceded countries was that the existing system or code of law, except that portion repugnant to the new status as an English colony, was modified only by proprio vigore legislation conferring the benefit of certain English law, and by colonial enactments validly made by a local legislature after conquest. Lord Mansfield considered the law as to the conquest of Grenada in Campbell v. Hall.⁶ The propositions he formulated with respect to sovereignty, prerogative, and English Law are valid today, with only a few exceptions.

In 1774, Lord Mansfield stated six propositions "too clear to be controverted", as follows:

- (1) "A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain."
- (2) "that the conquered inhabitants once received under the King's protection, become subjects; and are to be universally considered in that light, not as enemies or aliens." 7
- (3) "that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning."

But such articles to be binding must be confirmed by treaty and treaties have no domestic effect. They could not impinge upon Parliament's sovereign and exclusive

power to change law in force in a conquered country by statute.⁸

Lord Mansfield continued:

- (4) "that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives."

Englishmen residing in conquered lands often claimed the benefit of laws not actually conferred by the Royal prerogative and such claims were to be one of the issues of the American Revolution.⁹

- (5) "that the laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in Calvin's case, shows the universality and antiquity of the maxim. For that distinction could not exist before the Christian aera; and in all probability arose from the mad enthusiasm of the Croisades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known."

Coté notes two exceptions to this proposition:

- (i) Although pagan law as such can survive, and has in fact been provided for in Asian communities with duality of law, barbaric rules such as are against public policy or contrary to religion or anything malum in se are abrogated; 10 and
- (ii) Constitutional law of the former monarch cannot be retained, particularly as it affects the Crown's position in respect of the Courts and government. 11

Some changes to English Law are necessary in a conquered country. Coté raises two questions relative to this. He asks first, who may alter the law initially in force?

Parliament has sovereign power over British possessions as has the local legislature, and, some residual power remains to the conquering King by virtue of his royal prerogative,¹² limited by proposition six of Lord Mansfield, which is as follows:

- (6) "that if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new changes contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; ..."

Coté's second question is: When are the prerogative powers transferred to Parliament?

He lists five cases in which this occurs, as follows:

- (i) when a conquered colony is granted colonial status;
- (ii) when a constitution is granted, unless the prerogative is specifically reserved; 13
- (iii) with a proclamation promising to call an assembly, even though not yet instituted; 14

But he suggests that the prerogative may apply when the local assembly is unable to act; ¹⁵

- (iv) with a charter regulating the courts, an order in council not being necessary; 16 or
- (v) with the appointment of a governor if such delegation is contained in his commission or instructions.

But he notes that the appointment of a governor was not an automatic delegation, even if the governor's initiatives were acquiesced in by the King.¹⁷

The Privy Council has ruled that the rules set out in Campbell v. Hall extended to colonies ceded by inhabitants, and not by another ruler.¹⁸ Clearly it is not applicable to non-British territories such as protectorates, which were really international wardships.¹⁹

(b) By settlement and plantation

At common law, English Law was in force in settled colonies by the fact of settlement. The King's prerogative did not include the power to legislate for a settled colony, although it did include the power to establish courts to administer English Law, yet another method of reception.²⁰ The law was stated in 1693 in Blankard v. Galdy, as follows:

"... in the case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there;" 21

Later, two exceptions were made to this general statement:

(1) The requirement that proprio vigore legislation must name the foreign plantations is clearly implied in the following qualification which was formulated in 1722:

"...That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England; though, after such country is inhabited by the English, acts of parliament made in England without naming the foreign plantations, will not bind them..." 22

(2) An exception was made by Lord Mansfield in 1769 with respect to suitability to the circumstances of a new colony. When considering the applicability of a police statute to Jamaica, he excepted law that was:

"... not adapted to the circumstances of a new colony; and therefore no part of that law of England which every colony, from necessity, is supposed to carry with them at their first plantation." ²³

This exception is generally treated as two separate questions:

What part of the law of England is of necessity carried to a colony? and

What circumstances of a new colony are relevant?

One author, Dr. S. H. Z. Woinarski,²⁴ views both as "equivalent in substance" although different in form. The first, putting the emphasis on English Law - distinguishing between what is general and what is only of local significance; the other, placing emphasis on the circumstances in a colony to determine applicability. The better opinion seems that the two matters should be considered separately, particularly in respect of a reception statute.²⁵

The phrase "circumstances of a new colony" found a place in the political thinking²⁶ and in due course was incorporated into enabling charters and statutes providing for new colonies, the third method of introducing English Law.²⁷

(c) By charters and statutes

The original American colonies were organized by Imperial

charters and statutes which usually provided that the laws of the colony should not be repugnant to the Law of England. Later, such documents were used either to remove problems in applying settler's law, or to organize new colonies and provide for the reception of English Law in such colonies. To determine the constitutional laws of colonies such as British Columbia, it is necessary to consider not only Acts of Parliament at Westminster, local legislation, but also statutory and prerogative instruments made by the Queen in Council.²⁸

Several problems are inherent in this method of reception.

- (i) Some prerogative instruments which introduce English Law were not authorized by Statute.

This would relate to a reception date prior to the British Settlements Act, 1843,²⁹ and not to a jurisdiction such as British Columbia with reception provisions of a subsequent date.

- (ii) There is an overlap in some cases with legislation in force by right of settlement, but not in force proprio vigore.

In respect of the former Colony of Vancouver Island and the Stickeen territories of British Columbia, discussed in Chapter II of this thesis, the date provided was after settlement had occurred. Although English Law would be in force in any event by virtue of settlement, the dates are ~~another complication~~. Côté poses a question which is of some significance in British Columbia,

"If at the time of this introduction, there are Imperial statutes in force in the colony, which are not in force in England; does the introduction of

English Law repeal them to the extent they are part of the colony's law?" 30

- (iii) Where local legislation has introduced English Law without mentioning statutes or equity what parts of English Law are in force? 31

This problem is one of interpretation. The statutes of introducing English Law are not uniform and each must be interpreted according to its terms.³² In British Columbia the statute is phrased in the double negative and that phrasing has been interpreted to affect the criteria of applicability.³³

(d) By extension of the boundaries or by separation from a Colony

This is a historical matter. In British Columbia, boundary extension appended certain islands to the colony of Vancouver Island and the Stickeen lands and other lands west of the Rocky Mountains to the original mainland Colony.^{33A} Examples of separation occur in Australia where Queensland separated from New South Wales and Papua New Guinea was separately constituted.³⁴ New Zealand was both joined with and separated from New South Wales.³⁵

(e) By establishment of Courts

Legislation for the establishment of courts (as distinguished from legislation merely regulating or re-establishing courts in and for an existing colony) is another means of reception.³⁶ An example is to be found in providing that the Courts of Upper Canada should apply to North America's fur trading lands.³⁷ The Foreign Jurisdiction Act, 1890,³⁸ had a similar effect in respect of protectorates. Such legis-

lation must not be assumed to do more than was intended. Legislation establishing Vancouver Island's Courts did not change the applicable law.³⁹ Côté cautions:

"...in the absence of express words in such legislation, there is no need to read such words as being intended to upset the common-law rules as to what law is in force in a settled or conquered colony. ... the prerogative extends to the establishment of courts but ... not to general legislation, especially in a settled colony. Therefore many of these instruments which were made under the prerogative without any Act of Parliament probably could not change the law in the colony even if we were to interpret them as purporting to do so." 40

3. Legislation in force proprio vigore

(a) Background

Certain statutes are part of the "Imperial character"⁴¹ of Parliament at Westminster and are not subject to interpretive rules applied to received law as such. Such legislation is in force in a colony, or colonies, by its own strength. Proprio vigore legislation itself (or by other enabling statute) must provide "by express words or necessary intendment"⁴² that it shall so be in force, whether or not it is in force in England and whether it was enacted before a colony was known or after the reception date.

Two important statutes of this type, each made applicable proprio vigore to the whole legislative context of the colonial empire, proscribe the effect of proprio vigore legislation.

The first important statute -- An Act to Remove Doubts as to the Validity of Colonial Laws, generally known as the Colonial Laws Validity Act, 1865⁴³ -- provided, inter alia, that a colonial

statute would be found repugnant to an Imperial statute applicable to a colony proprio vigore only to the extent of the repugnancy and regardless of whether or not the colonial statute predated the Imperial statute.

The second statute -- the Statute of Westminster, 1931⁴⁴ -- was enacted in confirmation of the growing autonomy of the colonies and of several of them attaining Dominion status following the Imperial Conferences of 1926 and 1931. The Statute provided that:

1. the Colonial Laws Validity Act, 1865, should no longer apply to any law made after the Statute of Westminster, 1931, by the parliament of a Dominion or by any of the legislatures of the Provinces of Canada;
2. proprio vigore legislation should not be enacted to extend to a Dominion or to any Province of Canada "unless it is expressly declared in that Act that the Dominion (or Province) has requested and consented to the enactment thereof";
3. the powers of a Dominion and of the Provinces of Canada were increased, by giving them the power to repeal or amend an Imperial Act in so far as it is a part of their law proprio vigore. Some positive step must be taken to perfect this power.

(b) Colonial sovereignty before the Statute of Westminster, 1931

The enacting of proprio vigore legislation by Parliament at Westminster pro tanto limited the constitutional power and independence of the affected colonies. Such legislation applied and therefore was received whether or not it fulfilled the prerequisites for reception of English Law and whether or not it was in force in England.

The colonial legislatures, prior to attaining Dominion status, were subordinate to Parliament at Westminster, and their legislation was, until the Statute of Westminster, 1931,⁴⁵ limited to strictly territorial limits, subject to disallowance, and liable to be overridden by Imperial enactments. When the various colonies were united, the situation was exactly the same. Begbie, C. J. stated the situation for British Columbia after union with Canada:

"The question of supremacy in relation to subjects of legislation as distributed by the British North America Act arises only between the Dominion Parliament and the Provincial legislature. The Imperial Parliament is sovereign to both." 46

Proprio vigore legislation may be received whether or not enacted before a specific colony was known. For example, the Court of Appeal of British Columbia found the Herbalists Act, 1542,⁴⁷ to be in force, it being extended to:

"any parte of the realme of England or within any other the King's domynions".

Another example of express words is found in the Bill of Rights, 1688, which extended to

"the Kingdoms of England, France and Ireland and the dominions thereunto belonging according to the resolution and desire of the said lords and commons."⁴⁸

The presumption that acts of parliament made in England after settlement will not apply to the colonies, did not operate in respect of proprio vigore legislation. Such legislation was received, even if enacted after the reception date, provided that it was applied specifically to the colony in question, or to colonies generally.⁴⁹

The Colonial Laws Validity Act, 1865, clarified this matter for the colonies. The Statute was enacted as a result of the repugnancy cases of South Australia. Boothby, J.⁵⁰ had persistently ruled that many colonial enactments were invalid on the ground of repugnancy to the Law of England -- not on the much less restrictive ground of repugnancy to the legislation in force proprio vigore. The effect of these judgments was to cripple the local legislature and the Imperial Parliament passed the 1865 Statute to clarify the situation for Australia and for all colonies.

In other cases where repugnancy might be an issue, the Imperial Parliament has passed legislation declaring the colonial act in question to be valid.⁵¹

(c) Colonial Sovereignty after the Statute of Westminster, 1931

By the Statute of Westminster, 1931,⁵² the Dominions and the Provinces of Canada -- but not the States of Australia -- were given inter alia the power to repeal proprio vigore legislation. To exercise the power, some positive step is required.⁵³ Once the Federal or Provincial jurisdiction has legislated, validly occupying the field previously occupied by the Imperial legislation, the Imperial legislation is repealed, altered, varied or modified by the local legislation.

The Federal Parliament has removed the right of appeal to the Privy Council,⁵⁴ an appropriate Federal head of jurisdiction. However, realignment of the legislative division between the Federal and Provincial authorities, which were exclusively provided for and

set up in the British North America Act, 1867,⁵⁵ requires joint action by both the Parliament of Canada and Parliament at Westminster.⁵⁶

Constitutional amendment for Canada is a matter of some complexity. By convention, Parliament at Westminster is precluded from enacting any amendment without formal request from the federal Government, probably by joint address of both Houses. The concurrence of the Provinces is a matter of some concern which may not be scrutinized by the Imperial Parliament. If Provincial sovereignty were affected, and they had not been consulted, they would have recourse by protest. In such case, the appropriate channel for such protest is through the Canadian government.⁵⁷

If the power conferred is not exercised, the proprio vigore legislation remains in force.

Oteri and Oteri v. R.,⁵⁸ a case heard by the Privy Council in 1976 on appeal from the Full Court of Western Australia, special leave having been granted by Order in Council, illustrates a problem which can arise if such legislation has "ambulatory effect". A charge of theft under the Theft Act, 1968 (Imp.)⁵⁹ was laid in Western Australia, the offence having occurred 22 miles from shore on a boat owned by the defendants, naturalized Australian citizens, who were resident in Western Australia. Lord Diplock, delivered the judgment of the Board, dismissing the appeal and upholding the conviction, notwithstanding the Statute of Westminster, 1931, and the creation of separate Australian citizenship by the British Nationality Act, 1948 (Imp.).⁶⁰ The decision depended on four propositions:

1. The ship was a British ship as she is owned by "British subjects" as defined by the British Nationality Act, 1948 (Imp.), section 2.

The ship was not registered under the Merchant Shipping Act, 1894 (Imp.), 61 and was by section 72 deprived of the benefits, privileges, advantages and protection enjoyed by British ships, but non-recognition did not deprive the ship of her British nationality. 61

2. The criminal law of England extends to British ships on the "high seas". The Court said:

"... at common law a British ship fell under the protection of the sovereign; those on board her were within the King's peace and subject to the criminal law by which the King's peace was preserved. ... the applicability of English law to "treasons, felonyes, robberies, murders and confederacies ... committed upon the sea" was recognized by a statute of 1536. "An Acte for the punysshement of Pyrotes and Robbers of the Sea". The Offences at Sea Act 1799 was but expository of the common law in providing "that all and every Offence and Offences, which after the passing of this Act, shall be committed upon the High Seas, out of the Body of any County of this Realm, shall be, and they are hereby declared to be Offences ... liable to the same punishments respectively as if they had been committed upon the Shore."

This is the only part of the Act of 1799 which was left unrepealed by the Criminal Law Act 1967 (Imp.). It is still in force in Western Australia. It is, in their Lordships' view, ambulatory in its effect, with the consequence that when a new offence in English law is created by a statute of the United Kingdom Parliament it ipso facto becomes an offence if it is committed on a British ship unless the extension of the statute to British ships is excluded by express words or by necessary implication. Such an implication cannot, in their Lordships' view be drawn from the fact that the Theft Act 1968 (Imp.) does not apply to Scotland or Northern Ireland. As with Australia, there is not a single criminal law that is common to the whole of the United Kingdom; and it has always been the criminal law of England that was applied to persons on British ships within the jurisdiction of the Admiralty.

"... all offences committed on board British ships on the high seas are within the criminal jurisdiction of the Admiralty -- though in the United Kingdom the Admiralty criminal jurisdiction during the course of the nineteenth century became exercisable through the ordinary criminal courts...." 62

3. Offences which are committed on British ships are within the criminal jurisdiction of the Admiralty; and that this was the case "though in the United Kingdom the Admiralty criminal jurisdiction during the course of the nineteenth century became exercisable through the ordinary criminal courts." 63
4. In Western Australia, the exercise of the jurisdiction is regulated by the Admiralty Offences (Colonial) Act, 1849 (Imp.), 64 which in effect provided that if an offence were not punishable under the law of Western Australia, punishment would correspond most nearly to the punishment to which a person would have been liable if the offence were tried in England.

The "ambulatory effect" of the 1799 Statute⁶⁵ applied a 1968 Criminal Statute, in force in England, to a ship which although registered in Australia was not registered under the provisions of the Merchant Shipping Act, 1894 (Imp.). The vehicle of application was the 1894 Statute and the British Nationality Act, 1948 (Imp.).

Although the issue is raised with respect to Western Australia, which was not granted powers of repeal by the provisions of the Statute of Westminster, 1931,⁶⁶ the result would presumably be similar where an empowered legislature, such as Canada and the provinces, has failed to act. The effect of this case presents one of the best arguments for resolving the matters incidental to the reception of English Law.

4. What parts of English Law are received?

(a) Statutes

(i) Is there a cut-off date?

At what date is statute law in England to be ascertained: the date of settlement or foundation of the colony, the date of institution of the first legislature, or the date chosen by legislation?

The following general propositions are settled:

(1) Statutes enacted subsequent to the date of settlement do not apply, unless extended to the colony by act of Parliament, by order in council, or by an affirmative act of local legislation, such as the English Law Act. The following exceptions must be noted:

1. Statutes after the date of settlement merely restating the common law at the appropriate date will be in force; 67 and
2. Statutes after the date of settlement in force in a colony, and by reference contained in a proprio vigore statute, when jurisdiction for the field has not been assumed pursuant to the powers granted by the Statute of Westminster, 1931, will apply.

Similarly, statutes with an "ambulatory effect", must be specially considered. 68

(2) The repeal in England of a statute does not entail its repeal elsewhere. The decisive matter is whether it was in force in England on the reception date.⁶⁹

(ii) Which English Statutes are received?

Assuming a precise date has been ascertained for reception, it is possible to determine all statutes of the Imperial Parliament in force on that date. From this list, to isolate the acts of general application in force in England, which must be considered for reception,

these groups must be extracted:

1. proprio vigore legislation relating to a specific colony or colonies, but not to the colony under consideration;
2. proprio vigore legislation extending to all colonies, and particularly to the colony in question. Any proprio vigore legislation, "ambulatory in its effect"⁷⁰ should be specially noted; and
3. local acts which are not of general application and relate solely to local circumstances in England and have no relevance outside England.

The determination of whether an act is of general application, the law of England which every colony from necessity receives, or whether it is a law of local policy which relates solely to local circumstances in England, having no relevance outside England, is often considered in conjunction with a discussion of circumstances and local conditions in the colony.⁷¹

(b) Common Law

It has always been accepted that the common law was more readily received than statute law. It was assumed that "(a)n Englishman going to found a colony may be supposed to know the common law, by common sense..."⁷² Its reception has been described by Halliburton, C. J. in Uniacke v. Dickson, a 1848⁷³ decision of the Nova Scotia Supreme Court in these terms,

"Among the colonists themselves there has generally existed a strong disposition to draw a distinction between the common and the statute law. As a code, they have been disposed to adopt the whole of the former, with the exception of such parts only as were obviously inconsistent with their new situations ...

...As it respects the common law, any exclusion formed the exception; whereas in the statute law, the reception formed the exception ...

... the distinction exists in the very nature of things, and is derived from the origin of the two codes. The common law had its foundation in those general and immutable principles of justice which should regulate the intercourse of men with men, wherever they reside. The statute law emanates from the wisdom of the legislature of the day, varies with varying circumstances and consists of enactments which may be beneficial at one time and injurious at another -- which might advance the interests of one community, and prove ruinous to those who were differently situated ..."

Various facts justify this more general acceptance.

The common law was prized by Englishmen not only for its accessibility, but also for its versatility in adaptation by judicial interpretation even to colonial situations, provided there was not "obvious inconsistency" in the new colony. Moreover, the statutes were prolix and, prior to 1870 when the first Index⁷⁴ was published, were difficult to ascertain. They were largely inaccessible in the colonies, particularly statutes passed after a distant colony was settled.

Two problems relative to the reception of common law have however emerged and been developed in our Courts:

(i) Is there a cut-off date for reception of common law?

Opinions differ as to whether there is a cut-off date for the reception of common law. Two scholars, Allott and Park,⁷⁵ both writing in respect of African law (where the reception of English Law has received much attention with recent developments

in emerging nationalism and accommodation of customary law) have respectively presented the positive and negative answers to this question. The positive argument of Allott is that the common law can be ascertained at a particular date and that this should be done; Park says that such is not the case.

The following are factors to be considered:

1. At the time the colonies were constituted, it was intended that appeal would be taken to England -- to the King in Council, and later to the Privy Council; 76
2. The doctrine of precedent was in force and remained in force at least until 1949 (for Canada). The obligation to adhere to English decisions is in potential conflict with the idea of a fixed date, unless an earlier decision to the same effect can be found. 77
3. No intention existed, apparently, to cut off this access to the growth of the common law; 78
4. British Columbia and other colonial jurisdictions habitually refer to English decisions after the reception date.

These considerations support Park's argument, as do two British Columbia decisions. Wood, J. of the Supreme Court, expressed this opinion in 1955: "I do not agree that the common law is any more static in British Columbia than in England."⁷⁹ A decision of the same Court in 1963, Re Lotzkar,⁸⁰ declared the rule in Allhusen v. Whittell in force, noting that the 1867 date of the case was immaterial, particularly when the principle behind the case had been enunciated prior to the date of the introduction of English Law. This last qualification somewhat weakens the authority

of this case in support of Park's argument rejecting a cut-off date.

Some support can be found for Allott's argument that the cut-off date is the reception date provided by statute in the Alberta case, Rex v. Cyr.⁸¹ This 1918 decision of the Alberta Supreme Court, Appeal Division, considered an appeal from a conviction made by a woman magistrate (on grounds that a woman was ineligible for judicial office). Stuart, J. distinguished the English decisions on the basis of local circumstances but said of the common law,

"In my opinion in a matter of this kind the Courts of this Province are not in every case to be held strictly bound by the decisions of English Courts as to the state of the common law of England in 1870. We are at liberty to take cognizance of the different conditions here, not merely our physical conditions, but the general conditions of our public affairs and the general attitude of the community in regard to the particular matter in question."

It is a peculiarity of cases where the reception date is adhered to and a common law principle not applied, post reception date cases are referred to, due to the operation of the doctrine of precedent.⁸²

The question may simply be resolved on the reasoning that it is not necessary to cut-off the common law, and the respect for it is decisive and overcomes the influence of a reception statute.⁸³

- (ii) Judicial Development limiting general acceptance of common law

Although general acceptance of common law is implicit in most cases,⁸⁴ the courts have limited this general acceptance for two reasons:

- (1) The exception noted by Halliburton, C. J.,
 "such parts only as were obviously inconsistent
 with their new situation" ⁸⁵

Generally, this exception has developed with the reasoning that the law is received but is inapplicable to the new situation. Such obvious inconsistency has been found

(a) in the water cases:

The physical differences of Canadian rivers and their navigability, and the extensive size of the Canadian lakes ⁸⁶ have been the basis for exceptions in respect of the common law. Navigability, and not the English division of tidal and non-tidal, ⁸⁷ has become the decisive feature in applying the common law presumptions with regard to water. The ad medium filum aquae doctrine has been deemed inapplicable to a "highway of transportation" such as the Red River in a 1921 Manitoba decision. ⁸⁸ This case distinguished on the basis of different reception provisions a previous Ontario decision, Keewatin Power Co. v. Town of Kenora, which had held that the doctrine was in force in respect of a non-tidal river, whether navigable or not. ⁸⁹ In effect, the Manitoba Court adopted the trial judgment of Anglin J. in the Ontario case. In the Keewatin case, Anglin J. had found the English common law rule inconsistent with and unsuitable to local conditions, for reasons equally pertinent to 1792 (the Ontario reception date) and 1907 (the date of the case). He found the common law rule arose in England at a time when the title to beds of non-tidal rivers had long since vested, a condition not found in Ontario, and ruled the

Crown owned the alveus of the Winnipeg River, even though non-tidal. The decision was reversed on appeal on the grounds that English Law was introduced and was in force, including the presumption that prima facie adjoining owners owned ad medium filum aquae, in non-tidal waters, notwithstanding the navigability of the river in question. This decision of the Court of Appeal has been followed by the Supreme Court finding ownership in the adjoining owner out to the middle of the stream.⁹⁰

In a British Columbia case, the doctrine was applied notwithstanding dissent on the grounds that although the rule was introduced in British Columbia, which is the pertinent point for this thesis, it was rebuttable where title had been taken under the Torrens System,⁹¹ in force by subsequent local legislation (the second exception).

In Canada, such "special circumstances" have been dealt with by statute in many cases, particularly in the numerous enactments relating to water.⁹² The distinction made as to the navigability and ownership of beds of non-tidal rivers is similar to that used to distinguish highways in Canada from those in England.

(b) in the highway cases:

Fleming v. Atkinson,⁹³ a 1959 Ontario case involved the failure of a farmer with lands adjoining the highway to prevent his animals from straying thereon. As a result, a user of the highway suffered injury. The responsibility for the highways was distinguished

by the Court on the basis of the different conditions in England where the highways are dedicated, providing limited rights to the user, and in Ontario where the highways were created by survey and not dedicated. The majority decision was that the historical basis for the common law rule never existed. The Supreme Court of Canada agreed with the decision of the Court of Appeal but their reasoning was somewhat different in considering the common law as stated in the 1947 English case, Searle v. Wallbank.⁹⁴ The Court of Appeal distinguished the Searle case on the grounds that it concerned a single animal and not the herd that had strayed onto the Ontario highway, and then attached liability for the herd to the adjoining owner. The Supreme Court distinguished the Searle case on the basis of the peculiarities of English highway dedication and also on the basis of modern traffic conditions creating a duty on the adjoining owner, to which the ordinary principles of negligence were applied. The Court did not specifically deal with the 1792 reception statute. It should be noted that Rand, J. noted historical differences with respect to highway ownership but did not adopt the usual formula that the rule is received, but is not applicable due to different local circumstances. In the two dissenting judgments, Locke, J. said he did not consider it was necessary to rule on the matter, however Cartwright, J. said,

"I can find no sufficient reason in the historical differences between the ways in which highways came into existence in England and in Ontario to warrant the formulation in the two jurisdictions of different rules of law as to the duty of the owner ... abutting a highway." 94A

The various judgments, therefore, do not support the case as strong authority for the suitability of local conditions being a governing factor.

In British Columbia a similar result was reached more strongly in City of Vancouver v. William A. McPhalen.⁹⁵ This 1911 case was an appeal from the British Columbia Court of Appeal. The Court dealt with the specific provision in the Douglas Proclamation and found

"There can ... be little doubt that the common law rule under which the inhabitants of parishes through which highways passed were responsible for their repair was never introduced into British Columbia."

Duff, J. considered the state of affairs at the date of the Proclamation, 1858, when the Government of necessity assumed the maintenance of the highways which had been built by a detachment of British engineers: the physical difficulties of the country, sparse settlement, and the need for roads outside the municipal areas. The Court concluded that the common law rule "has never been acted upon and was, in 1858, and still is, from local circumstances inapplicable". In this case the Court again referred to many cases which had been heard in England after 1858. Here in 1858 and in 1911 local circumstances were different from England.

Else-Mitchell has suggested that "... the traditional rights of the common law which Englishmen claimed as their birthright were dormant rather than extinguished ..." in the early days of colonial development, and from time to time the occasion arose for invoking them.⁹⁶ This proposition would not of course apply where the local

legislature had enacted contrary provisions, the second exception to the general acceptance of common law.

- (2) The exception usually found in the reception statutes, inapplicability of common law because of local legislative enactments.

The matter was suggested by Halliburton, C.J., in Uniacke v. Dickson, previously referred to, when he said:

"Every year should render the Courts more cautious in the adoption of laws that had never been previously introduced into the colony, for prudent judges would remember that it is the province of the Courts to declare what is the law, and of the legislature to decide what it shall be." 97

Two Alberta cases have decided to exclude the common law on the basis of subsequent legislative enactments. In Quinn v. Beales,⁹⁸ a 1924 case, the Court found the reason for a common law rule in England was destroyed by Provincial enactment. In re Simpson Estate⁹⁹ considered the case of a rule which was actually capable of being acted upon here, the Rule in Shelley's Case. The Alberta Court adopted the reasoning of Robinson, C.J. of The Court of Queen's Bench of Ontario, who had said, when considering the Mortmain Acts, they were,

"... all actually capable of being acted upon in this country, but which, having been passed upon grounds and for purposes peculiar to England and either wholly or in a great degree foreign to this colony, have never been attempted to be enforced here, and have never been taken to apply to us...." 100

The Simpson Case found the Rule in Shelley's Case was not "suitable" and found that even if the Rule had been introduced, it

would be abrogated by the Local Acts in Force in Alberta in 1927.

5. What special parts of English Law are received?

Coke, writing in the early seventeenth century, referred to fourteen "divers lawes within the realme of England" and lists them, including the law of the crown, of Parliament, of nature, statute law, customs, ecclesiastical law, and the common law of England.¹⁰¹ Early colonial charters provided that the colonial legislation should not be repugnant to English Law.¹⁰² At a later date, it was the practice to apply English Law to the various colonies as at a specific date. This method of applying law to the colonies has been criticized:¹⁰³ however, the status of the statute law in England in the period before the Revision of 1865¹⁰⁴ was such that probably no other method was feasible. The specific provision for British Columbia was of "the Civil and Criminal Laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable".¹⁰⁵ What special parts of English Law are included in this provision?

(i) Equity

Equity, like common law, is a case law system, which developed into a well established and reasonably ascertainable body of law. Originally, it was based on "fairness", however in later years the most distinguishing feature that remained was that it was administered by the Chancellor in his own chancery court. That situation remained until 1875 when the two court systems in England were combined.

The reception provisions for British Columbia and the

provision of a single court for the colony predate the Judicature Act, 1873¹⁰⁶ which statute consolidated in one court of judicature in England and vested in that court the jurisdiction previously vested in the several merged courts:

"the high court of chancery of England, the court of queen's bench, the court of common pleas at Westminster, the court of exchequer, the high court of admiralty, the court of probate, the court of divorce and matrimonial causes, and the London court of bankruptcy"

The Judicature Act contains the following provision:

"In every civil cause or matter commenced in the high court of justice, law and equity shall be administered by the high court of justice and the court of appeal respectively"

Falconbridge has suggested that the general reception of English Law did not include equity, unless chancery courts were established.¹⁰⁷ An argument can be made that since 1615,¹⁰⁸ equity had become the law of the land in England, although administered by separate courts. The Chancellor applying equitable principles to common law rules to effect better justice and prevent rigidity in the common law. Côté argues in this vein, that "laws" can be interpreted to include equity and presents the view that Falconbridge is wrong and that equity is an integral part of English Law, and the contrary interpretation is unduly narrow.¹⁰⁹

For a reception date prior to 1873, the narrow view of Falconbridge may be more precise, rebutted by the granting of chancery jurisdiction or by the establishment of chancery courts.

(a) What then is the situation in British Columbia?

The various forms of the English Law Act introduced "the Civil and Criminal Laws of England,"¹¹⁰ not merely common law.

The Supreme Court of Civil Justice of the Colony of Vancouver Island, specifically had jurisdiction in all matters of law and equity.¹¹¹ The Vancouver Island Civil Procedure Act, 1861,¹¹² introduced the English statutes dealing with common law procedure passed in 1852, 1854 and 1860 in England, and provided that the rules of the English High Court of Chancery should regulate the proceedings of the Supreme Court sitting in Equity. The powers of the Chief Justice included the power to amend such rules in special circumstances at law or in equity.¹¹³

In mainland British Columbia, the 1859 Proclamation provided, inter alia, that The Supreme Court of Civil Justice of British Columbia,

"... shall have complete cognizance of all pleas, whatsoever, and shall have jurisdiction in all cases, civil as well as criminal, arising within the said Colony of British Columbia." 114

Such provisions appear to rebut Falconbridge's suggestion, if it is in fact valid.

In the period between 1888 and 1897, British Columbia's Consolidated Statutes included the Law and Equity Act.¹¹⁵ Its provisions were based for the most part on sections which had been drawn from Imperial Statutes and the Ontario Statute. In the 1897 Revision of the statutes, its provisions were absorbed in the Supreme

Court Act save for two sections which were transferred to the Insolvent Estates Act and the Aliens Act.¹¹⁶

(ii) Ecclesiastical Law

Blackstone's view of the applicability of ecclesiastical law was that "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".¹¹⁷

A 1857 case, R. v. Eaton College¹¹⁸ determined that although by Royal prerogative the Queen could name Bishops, unless forbidden to do so by statute, in colonies without established churches the Bishop so named had no special powers such as he would have had if the church had been established.

The Church of England was not established in British Columbia. The Courts have indicated that the church legislation in force in England may not extend here, but there is an indication that in matters within the church, and not with relation to the church and the public generally, such legislation would be taken as a guide. Begbie, C. J. in Bishop of Columbia v. Cridge¹¹⁹ an 1874 case which asked the Civil Court to support a decision of an ecclesiastical inquiry commission, said when considering the Church Discipline Act,¹²⁰ that it is not law at least in its entirety, but pointed out that it is good law, good sense, and convenient law and that "the spirit, though not the letter, of the ... Act is to be adhered to.

... it is to be taken as a guide".

As ecclesiastical courts handled probate and nullity until 1857,¹²¹ such jurisdiction was a problem for colonies with a prior reception date. In the case of Vancouver Island, specific provision was made giving the Court of Record jurisdiction "in matters Civil and Criminal, and such equitable and ecclesiastical Jurisdiction" in 1848. These matters were therefore specifically provided for.¹²² Colonies such as British Columbia with a reception date after 1857, do not have such problems.

(iii) Legislation other than Acts of Parliament

The reception of statute law has been referred to generally and will be discussed in more detail in Chapter IV.

Legislation other than Acts of Parliament presents another facet to the reception problem. Côté postulated this question,

"Could valid legislation under the prerogative, or subordinate legislation by delegated authority under an Act, be received?"¹²³

In Reynolds v. Vaughan, an 1872 decision, Begbie, C. J. ruled that an order-in-council issued in England in 1856, and not extended to the colony proprio vigore, was not in force. He interpreted the words "civil and criminal laws of England" to mean "common and statute law, and not orders-in-council, although issued under the authority of an Act of Parliament". He continued,

"An Englishman going to found a Colony may be supposed to know the Common Law, by common sense, and to carry the Statutes (in the form of Chitty)

in his hands. But Orders in Council are something extra. I conceive that, though Statute laws may be taken to be in force in a colony proprio vigore, yet Orders in Council under powers in a statute, like orders of Court under similar powers, would require to be promulgated anew by the Legislature here, or by a General Order here." 124

An example of such a proprio vigore provision is found in a 1863 Imperial order-in-council,¹²⁵ which provides that Letters Patent take effect in colonies when made known there.

(iv) Constitutional law

Constitutional law applies in both settled and conquered colonies. However, in respect of settled colonies the better view as expressed by Côté is that a settled colony receives the royal prerogatives, except those not essential to sovereignty, and except those unsuitable to the colony. With respect to the legislative distribution which exists in a federal state, he notes "the Crown's rights undergo a similar distribution and the Crown in each right receives the prerogatives and duties appropriate to its property and legislative competence".¹²⁶

The distinction is drawn by the Courts as to property which has vested, and that which has not. The judgments in the recent Reference re the Strait of Georgia to the British Columbia Court of Appeal follows the common law rules as to vesting of property in accordance with the division between the two legislatures.¹²⁷ This is however to be distinguished from a case where a transfer is made from one legislature to the other. The Courts, again in accord with the Law of England, require that the intention to transfer must be

expressed or necessarily implied. An example of this is found in a British Columbia case determining the effect of a conveyance of public lands to the Dominion and a finding that such conveyance did not include the transfer of minerals.¹²⁸

The Crown in its various capacities is represented by the Governor General and by the Lieutenant-Governor. The latter is appointed by the Government of Canada, and not by the Sovereign, yet the appointment is to represent the Sovereign within the Province, and to carry out the duties of the Sovereign at the provincial level of responsibility.¹²⁹ Originally, the office was the principal federal check on the provincial legislatures. In 1882 the Governor-General-in-Council, in a Minute of Council transmitted to the Lieutenant-Governors, noted

"The Lieutenant Governor is not warranted in reserving any measure for the assent of the Governor General on the advice of his Ministers. He should do so in his capacity of a Dominion Officer only, and on instructions from the Governor General. It is only in a case of extreme necessity that a Lieutenant Governor should without such instructions exercise his discretion as a Dominion Officer in reserving a bill. In fact, with facility of communication between the Dominion and provincial governments such a necessity can seldom if ever arise." 130

Thereafter, the reservation on grounds of constitutional validity has been deemed to be inappropriate, the matter being determined in the Courts, unless of national interest.

In August, 1958, the British Columbia Mineral Taxation Act was considered by the Cabinet and it was decided that the matter

was not of "national interest" which the then Minister of Justice, the Hon. E. Davie Fulton, noted must include "matters of practical or physical effect".¹³¹ The case then went to the Courts for decision.

(v) Admiralty Law

In England the common law courts had jurisdiction within the counties, terminating at low water mark.¹³² The Admiralty had jurisdiction over the sea outside the county, although there was a concurrent jurisdiction in parts at least of tidal creeks, estuaries and bays.¹³³

The Sovereign could order the establishment of a Vice-Admiralty Court in any Colony, and did so in respect of Vancouver Island, and later, in respect of British Columbia.¹³⁴ When such courts were established, they were Imperial and not colonial courts and administered the Law of England, which accorded with international law.

Colonial jurisdiction in Admiralty has grown in several stages.

- (1) In the first stage, colonial governors were given powers of government that correspond with the common law jurisdiction, Admiralty jurisdiction being reserved to the Lord High Admiral. At this stage, the colonial government has no Admiralty jurisdiction because this had not been granted to it. By Letters Patent, Vice-Admiralty Courts were created. ¹³⁵
- (2) The Vice-Admiralty Courts Act, 1832 made statutory provision for the Vice-Admiralty Courts. ¹³⁶
- (3) Admiralty jurisdiction was vested in the colonial courts as to criminal matters by the Admiralty

Offences (Colonial) Act, 1849. 137

In 1883, consideration was given to the competence of the Canadian government to create Courts which should exercise jurisdiction in respect of matters arising within the territorial waters, and in some cases beyond. It was the opinion of the Law Officers and Admiralty Counsel that it would not be within the power of the Canadian Parliament to create a Court which should possess complete Admiralty jurisdiction. The Opinion is to the following effect,

"The Admiralty Courts have to deal largely with foreign ships and questions of international law, and there is great advantage in maintaining a uniformity of law and practice in such matters throughout Her Majesty's Dominions." 138

Problems continued to arise in respect of the Vice-Admiralty and Admiralty jurisdiction, particularly in respect of the jurisdiction of the Vice-Admiralty Court which in some cases was concurrent with the colonial civil courts, and as a result

- (4) Admiralty civil jurisdiction was vested in the colonial courts by the Colonial Courts of Admiralty Act, 1890. 139
- (5) Colonial legislation had no extra-territorial effect, "except perhaps, in limited cases over its own denizens". 140 The Statute of Westminster, 1931, freed the Canadian Parliament but did not release the Canadian Provinces or other Australian States from the restriction of territoriality in respect of legislative enactments. 141

The whole matter of the reserve of jurisdiction to the Admiralty has been elaborated as it is material to the relationship between the Dominion and the provincial governments and their divided sovereignty. 142

(vi) Law Merchant

Like Admiralty Law, this branch of the law was drawn from international sources, but since the work of Lord Mansfield has been recognized as the Law of England. It was received in the colonies as such.¹⁴³

(vii) Practice and Procedure

Vancouver Island and the original mainland Colony of British Columbia provided Rules of Court. These Rules in effect adopted for the colonial courts the practice of England.¹⁴⁴ After Union the same practice rules continued. Practicioners in the Province have principally used the British practice Books, Bullen and Leake and the White Book¹⁴⁵ to supplement the Rules from time to time in force.

Rules of evidence, which, like practice rules, are considered to be adjectival and not substantive, are suitable for reception.¹⁴⁶ At an early date however, an Evidence Act was provided which made reference not only to the law in force in England, but also to that in force in Ontario and Canada.¹⁴⁷

Coté notes that practice and procedure of legislative assemblies is not automatically received.¹⁴⁸ Provision was made in the Colonies with respect to these at an early date and the Imperial Parliament ratified at least once a Colonial enactment amending the constitution of such assemblies.¹⁴⁹

IV. JUDICIAL INTERPRETATION AS TO RECEPTION OF ENGLISH STATUTE LAW

When a body of English Law is imported either by virtue of settlement or by virtue of a reception statute, three qualifications affect the reception of English statute law not in force proprio vigore:¹⁵⁰

- (1) settlers take with them the law in force at the date of settlement, not law subsequently enacted; 151
- (2) only statutes of general application are received; and
- (3) received law is given effect, subject to limitations and modification of local circumstances:
 - (i) of local statutes in force;
 - (ii) so far only as the circumstances of the territory and of its inhabitants permit;
 - (iii) subject to such qualifications as local circumstance render necessary. 152

1. Applicability

Prima facie, the more general the extent of the statute as declared by the Imperial Parliament, the more apt it would be applicable to the colonies. If a statute merely declares the common law, there is strong reason to believe it would be in force. Similarly, remedial statutes which limit, are in derogation of, or abrogate the common law are generally received. 153

(a) Time to test applicability

(i) In England

The date may be the cut off date provided for reception (19 November, 1858) or the date the particular statute was enacted. The

leading British Columbia case, In re Munshi Singh, favours the latter. In 1914 that case approved the rule as stated by Viscount Haldane, L.C.,

"... In endeavouring to place the proper interpretation on the sections of the statute before the House sitting in its judicial capacity, I propose ... to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense ..." 154

Similarly in Re Simpson Estate,¹⁵⁵ the appellate division of the Supreme Court of Alberta has decided that the date of enactment is material, because the essence of the problem is whether the reason for the adoption of the English rule in question would be equally applicable to conditions in Alberta.

Côté favours the date set for reception, "and therefore the reasons why the rule in question was retained in England rather than the reasons for its original development". He also argues that if the cut-off date is used in England, and the same date in the colony, the social conditions in both would be more similar. What then are the authorities for the cut-off date in the colony?¹⁵⁶

(ii) In the colony

Five dates may be used in the colony

- a. the cut-off date, the date English Law was received, favoured by Blackstone; or
- b. the date the statute was introduced in England; or

- c. the date colonial courts first considered English statute's applicability; or
- d. the date of the facts giving rise to the issue arose, which is favoured by Côté; or
- e. the date of the proceedings.

157

The first, the date set for the reception, is important.

It limits the class of enactments which can be received to those in force in England at that time. This view, that the decision date is tied to the date of the reception legislation, (in the case of British Columbia the 19th November, 1858) is accepted in Australia, as set out in 1839 by Stephen J. in Ex parte Lyons, In re Wilson,¹⁵⁸

"... the question whether any particular statute is in force may be determined ... 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 would compulsorily be applied, which then, at the passing of the 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 ..."

It is supported by the following British Columbia cases:

In Brown v. Brown a 1909¹⁵⁹ case involving the right of appeal in divorce, Irving J. said:

"... the jurisprudence came in as it stood on 19 November 1858 insofar as not inapplicable on that particular day and a right of appeal would be a matter to be dealt with by the law-making power when the Colony required a Court of Appeal ..."

And in 1970,¹⁶⁰ the majority of the Court used 1858 as the date in distinguishing the Imperial Poor Laws as,

"... a system which could be applied only in a settled, organized country, having established parishes ..."

and proceeded to examine local circumstances in 1858. The dissenting judgment of Taggart, J. A. referred to local circumstances at both the reception date and the time of the case, which

"... were not November 19th, 1858, and are not now such as to render inapplicable whole parts of the Poor Relief Laws ..."

161

The use of the reception date permits of a decisiveness as to the law in that a decision made relative to the reception date is decisive as to reception and applicability, subject only to the consideration of subsequent legislation by the appropriate authority. Kennedy supports this view,

"Counsel argues that applicability or inapplicability is determined not as of 1858 when English Law was introduced into British Columbia, but as of the particular moment the question comes before the court. The courts "neither decide whether (the statute) was applicable in 1792 (Ontario) or in 1858 (B.C.); nor do they assume to prophesy whether it will be or become applicable at some future time". Counsel further states that a decision holding English Legislation inapplicable in the colony speaks only as to its applicability "then" (at the time of the decision) and does not bind future courts in different times. This proposition is spoken of as "one that has been actually adopted by the courts". With great respect I cannot agree that, in effect, British Columbia's English Law Act is to be interpreted as allowing courts to find that an English statute of pre-1858 vintage is not "inapplicable" one week, and inapplicable the next."

162

There are some cases where the date the facts of the case arose must be considered, that is where a decisive event occurred and the law must be interpreted then, , as for example with respect to the question of harbours at the date of Union of British Columbia with Canada (1871).¹⁶³ The Court properly considered local circumstances as at the date of the Union (1871),

"... at that time evidence shows no one there resident ... a state of nature, compared with the Vancouver Townsite ..."

In the result, English Bay was not a "harbour" as it was not one at the date of Union (1871). Therefore, title to the bed and foreshore remained in the Province, not passing to the Federal Government. There was no "latent" effect, attaching to any harbour that becomes a public harbour.

Much support can be found, however, in British Columbia decisions for the other choices. Judges have looked not only to the reception date, but to conditions in the province since that date, and as at the date the issue before the courts arose. Examples supporting the date of the proceedings are,

Manson, J., in R. v. Columbia Paper, a 1954 case, said,

"...I find nothing in the history of our province or of the Island that suggests there ever were such conditions existing in British Columbia ..."

164

Similarly, in Sheppard v. Sheppard, in 1908 he said, with respect to inadequate machinery on the reception date,

"... if it is sound and the test is to be pinned down to a certain and single day, the same test must

inevitably be applied to all other statutes civil and criminal: there cannot be one strict test against the Divorce Act and another lax test in favour of all other statutes; and if that strict test is to be generally applied, then the criminal laws of England, must, for the most part, go by the board, including trial by jury ..."

165

Bouck, J. in The Horse and Carriage Inn Ltd., v. Fred Baron,¹⁶⁶

in 1975, having previously decided the Real Property Act, 1845¹⁶⁷

had been replaced by British Columbia legislation, as an alternate reason for the decision that the Act was inapplicable, referred to

the present tense in the English Law Act¹⁶⁸ and to the Interpretat-

ion Act, s. 23(d),¹⁶⁹ He concluded with respect to a set of facts

in 1972, the date of the facts giving rise to the issue before the Court arose,

"... I do not believe the local circumstances were or are such in British Columbia that this archaic method of completing a contract should be preferred..."

Statute amendment in British Columbia supports the argument put forward by Bouck, J. that the law must be regarded as always speaking. Verb tense changes effected in the English Law Act may have permitted the interpretive change which has taken place, although such reason has not been specifically noted. The words "Civil and Criminal Laws of England" have been joined to the various verb forms now listed,

"are and will remain in full force ..."

by the 1858 Proclamation of Governor Douglas,

"are, and shall be in force ..."

by the English Law Ordinance, 1867
 "shall be in force ..."
 in enactments between 1888 and 1948 of the
English Law Act
 "are in force ..."
 by the English Law Act, 1960.

The present form of the Statute does not carry with it the imperative or futurity quality found in the first two enactments. Certainly the Courts would have every reason to believe that the legislature deleted the imperative enactment with remedial intention. The change effected in 1960 certainly removed any suggestion of the imperative. It would appear therefore that, in British Columbia, the reception date is not decisive and a decision that an Act is in force is not a precedent but only rebus sic stantibus.¹⁷⁰

Coté has raised a question as to the validity the English Law Act enacted after Union, in 1871, due to the legislative loss imposed by the terms of the British North America Act, 1867. If his argument can be supported, the 1888 Consolidation would still be in force with the imperative character of its verb.¹⁷¹

(b) What is a statute of general application?

The test may be phrased in various ways, Roberts-Wray suggests,

"... the rules can be reduced to one principle: that the imported English law is to be applied with the limitations and modification required by local circumstances;

... that the principle has not only its positive aspect, that English law must be pruned or adapted in the light of local circumstances, but also the negative aspect that the application of any given law is to be entirely rejected if the circumstances which explain its origin in England have no relevance in the country concerned¹⁷²

or as suggested by Cote,

"... one need only see why the law exists or existed in England and what other effect it would have there and then see whether the same social or moral problems exist in the colony and whether the rule would have any other side effects in the colony." 173

(i) A law of local policy

The judgment which forms the basis for the exclusion of a law of "local policy", is that of Sir William Grant, M.R. in Attorney-General v. Stewart,¹⁷⁴ an 1816 case which reads in part:

"Whether the statute of mortmain be in force in the island of Granada, will ... depend on this consideration -- whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country in which it is by the rules of English law that property is governed. I conceive that the object of the statute of mortmain was wholly political -- that it grew out of local circumstances, and was meant to have a merely local operation. It was passed to prevent what was deemed a public mischief, and not to regulate, as between ancestor and heir, the power of devising, or to prescribe, as between grantor and grantee, the forms of alienation. It is incidentally only, and with reference to a particular object, that the exercise of the owner's dominion over his property is abridged. ... framed as the Mortmain Act is, I think it is quite inapplicable to Granada, or to any other Colony. In its causes, its objects, its provisions, its qualifications and its exceptions, it is a law wholly English, calculated for purposes of local policy, complicated with local establishments, and incapable, without great incongruity in the effect of being transferred as it stands into the code of any other country" 175

This case has been approved in British Columbia,¹⁷⁶ is followed, and is accepted with respect to this Statute. In Ontario, an exception is made on the basis of local legislation, in these terms,

"...The legislature it is admitted, are the best interpreters of their own laws; ... and they have shown it to be their understanding, that without such express legislative authority the English Statutes of Mortmain would have restrained parties from making such a disposition, for they have added the words 'the Acts of Parliament commonly called the Statutes of Mortmain or other acts, laws or usages to the contrary thereof notwithstanding'." 177

The British Columbia Courts have given the following reasons for deciding a statute was not of general application:

- a. "... only for the better administration of the laws of the poor in England and Wales, and had nothing to do with the status of persons generally under English Law. The moment a person left England and Wales, he was not liable to the administration of the poor laws of England ..." 178

when considering the Poor Relief Act, 1601;

- b. it was "... not a general act, but required a special act to make it applicable to the Isle of Man and the machinery by which the act is to be worked out could not be applied here",

when considering the Crown Suits Act; 179

- c. that the 1853 Stamp Act was not introduced in that police and revenue laws were specifically excluded by Blackstone. 180 This case approved the decision in Jex v. McKinney, 181 a case from British Honduras, particularly the passage, "framed for reasons affecting the land and society of England, and not for reasons applying to a new colony"

2. Local circumstances in the Colony

(a) Different physical and social conditions

Bouck, J. said, as one of the reasons for not applying the Real Property Act, 1845, to British Columbia,

"... I do not mean to be critical of the Act of 1845. History shows that it was enacted to help solve deficiencies which had developed in the English conveyancing practice. The comparison is made to illustrate the danger of adopting as part of the law of British Columbia a statute passed to remedy a fault in existence on that date by a Legislature representing another society, in another time" 182

Here, he introduces not only the history of the statute, but also the society of British Columbia. Other references to British Columbia society, or local circumstances, and different physical and social conditions are found in the following instances, where it was determined that:

a. a statute was "...inapplicable to any state of things that ever existed here" 183

b. "... No workhouses existed in British Columbia in 1858 nor was any attempt being made to administer this Act in British Columbia" 184

c. a statute as to licensing was concerned

"... preeminently with local conditions in England which are not found here ..." 185

d. and Manson, J. has approved the Ontario case of Shea v. Choat, 186 and particularly the statement of Robinson, C. J. "It cannot possibly admit of doubt that its provisions are inapplicable to any state of things that ever existed here; a clause here and there might be carried into effect in this colony, or anywhere, from the general nature of their provisions; but that is not sufficient to make such a statute, part of our law, when the main object and tenor of its is

wholly foreign to the nature of our institutions,
and is therefore incapable of being carried sub-
stantially and as a whole into execution."

- (b) Is the double negative phrasing as to local circumstances
a decisive parameter for British Columbia?

Canadian cases generally, in respect of suitability or applicability, impose a different criteria of reception for common law and statute law. Common law applies to a Colony unless it is shown to be unsuitable and English statutes are generally not applied unless shown to be suitable.¹⁸⁷

In British Columbia, the reception statute provides for the Laws of England "so far as they are not, from local circumstances, inapplicable" ¹⁸⁸ and the double negative phrasing may be decisive to make statutes applicable (as is the common law), unless clearly inapplicable.

The double negative argument appears in Watt v. Watt,¹⁸⁹
a 1907 case. Clement, J. presents the argument in the following way:

"I am of the opinion -- at all events I assume -- that the use of the double negative throws the burden on him who asserts that a given English law, statute or other, of date prior to 1858, was not introduced into British Columbia. He must establish the affirmative proposition that the law in question was "from local circumstances" inapplicable to British Columbia ...

That new right (divorce) was so inseparably incidental to and bound up with the jurisdiction of an essentially local Court that I cannot bring myself to view it as other than itself essentially local. It is impossible in my opinion, to segregate the bare right to a judicial decree from the local conditions as to its enforce-

ment. These local conditions did not and could not exist in British Columbia ..."

The case was reversed on appeal. The Appeal Court dealt with the reasoning of the second paragraph but not with the argument presented by Clement, J. in the first paragraph.

The only other jurisdiction in Canada having the double negative is New Brunswick. Clement in his book The Canadian Constitution,¹⁹⁰ comments on the New Brunswick authorities,

"...If any distinction in principle can be drawn between the decisions in New Brunswick and those in Nova Scotia, it would appear to be this: that British statutes have been denied operative force in Nova Scotia unless clearly applicable, while in New Brunswick the tendency, at least of earlier authorities, seems to have been not to reject them unless clearly inapplicable. At the same time it must be confessed that this distinction cannot be clearly pointed out in every case ..."

The British Columbia Courts do not appear to have specially provided for the double negative argument and refer to cases in other jurisdictions having a different and positive wording as precedents.

(c) Inapplicability due to procedural problems

Where a statute is a statute of general application and is applicable, but some procedural machinery is lacking in the colony, the courts must then consider the extent to which it may be applied in part. Such procedural problems are inherent in the less developed colonial situation and in the legislative division of Canada.

In British Columbia, the Courts have tended to separate procedural difficulties to permit the substantive provisions of a

particular Imperial statute to function. MacDonald, C.J., said, in response to an argument that law and procedure were different and procedure had not been introduced,

"... The procedure in the Act so far as applicable to the conditions in British Columbia must be followed, and if any of them are inapplicable, which they plainly are, rules must be adopted by the Court which has inherent jurisdiction, in analogy to the rules set out in the Act" 191

Such procedural problems have been the principal factor in the Divorce and Matrimonial Causes cases in the Province of British Columbia.

There is perhaps no occasion for a petitioner to be so energetic in pursuit of his goal than in the matter of obtaining a divorce or nullity decree, and the cases have been pursued in appeals with great diligence. It had been decided that at the period of these cases, the Imperial Divorce and Matrimonial Causes Act, 1857 as amended by the Act of 1858 was substantially in force in the Province.¹⁹² The problems in the divorce cases arose from two procedural limitations in British Columbia,

- (1) the more simple structure of the Provincial courts in the early colonial period, as compared with those in England and contemplated by the draftsman of the Divorce and Matrimonial Causes Act; and
- (2) the division of legislative jurisdiction which operated when British Columbia entered Union with Canada deprived British Columbia of divorce jurisdiction, except in respect of procedural matters. Notwithstanding the fact that the Federal government had jurisdiction, the Province after Union enacted the English Act, slightly amended, and in 1938, by an apparently procedural amendment purported to restrict remarriage of a divorced person. 193

This prohibition was utilized by those seeking a declaration that a second marriage, which had been made in the period proscribed by the Statute as amended, was a nullity on the ground that the divorced person lacked the capacity to marry in the proscribed period.

Kennedy has dealt with the procedural matters in three divisions:

- (i) "Where a substantive provision is found to be applicable, absence of incidental machinery will only rarely result in "dormancy" or "abeyance" until the machinery is provided. Usually the substantive provision is held to be effective and applicable within the existing local machinery" 194

The difficulties of Judges in Colonial situations, and their need to exercise greater powers than would be expected in a setting with a more developed judicial hierarchy to make received law function illustrates this proposition. In Sheppard v. Sheppard¹⁹⁵ the sole Judge of the Court found himself able to exercise jurisdiction allocated to three judges in England. Martin, J. (as he then was), after reviewing the authorities, reasoned that it was unsound to wholly reject an Act in the absence of machinery, so a compromise modifying its application by the circumstances existing in the colonial situation must be chosen. He said,

"I confess I cannot, with all due deference, quite comprehend how, in the face of the foregoing facts and of such a venerable and ever increasing body of authority, in the course of which no less than five judges have in reported judgments formally upheld this jurisdiction, any judge can refuse to exercise it; ..." 196

Two judges, Clement, J., dissenting in the Sheppard Case, and Begbie, C. J., in Watt v. Watt, had however refused to exercise the jurisdiction.¹⁹⁷

The statement of Martin, J. is in accord with Gray, J. in

.....198
S. v. S. which was followed in Sheppard v. Sheppard. He said,

"It would be inconsistent to hold we adopt an English remedial law for local purposes but when you want to use the remedy you must go to England";

.....199
 the Privy Council decision in Yeap Cheah Neo v. Ong Cheng New, relating to the application of English Law to the Straits Settlements where the legislation applied "as far as circumstances will admit". The Court ruled that the law must be taken to be "modified in its application by these circumstances"; and

.....200
 Rand, J. discussing Watts. v. Watts, in the Densmore case,

"The holding stands, as I view it, for the enactment by adoption of those provisions as they are fairly to be drawn from the statute, and that the law so adopted is to be accommodated to the judicial organs administering the law generally in the province ... The governing fact is the intention of the adopting legislature: ... the blanket law gathered up by the enactment was, by the principle then and now applied, to be confirmed or rejected by the Courts, ... an act of judicial legislation...."

The effect of these cases as summarized by Kennedy, was that English Law was "not from local circumstances inapplicable"

"... merely because the colony lacked judges or courts of the same quantity and name as those in England. A decision otherwise would have been intolerable, especially for colonies such as Vancouver Island and British Columbia, where the Supreme Court was the only court and was given 'complete cognizance of all pleas whatsoever' and jurisdiction 'in all cases, civil, as well as criminal, arising within' the colony...."201

Kennedy's second division is the applicable but dormant theory.

- (ii) "... where the substantive provision is tied to procedural machinery of some sort before it can be effective, and there is no suitable machinery at all, then either it is applicable but dormant until the machinery arrives, or totally inapplicable." 202

If the substantive right (appeal) merely lacks a court to enforce it, it may be applicable but dormant, provided it is not inapplicable for any other reason. The judgment of Rand, J. of the Supreme Court of Canada considered the Densmore appeal, in these terms:

"... I take the provisions restraining remarriage pending appeal to have been introduced as a substantive measure and that it remained procedurally inefficacious until, by provincial law, provision was made for appeal. ... the administration of justice by the Province surely extends to the final determination within the Province of the judgments of its own Courts" 203

Kennedy's article was published before the appeal was heard by the Supreme Court, and he was actually discussing the matter as it had been raised in the dissenting Court of Appeal judgment of Sidney Smith, J.A.,

"Whether the striking out of the 'hereby' in 1938 'created an incapacity to marry which did not previously exist'"

All applications of an English Act involve its being applied mutatis mutandis; and the necessity of omitting the word 'hereby' in order to apply the section is as nothing to the incongruities that must be passed over to apply the Act for other purposes; ... So if the right of appeal in the Province had existed in 1857, I would see no difficulty from the words 'hereby limited'. The question remains whether it is material that the remedy of appeal was only made available later, that is, in 1937 or 1938."

The answer to that is indicated by Martin J. in Sheppard v. Sheppard. He states that even where machinery is lacking to make an English Act operative here, still its provisions could 'be viewed as a partially dormant or abeyant principle of jurisprudence to become effective later on as the machinery arrived', and he particularly related this view to the subject of appeal." 204

The majority of the Supreme Court (Cartwright, Taschereau, and Fauteux, JJ.) found the remarriage a nullity and that the Act referred to appeal provisions which had no practical effect in British Columbia until appeals were provided in 1938.²⁰⁵ the provisions were dormant so long as no right of appeal existed, and became effective when an appeal was provided. Cartwright, J. dealt with the dissenting judgment of Sidney Smith, J.A., as follows,

"The main ground upon which Sidney Smith, J.A. proceeded was that the enactment and the amendment of s. 38 by the Legislature were unnecessary as s. 57 of the Imperial Act continues to operate in British Columbia mutatis mutandis, that the incapacity to marry, until the time for appealing from a decree dissolving a marriage has expired or in the result of any appeal a marriage has been declared dissolved, forms part of the substantive law of marriage and divorce in British Columbia which, while dormant so long as there was no right of appeal, became effective immediately upon that right coming into existence. I agree with this conclusion and with the reasons for it given by the learned Justice of Appeal. It appears to me to follow from the reasoning of Gray and Crease JJ. in S. v. S. ..., and that of Martin J. in Sheppard v. Sheppard ..., approved by the Judicial Committee in Watts & A.-G. B.C. v. Watts,"

206

In some cases this theory could not operate and the third option, total inapplicability would follow.

- (iii) "... where the machinery which is absent (machinery for appeals) is connected with a substantive right which is only absent (the right of appeal), and it is only incidentally connected with a different substantive provision (eg. the one in question, a limitation upon the right to remarry), yet connected in such a way by reason of the language of the legislation that the second substantive provision cannot operate without the machinery, the solution is best found in holding the second substantive provision is inapplicable."²⁰⁷

In support of this option, Kennedy poses the question,

"Should the subsequent provision of machinery for one purpose (appeals in Divorce cases) have the effect of altering the substantive law in an entirely different area (the right to remarry)?"

The Ontario case, Mercer v. Hewston²⁰⁸ is a case where in view of lack of machinery, the statutory provision requiring "enrolling" of deeds was held to be inapplicable as Ontario then had no Chancery Court. Kennedy notes that no suggestion was made that registration would be required if a Court of Chancery were created in Ontario, although some of the cases were after the Court was created. In the words of Martin, J., commenting on the case, in effect, the Court of Chancery itself was dispensed with".²⁰⁹

3. Problems inherent in a Federation

When British Columbia united with Canada in 1871, the legislative ambit of the Federal Parliament, assigned to it by section 91 of the British North America Act, 1867,²¹⁰ operated to deprive the Provincial courts of jurisdiction.

- (a) Is the Province of British Columbia justified in providing for a matter of Federal jurisdiction on the argument that the Federal government, having jurisdiction, has not made provision?

It would appear that it may.^{210A}

The Province is sovereign in respect of the heads of jurisdiction assigned to it and enumerated in s. 92. Legislation by the Province is competent unless and until the Federal Parliament enacts conflicting legislation,²¹¹ providing two conditions are met,

- (1) the subject of provincial legislation merely incidentally affects one of the classes of subjects enumerated in

s. 91 as a federal head of jurisdiction; and

- (2) the legislation is properly within one of the enumerated heads in s. 92.

In the following cases, such provincial legislation has been effective,

- (1) in considering whether County Court judges, sitting as local judges of the Supreme Court, could grant a divorce, the Supreme Court of Canada decided that as the Federal government had not passed legislation under s. 101 of the British North America Act, 1867,²¹² and therefore it was competent for the Province to pass laws with respect to the constitution, maintenance and organization of such courts and to confer the jurisdiction. The Court said,

"... the impugned legislation does not ... create any substantive right to make any change in the law or jurisdiction in that regard" 213
- (2) in Burk v. Tunstall it was held that it was competent for the Province of British Columbia to create mining courts and to fix their jurisdiction, but not to appoint any officers thereof with other than ministerial powers, judicial powers being within the competence only of appointees of the Governor General. 214
- (3) Provincial limitation acts, as applied to and curtailing the operation Federal statutory causes of action have been sustained on the ground that they are procedural in nature. This view was expressed in University of British Columbia v. Martin Forbes Bartlett ²¹⁵ where an action on a promissory note was barred by the British Columbia Statute of Limitations, no limitation period having been provided in the Federal enactment.

The contrary result is found, where a substantive enactment by the Province is in respect of a s. 91 head of jurisdiction. The problem is illustrated in the divorce cases and the allocation of divorce to the Federal government and procedure to the provinces. British Columbia further complicated the matter when, in revising the

statutes in 1897, it reproduced in part the Imperial Divorce Act of 1857 as a Provincial enactment. Kerwin, J., dissenting in Hellens v. Densmore, said

"... in view of s. 6 of c. 41 of the 1897 annual statutes of British Columbia, I cannot escape the conclusion that the British Columbia legislature did enact c. 62 of R.S.B.C. 1897 and it therefore becomes necessary to consider the validity of s. 40 thereof. If at that time it was beyond the competence of the Legislature it cannot affect the matter that subsequently there was a Court in the Province to which an appeal from a decree of divorce might be taken.

In my view it was ultra vires. Under Head 26 ... This was not a mere matter of procedure, but one of substantive law and has no relation whatsoever to the solemnization of marriage" 216

Kennedy has considered this problem and points out it is its place of inclusion in the Revised Statutes as an enactment that is inappropriate, and the English Act should have been placed with those statutes "taken over from England and included in an appendix for the convenience of the profession"217

The English Act was introduced by the reception statute before federation, so far as not inapplicable, and has continued in force thereafter.

(i) Is the case of such an English act, introduced by the reception statute before federation so far as not inapplicable and which had continued in force thereafter, different?

"The fact that it may be said that the Parliament of Canada can, since the Union, alone, in one sense, legislate on matters relating to Divorce, and might if it saw fit take away such jurisdiction from the Courts of the Province, does not in the least detract from the significance of the declaration of the Legislature of a Province as to the applicability of English laws to its own residents and circumstances

In British Columbia, the Federal Parliament has so far been 'disposed' to leave the exercise of that regulating jurisdiction to the Provincial legislature, in doing which that latter is just as free to recognize the applicability of an Imperial statute as it would be if it had the power to alter the jurisdiction conferred thereby. This power to regulate has been so clearly recognized by the Privy Council in the Fisheries case" 218

Such a statute which now fell under a federal head of jurisdiction, and was not repealed either (1) specifically, in 1886,²¹⁹ when the Federal Parliament repealed a few provisions in force in British Columbia

"so far as the said Acts and parts of Acts relate to matters within the legislative authority of the Parliament of Canada"

or (2) by implication, by the Federal Parliament enacting a substantial body of law or code such as would constitute implied repeal, remains in force for the Province until repealed. It remains in force by the joint operation of s. 129 of the British North America Act, 1867, and s. 146.²²⁰

In the Federal legislative ambit of s. 91, English Law in force in each Province includes,

- (1) English Law, common and statutory as introduced as part of the law of that Province or territory and not repealed by the Federal authority; and
- (2) English statutes made applicable proprio vigore to the Province or territory, falling within a s. 91 head of jurisdiction, and not altered by the Federal government after 1931; and
- (3) English statutes made applicable to Canada proprio vigore, and not altered after 1931.

(b) Is a valid law in force in British Columbia before Federal legislation was enacted, and superseded by Federal legislation, revived upon repeal without reenactment by the Federal authority?

(i) An Act in force by virtue of the operation of the English Law Act

In Foley v. Webster,²²¹ the question related to an English Act providing for interest on a judgment at four per cent which was "and continued to be law down to the passing of 49 Vict., c. 44 (Dominion Act)" Considering whether it was in force after the repeal of the Dominion Act in 1890, Drake J., said

"The contention that the repeal ... in fact repealed the right to recover interest at all on judgments is not well founded. These sections did not affect the principle of allowing interest on judgments, but only increased the amount of such interest, and by their repeal the law as it existed in this province was not repealed and still ~~is~~ the law here. The legislature never contemplated enacting a new law on the subject of judgments, but only a modification of a part of it, which modification having been subsequently repealed, left the old law as it existed"

Several British Columbia cases have considered the effect of the Criminal Code provisions and their effect on a similar statute,

The Offences Against the Person Act, 1828 (Imp.)^{221A} The most

recent, McIntyre v. Moon,^{221B} was a 1971 decision of Verchere, J. who said,

"In Sharkey v. Robertson (1969), 67 W.W.R. 712, 3 D.L.R. (3d) 745 (B.C.) Ruttan, J. had occasion to deal with an attack on those provisions similar to the one made here, and in the course of concluding that they were valid, he gave it as his opinion that the repeal of ss. 732-4 of the Criminal Code, R.S.O. 1906, c. 146 (which were first enacted in 1892 and continued until the present Code came into being, when ss. 733 and 734 were dropped but the provisions of s. 732 retained in what became s. 699) did not repeal such legislation as may have existed in the province before Confederation. I agree with that conclusion and with the further unstated, but I think, inherent conclusion that the enactment of ss. 732-4, or their predecessor sections in 1892, did not, by their enactment, procure the repeal of that legislation either.

To what has already been said I would add, however, that in my opinion (a) this is not a case to which s. 22 of The

Interpretation Act, R.S.B.C. 1960, c. 199, applies, because conflict between Canadian and provincial legislation serves only to suspend the legislative authority of the province in relation to the affected matter: see Provincial Secretary of Prince Edward Island v. Egan, [1941] S.C.R. 396 at 402, 76 C.C.C. 227, [1941] 3 D.L.R. 305;"

A different result would follow if Provincial legislation were enacted repealing by implication an Imperial Act in force by the provisions of the reception statute (or, after 1931, proprio vigore). As such received law is in force as law of the colony, and can be amended and dealt with as such, Provincial repeal would be effective in the usual way irrespective of how the Provincial law came into being. It would not revive if the repealing statute were itself subsequently repealed. The repeal would be in accordance with the provisions of the Interpretation Act.^{221C}

Two other British Columbia cases considered the 1828 Imperial Statute and the effect on it of the Criminal Code. They are:

- (1) Major v. J. McCraney, an 1897 case which went to the Supreme Court of Canada, appears at variance with the accepted rule as stated in the McIntyre Case. However, the Chief Justice in the Supreme Court did not make the ruling that the 1828 Statute was no longer in force in British Columbia, and pointed out that even if it were in force, the trial judgment of the late learned Chief Justice was wrong in his construction of s. 12 of the Act. He also says it would not have applied, and therefore its force was not material. The judgment of Drake, J., in the Court appealed from had said, "... the Act ... is no longer in force, and this is decisively shewn by reference to the course of legislation dealing with the criminal law...." This judgment is one at least which mention the enactment made by the Federal authority in 1886 deleting the criminal law provisions from the English Law Act.^{221D}
- (2) Sharkey v. Robertson, which case is mentioned in the portion of the McIntyre Case previously quoted.

The McIntyre Case was considered but distinguished on the facts recently in Saskatchewan.^{221E}

(ii) An Act in force as proprio vigore legislation

Until the Statute of Westminster, 1931, neither a Federal nor a Provincial enactment could repeal or amend legislation in force proprio vigore. Castles has suggested, discussing the Commonwealth of Australia,

"In some instances British Laws may no longer apply to 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." 222

The effect of a Provincial enactment on proprio vigore legislation was considered in Regina v. De Banou.²²³ The Herbalists Act, 1542, was in force in British Columbia proprio vigore in that it was extended to

"any parte of the realme of England or within any other the King's domynions"

The case decided that section 71 of the Medical Act, by implication, made the Herbalists Act, 1542, no longer effective in British Columbia, and the prescription of a physiotherapist that would have been permitted under the English 1542 Statute was found to contravene the Medical Act provisions.

The case makes the distinction between a consolidated act and an enactment, and the effect thereof, in order to fix the date of the Medical Act. It was enacted in 1946, and was found not to be a mere re-enactment of pre-1931 provisions, such as would exclude the effect of the Statute of Westminster, 1931.

(c) Limitations of extra-territoriality(i) Historical Background

Colonial legislatures could only legislate for their own territories. In the nineteenth century, the Colonial Bills with extra-territorial effect were disallowed by the Law Officers of the Crown, and by the Courts when they began considering such colonial legislation.²²⁴ Imperial review of colonial legislation -- whether approval, amendment or disallowance -- was a well established part of the Imperial administrative process. It was undertaken by the Committee of the Privy Council for Trade and Plantations, the Board of Trade, and the Colonial Office which Office was made a separate department of state in 1854.²²⁵ The King-in-Council acted on the minute of the Secretary of State for the Colonies who was advised by legal counsel in both the Colonial department and in the Privy Council Committee for Trade and Plantations. After considering Colonial legislation, it was the duty of these eminent counsel to report an opinion on such legislation "in point of law".²²⁶ Several collections of Opinions are published and the availability of this source in the Colonies greatly increased thereby.²²⁷

Although the origin of the doctrine is obscure, it was raised in the Canadian Prisoners Case, of 1839,²²⁸ when Lord Durham transported Canadian rebels to Bermuda.

Extra-territoriality is now conceded to the self-governing Dominions by the Statute of Westminster, 1931,²²⁹ but the Provincial Legislatures are still confined to territorial legislation.

Colonial attempts were originally made to extend jurisdiction beyond the three mile limit,²³⁰ in matters of criminal law and in claims of the right to enforce the Crown's neutrality therein by ordinance restricted to three miles and to act under the Foreign Enlistment Act.²³¹ The right to enact colonial pilotage laws limited to the territorial sea, before pilotage was regulated by the Merchant Shipping Act, 1894, was another aspect of the problem.²³²

Further opinions relate to colonial trade and treaty relations. The Imperial Parliament showed reluctance to override Colonial authorities with respect to observance of treaties, with the result that the Crown had different treaty commitments for different possessions. Eventually a solution was reached in territorial application to Colonies only after they signified their assent to be affected by the treaty in question, and undertook to enact appropriate legislation. When colonies federated, the continued application of a treaty to a portion of the federation was a problem, particularly if it affected a field of federal competency.²³³

- (ii) Provinces limited as to extra-territoriality, before and after 1931

Colonial legislative efforts to extend territoriality were limited to the territorial sea (lying between low water mark and the three mile limit), as provided in the Circular Despatch of 16th December, 1842,²³⁴ which reads inter alia,

"... When the operation of a Colonial Act is confined to a range not exceeding one league from the shore, and relates to matters of local interest, the regulation of

which, by local enactment, is indispensable to the welfare of the Colony, no objection will be made to such an Act on the ground of the local range and extent of its operation exceeding the limits of the jurisdiction of the Colonial Legislature; Examples of such Acts are those relating to pilotage, to quarantine, to customs duties, and to fisheries.

But if a Colonial Enactment be made to take effect on the high seas at a distance exceeding three miles from the shores of the Colony -- that is, if it shall purport to regulate, to prevent, or punish any acts done on shipboard beyond those limits, such Enactments will be null and void. In what manner of acts of that kind may be disposed of by Her Majesty, is a question on which no one inflexible rule can be laid down. But it may be stated, as a general rule, that the Queen will, in no case, be advised to confirm or sanction any such Enactment."

The Provinces are still so limited. In some instances however Provincial legislation has been found intra vires where the basis was property civil rights within the Province and the effect on residents abroad was only incidental,

- (1) in Workmen's Compensation Board v. C.P.R.²³⁵ a 1919 case, the validity of the provision in the Workmen's Compensation Act, 1916 (B.C.) extending benefits to a workman killed outside the Province was considered. The accident occurred when a ship floundered outside of territorial waters. It was held that the right arose, not out of a tort having a source outside the Province, but out of a contract of employment, made within the Province and the action is to secure a civil right within the Province.
- (2) in Gagen v. Gagen,²³⁶ a 1934 case, the provision in the Deserted Wives' Maintenance Act whereby the British Columbia magistrate had jurisdiction and ordered service on a husband by registered mail to his new residence in New Zealand was considered. Macdonald, C.J.²³⁷ ruled,
 1. that the Magistrate had jurisdiction by the operation of the interpretation section, and
 2. the legislation was valid and not extra-territorial, but ruled that even if it were, the Magistrate had jurisdiction, the desertion having taken place in British Columbia.

This case is based on the proposition that some powers extend to citizens abroad.²³⁷

(iii) Federal Provincial conflict

Farris, C.J.B.C. (with whom Bull and McFarlane, J.J.A. agreed) in the 1976 Reference re Ownership of the Bed of the Strait of Georgia and related areas,²³⁸ in determining British Columbia's jurisdiction for the waters in question, approved the Reference re Offshore Mineral Rights (B.C.),²³⁹ and quoted the following passages:

"So far, we are of the opinion that the territorial sea lay outside the limits of the colony of British Columbia in 1871 and did not become part of British Columbia following union with Canada. We are also of the opinion that British Columbia did not acquire jurisdiction over the territorial sea following union with Canada ..."

"It is Canada which is recognized by international law as having rights in the territorial sea adjacent to the province of British Columbia ..."

The territorial sea now claimed by Canada was defined in the Territorial Sea and Fishing Zones Act of 1964 referred to in Q.1 of the order in council. The effect of that Act, coupled with the Geneva Convention of 1958, is that Canada is recognized in international law as having sovereignty over a territorial sea three nautical miles wide. It is part of the territory of Canada."

and concluded,

"These passages make it clear that the court was dealing with rights in the territorial sea adjacent to the Province of British Columbia. The waters of the Gulf of Georgia are not part of the territorial sea. It may be noted that under Article I of the Treaty of 1846, it is only in respect of that portion of the Gulf of Georgia that lies south of the 49th parallel that there is a right of free navigation. The concept of closed navigation is inconsistent with the concept of a territorial sea. Indeed, counsel for the Attorney-General of Canada conceded that the waters involved in this reference are 'internal waters'. I am ... satisfied that the deci-

sion in the Offshore case is not determinative of the issue in this case. That issue was not even considered by the court."

The dissenting judgment of Seaton, J.A., also referred to the Offshore opinion,²⁴⁰

"British Columbia can only succeed on this branch of the case if it is found that the solum was situate in British Columbia in 1871 at the time of British Columbia's entry into Confederation ... Canada, on the other hand, argues that in 1871 at the time of British Columbia's entry into the union, land below the low-water mark was regarded at common law as being outside the realm; that it was not part of the colony of British Columbia in 1871, and that at, or following union, it did not become part of the province of British Columbia." 241

and concluded, ~~that~~,²⁴¹

"The court concluded that the land below the low water mark was outside the Colony of British Columbia in 1871 and was never part of the province. That reasoning is applicable here." 242

An appeal to the Supreme Court of Canada is pending.^{242A}

(iv) The distinction between proprietorship and jurisdiction

The distinction is made by Seaton, J.A.²⁴³ between proprietorship and jurisdiction,

"A number of the province's arguments shifted from sovereignty and international law to proprietorship and common law without recognition of the step. In my view, except in so far as international law has influenced domestic law, the law of nations does not concern us. I assume that these were British waters, that they are now Canadian waters and that they are now inland or internal waters in an international law sense. But that does not advance British Columbia's position because ours is not an international law question. It is a question of proprietorship the answer to which will be found in the legislation and the common law. What we need to know is whether or not these waters would have been described as part of the county or part of the realm by

reason of their being inland waters as that term was used at common law and whether or not they were part of the colony.

At common law the definition of inland water was, and basically still is, geographic. To be inland, waters must be inter fauces terrae. The most accepted description of waters inter fauces terrae is that of Lord Hale [in *De Jure Maris*, p. 1, c. 4]:

"That arm or branch of the sea which lies within the fauces terrae, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county".

The Privy Council, particularly the judgment of Lord Herschell considered this matter in Re Provincial Fisheries.²⁴⁴ In his judgment, he said that whatever proprietary rights were vested in the Province at Confederation remained there, except such as are by the express enactments of the British North America Act, 1867, transferred to the Dominion of Canada. The distinction is a valid one which is also supported by the decisions in respect of Indian lands. Lord Watson said,

"There can be no a priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title."

245

4. The Role of the Courts

(a) Justification

The Courts have found justification for what has been done

in ruling, upon grounds of public policy and of avoiding confusion, that when a matter has been continued for some time, the remedy lies in legislation and not in judicial reversal of already decided matters.

Martin, J. (as he then was), in Sheppard v. Sheppard²⁴⁶ approved the judgment delivered by Chief Justice Marshall in McKeen v. Delancey, which reads in part,

"... Were this Act of 1715 now, for the first time, to be construed, the opinion of this Court would certainly be, that the deed was not regularly proved
....

But, in construing the statutes of a state on which land titles depend, infinite mischief would ensue, should this Court observe a different rule from that which has been long established in the state

On this evidence the Court yields the construction which would be put on the words of the Act, to that which the Courts of the State have put on it, and on which many titles may probably depend"

Martin, J. also referred to the signing of rules of Court by all the British Columbia judges in 1906,²⁴⁷ for the express purpose of avoiding doubts as to jurisdiction and to the exercise of the jurisdiction and its acceptance in other decisions. After considering that the enactments made by British Columbia had not been disallowed by the Governor General in Council, and the Federal Parliament had not exercised its allocated jurisdiction, he concluded,

"This legislative and judicial invitation ... to the people of British Columbia to resort to this Court for the exercise of its divorce jurisdiction presents to my mind the strongest possible case for non-interference with its continued exercise. ... here we have a jurisdiction of 31 years founded on a decision most carefully considered and after unusual precaution taken as to rules, procedure and otherwise, with a full realization of the gravity

of the matter and for the express object of removing any hesitation in the public mind about resorting to the Court in the future to obtain relief by way of divorce. Thirty-one years is a period of time in the short life of a colony and Province so young as this which relatively corresponds to a period of centuries in so ancient a country as England.

During the said period many decrees for nullity and dissolution of marriage have been granted, ... which doubtless have been made absolute by this time Further, and of prime importance, many of those whose marriages have been dissolved have remarried in this Province and in other lands, and have children of the second marriage The circumstances in my opinion present the strongest possible ground in the public interest for refusing, unless absolutely compelled to do so, to disturb this jurisdiction and bring about a social and domestic calamity in our midst" 248

(b) Are the Courts the appropriate body to provide for the matter?

We respect judicial decision making as an objective and rational process, but it does have limits which appear in the process itself,

"... It is objective in that, to the extent that there is social consensus on a particular matter, it will enunciate that consensus. It is rational in that the judge has the duty of integrating his decision with the rest of the law, and also in that the judge must attempt rationally to justify even his value judgments. It is defectively rational only in that, ...: "(T)he kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied." It is in this power of changing the rules while applying them that judicial creativity consists" 249

Judicial decision making as the vehicle to interpret and determine reception of Imperial legislation requires first that the issue must be raised and litigated. The whole matter is therefore dealt with only at isolated times in respect of isolated statutes, as

they affect the litigation in question. The whole statement as to reception is a growing and changing thing governed by this process, but always limited by the cases before the Courts. Gray, J. in a judgment pronounced in 1877, foresaw no problem in the non-user of a particular statute until needed,

"The application or non-application of a statute, or any particular part of it, does not rest upon the view or opinion of any one person, however conscientious he may be, but upon the wants and necessities of the community; nor does it depend upon the frequency or common nature of the subject legislated upon. It is sufficient if the evil occurs. The moment it does, the statute applies. The mere fact that there has been no call for its application in the particular direction since the introduction of the statute is no answer. Its powers may be dormant for years; lapse of time will not destroy them. The occasion which requires the remedy, and the demand for it, at once give the needed vitality, unaffected by the provision of non-user.:" 250

In the intervening century, the changes in the English Law Act²⁵¹ and the consideration of applicability at the present time combine to the effect that an interpretation when made will not necessarily be a precedent at a future time.

This does lend flexibility to the statute law of a developing community, but does so at the cost of a finality in any determination made. The law is to be considered as always speaking, but if in doing so a decision as to inapplicability is always subject to being changed on the grounds of further social development. What is today regarded as a fragmentary mosaic of decisions will become decisions rebus sic stantibus. The further question arises,

Can we regard decisions that a statute is not inapplicable and in force as binding, whereas a decision of inapplicability would leave the statute in question with the "needed vitality" described by Gray, J. 252 to be invoked at a later date when the occasion demands the remedy?

This Chapter has not discussed all the British Columbia cases. Those selected for discussion have been chosen to illustrate the problems inherent in and associated with the reception statute. Blackstone suggested that the colonial Courts, subject to the superintending power of the Imperial Parliament, should determine the answers to reception problems. The increased powers of colonial legislatures and the growth of constitutional independence prompted the then Chief Justice of Ontario, in 1845, to suggest,

"We can hardly suppose a point more especially within the province of the legislature to decide, than whether a particular part of the statute law of England is or is not so far in its nature applicable to the state of things in this province." 253

Many jurisdictions with similar legislation have undertaken and are advocating legislative reform as the only complete, definite way to resolve the problems inherent in the reception statutes. These will be examined following a consideration of the legislative reform that has taken place in England.

FOOTNOTES (Part II)

1. Part II of this thesis has been organized to deal with the issues raised by Cot , op. cit. (n. 5 p. 19) @ p. 29ff. His views are frequently referred to in this Part.
2. Smith v. Brown, 2 Salk. 666; 91 E.R. 566, a case involving the sale of a negro in Virginia, Holt, C.J. said, "... the laws of England do not extend to Virginia, being a conquered country their law is what the King pleases" similarly, when considering the law of Jamaica, in Blankard v. Galdy, (1693) 2 Salk. 411; 91 E.R. 356 (K.B.); but, read this subject to Lord Mansfield's sixth proposition, Campbell v. Hall (1774), 1 Cowp. 204 @ 209; 98 E.R. 1045 @ 1049, discussed infra, p. 27
3. Cot , op. cit. pp. 48-9; R. Else-Mitchell, "The Foundation of New South Wales and the Inheritance of the Common Law" (June, 1963) 49 Royal Australian Historical Society Journal, p. 1 @ 3-4.
Prohibitions del Roy (1607) 12 Co. Rep. 29; 77 E.R. 1310, "the law and customs of England cannot be changed without an Act of Parliament, for this, that the law and custom of England is the inheritance of the subject, which he cannot be deprived of without his assent in Parliament...."
4. 50 & 51 Vict., c. 54 (Imp.); Cot , op. cit. p. 50 n. 125 lists the exceptions: the exercise of the prerogative fixing the date for reception for settled colonies, the introduction of the courts, legislatures and corporations, what the prerogative allows in England; and what the British Settlements Acts allow; Kenneth O. Roberts-Wray, Commonwealth and Colonial Law, (New York, Frederick A. Praeger, Inc., 1966) p. 164 suggests two areas where prerogative may survive:
 - (1) remote territories, e.g. Antarctica; and
 - (2) annexed territories where not occupied by British.
 T. Olawale Elias, British Colonial Law A Comparative study of the Interaction between English and Local Laws in British Dependencies (London: Stevens & Sons. Limited, 1962) p. 49 lists the cases of early settled colonies that preceeded the British Settlements Act, 1843; including the Leeward Islands, Barbados, Bermuda, British Honduras and Bahamas. As to Barbados being a plantation, Dutton V. Howell, (1693) Shower 31, 1 E.R. 21.
5. 53 & 54 Vict., c. 37 (Imp.); Roberts-Wray, op. cit. p. 165ff. considers the effect of this group of enactments.
6. Supra, n. 2.
7. Except Protectorates, v. W.C. Ekow Daniels, The Common Law

in West Africa, Butterworths African Law Series No. 9 (London: Butterworths, 1964) p. 125ff, as to law in protectorates and trust territories.

- 8 Côté, op. cit. (n. 5, p. 19), p. 43ff.; Roberts-Wray, op. cit., p. 214, 541. Inhabitants cannot enforce treaties in municipal courts: Vajesingji Joravarsingji v. Secretary of State for India (1924) L.R. 52 (I.A.) p. 357 @ 360; cf. inhabitants have benefited in British Columbia where Indian treaties made by the Hudson's Bay Company were treated as "treaties" Regina v. White and Bob (1965) 52 W.W.R. 193 @ 198, per Davey, J.A. deeming the H.B.C. to be an "instrument of Imperial policy"; and @ 211ff. in the judgment of Norris, J.A. who outlines the history of the area and discusses it in relation to aboriginal rights.
- 9 Elizabeth Gaspar Brown (in consultation with William Wirt Blume) British Statutes in American Law 1776-1836 (Ann Arbor: The University of Michigan Law School, 1964) p. 17ff.
- 10 Côté, op. cit., p. 41.
- 11 Loc. cit.
- 12 Ibid., p. 46.
- 13 Ibid., p. 48. Crown's power limited after legislation. See In re Bishop of Natal, 3 Moo. P.C. (N.S.) 115.
- 14 Campbell v. Hall, supra n. 2.
- 15 Côté, op. cit., p. 46ff.
- 16 Loc. cit.; Jephson v. Riera 3 Knapp 130 @ 151, 2; 12 E.R. 598 @ 606.
- 17 Roberts-Wray, supra n. 4, p. 337-8.
Dutton v. Howell, supra n. 4, as to the authority of the Governor not being a delegation of sovereignty. cf. Cameron v. Kyte (1835) 3 Knapp 332 (J.C.P.C.) where total sovereignty of a colony is delegated to a Viceroy, then his acts are valid although not in conformity with his instructions. Considering colonial boundaries, McIntyre, J.A. dissenting, Strait of Georgia Case, supra (n. 1, p. 19) @ p. 135, deals with colonial boundaries, "They have the effect of granting territories to colonial governorship, and thus affecting the Royal prerogative."
Transvaal Raid Case, Reg. v. Jamieson (1896) 2 Q.B. 425 as to the governor exercising legislative power.
- 18 Jephson v. Reira, supra n. 16.
- 19 Foreign Jurisdiction Act, 1890, supra n. 5. The Schedules to this Act consist of lists of Statutes which may be extended to a territory by Order in Council; Acts which may be revoked or varied by Order in Council; and a List of Enactments repealed.

20. This will be discussed in part (c), p. 29.
21. Supra, n. 2.
22. Case 15. Anonymous (1722) 2 Peere Williams, 75, M.R.; 24 E.R. 646 (P.C.) . cf. Aliens, R. v. Valentine (1871) 10 S.C.R. (N.S.W.) 113; Reg. v. Burdell, 1 Old. 126 as to jury rights.
23. R. v. Vaughan (1769), 4 Burr. 2500; 98 E.R. 308 @ 311 (K.B.)
24. S. H. Z. Woinarski, "An Introduction to the History of Legal Institutions in Victoria" (unpublished doctoral thesis), discussed by Alex C. Castles, "The Reception and Status of English Law in Australia (1963-1966)" 2 The Adelaide Law Review, p. 1 @ 20; and referred to by G. W. Patton, ed. The Commonwealth of Australia (London: Stevens & Sons Limited, 1952) p. 4, (Volume II of The British Commonwealth, the Development of its Laws and Constitution).
Sir William Grant, A. G. v. Stewart, (1817) 2 Mer. 143; 35 E.R. 895 @ 900.
25. Castles, loc. cit.; Coté, op.cit., p. 66, n. 259.
26. Durham Report, House of Commons Paper No. 3 of 1839, Arthur Barriedale Keith, ed., Speeches and Documents on British Colonial Policy 1763 - 1917, (London: Oxford University Press, 1916) p. 115.
27. Provision was made in this way for the original mainland colony of British Columbia and for the Stickeen territories.
28. Brown, supra n. 9, p. 4ff.
29. Supra n. 4. Royal instructions are particularly mentioned in s. 3 which deals with the power to delegate legislative power.
30. Coté, op. cit. (n. 5 p. 19), p. 49.
31. This will be discussed in Section 5, p. 49ff.
32. cf. Macdonald v. Levy (1883) Legge 39, statute only intended to confirm the common law and not alter it. It may be that reception statutes only provide a cut-off date for English statutes that may be applicable, v. infra, as to New York, p. 147.

- 33 This will be discussed at p. 69.
- 34 Castles, supra n. 24, p. 94.
 Queensland separated in 1859, as acknowledged in the Supreme Court Act 1867 (Queensland).
 Papua New Guinea: Papua was annexed to Queensland in 1884 and transferred to the Commonwealth in 1906. New Guinea was made a mandate in 1921. In 1973 it became a separate State.
- 35 The history of New Zealand is similarly complex, v. J. L. L. Robson, gen. ed., New Zealand (London: Stevens & Sons Limited, 1954), p. 2ff. (Volume IV of The British Commonwealth, the Development of its Laws and Constitution).
 New Zealand also provides for native customary law: Arani v. Public Trustee of New Zealand (1920) A.C. 198, a case referred to His Majesty in accordance with the prerogative power to hear appeals from the Native Appellate Court of New Zealand.
 New Zealand is treated as a settled colony and has English law as at 14 January, 1840, Roberts-Wray, supra n. 4, p. 629.
- 36 Coté, op. cit. (n. 5 p. 19), p. 52ff.
- 37 43 Geo. III, c. 138 (Imp.) 1803; 1 & 2 Geo. IV, c. 66 (Imp.) 1821: v. Appendix A III (i) (ii), p. 215, infra.
- 38 Supra n. 5.
- 39 An Act to provide for the Administration of Justice in Vancouver's Island, 12 & 13 Vict., c. 48 (Imp.) 1849, v. Appendix A III (iii), p. p. 215, infra.
- 40 Coté, loc. cit.
- 41 The phrase "imperial character" is taken from a speech to Parliament at Westminster made by Edmund Burke, 19 April 1774, printed in Problems of Parliamentary Government in Colonies (London: The Hansard Society, 1953) p. 116.
- 42 The phrase is taken from the Colonial Laws Validity Act, 1865 29 & 30 Vict., c. 63 (Imp.) v. Appendix A, VI, 1, p. 225, infra.
- 43 Ibid.
 The Declaratory Act, 1766, 6 Geo. III, c. 12 (Imp.) which asserts Parliament's sovereignty should not be overlooked. It was not repealed until S.L.R. 1964.
- 44 30 & 31 Vict., c. 3 (Imp.) v. Appendix A, IV, p. 221.
- 45 Loc. cit.

- Roberts-Wray, supra n. 4, p. 254 as to disallowance which has not been exercised as to Canada since 1873.
- 46 Metherill v. Medical Council of British Columbia and Milne, (1892) 2 B.C.R. 186.
- 47 34 & 35 Henry VIII, c. 8 (Imp.) , v. n. 53, infra.
- 48 1 W. & M. sess. 2, c. 2 (Imp.)
- 49 Coté, op. cit. (n. 5 p. 19), pp. 32, 35. Similarly as to repeal, Bank of U.C. v Bethune, 4 U.C.Q.B. (O.S.) 165.
- 50 Castles, supra, n. 24, p. 3.; Elias, supra n. 4, p. 51; cf. Roberts-Wray, op. cit., p. 50, treating Boothby, J. as not merely obstructive, but as making a contribution in "provoking parliament into enacting a charter of freedom for colonial legislatures....", and at p. 398, summarizing the repugnancy cases.
- 51 25 & 26 Vict. c. 11 (Imp.) and 53 & 54 Vict. c. 26 (Imp.) re Australia;
- 52 Supra n. 44; Roberts-Wray, op. cit., p. 256, discusses the effect of the Statute and notes that only . 2 substantially changes the law. The other provisions confer the status of Dominions which had been arrived at the Imperial Conference 1926 (Cmd. 2768 Imp.) and Imperial Conference 1930 (Cmd. 3717 p. 17-19, approving the Report of the 1929 Conference on the operation of Dominion Legislation.) v. John Gough, Imperial Conferences 1887 - 1926 (unpublished paper, submitted for the Native Sons of Canada Scholarship, 1927-1928) has many interesting aspects of the rise of dominion status in Canada, and of the resistance thereto.
- 53 R. v. DeBanou (1969) 2 D.L.R. (3d) 424; 67 W.W.R. 54; [1969] 3 ~~W.W.R.~~ 157, considering 34 & 35 Hen.VIII c. 8 (Herbalists Act)
- 54 Bill 9, 1939, "An Act to Amend the Supreme Court Act," (R.S.C. 1927 c. 35 s. 54 (Canada)), proclaimed in force 23 December 1949.
Attorney-General for Ontario v. The Attorney General for Canada, [1947] A.C. 127.
- 55 Supra, n. 11, p. 20.
- 56 Roberts-Wray, op. cit., p. 832-3.
Paul Gérin-Lajoie, Constitutional Amendment in Canada (Toronto: University of Toronto Press, 1950) p. 129ff; provincial participation, p. 153ff.

57. Originally the Governor General was the appropriate channel of communication. The Canadian Government now has the right of direct correspondence with the British Prime Minister.
58. (1976) 11 A.L.R. 142 (J.C.P.C.)
59. c. 60, 1968 (Imp.)
60. c. 56, 1948 (Imp.)
61. 57 & 58 Vict., c. 60 (Imp.)
62. Supra, n. 58, at p. 147.
Criminal Law Act, 1967
63. as to admiralty jurisdiction, The Admiralty Offences (Colonial) Act, 1849 12 & 13 Vict., c. 96 (Imp.); and the Act of 1860 23 & 24 Vict., c. 122. As to Admiralty law, v. infra, p. 56ff.
64. Loc. cit.
65. Offences at Sea Act, 1799 (39 Geo. III, c. 37 (Imp.))
The case referred to is William Holyman & Sons. v. Eales [1947] Tas. S.R. 11, @ p. 12, a judgment of Morris, C.J.,
"I think the prosecution is clearly maintainable only as a prosecution for an offence under English law.... The law of Tasmania does not run outside the territorial waters of the State, i.e., the conventional three miles from the coast. ... The law applicable to her upon the high seas ... is the law of England" (the reference "her" is to the ship in question where the offence, cruelty to animals under the Protection of Animals Act, 1911 (1 & 2 Geo. V, c. 27 (Imp.)) occurred.);
@ p. 13, traces the Admirals' jurisdiction, limited by 13 Rich. II, c. 5 (Imp.) and 15 Rich. II, c. 3 (Imp.) which was transferred by 28 Hen. 8, c. 15 (Imp.) to commissioners and the commissioners' jurisdiction was extended by 39 Geo. III, c. 37 (Imp.)
66. Supra n. 44 p. 95; the effect of the Statute, v. supra p. 33ff.
67. Roberts-Wray, supra n. 4 p. 92, pp. 555-6.
68. Lord Diplock, Oteri Case, supra, n. 58, loc. cit. "ambulatory in its effect".
69. Coté, op. cit. (n. 5 p. 19), p. 54; R. v. Roblin (1862) 21 U.C.Q.B. 352 @ p. 354-5 (Ont.); Kelly v. Jones (1852) 7 N.B.R. 473 @ 474 (N.B.)
This is distinct from a statutory provision introducing law "from time to time"; cf. The Attorney General Act, (B.C) supra p. 17.

70. Supra n. 68.
71. Such law is received only in the absence of local legislation. v. infra p. 59 as to Applicability.
- A.G. v. Stewart, supra n. 24, "Whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country in which it is by the rules of English law that property is governed. I conceive that the object of the statute of mortmain was wholly political -- that it grew out of local circumstances, and was meant to have merely a local operation."
72. Reynolds v. Vaughan, (1772) 1 B.C.R. v, pp. 3-4.
73. (1848) 2 N.S.R. 287 @ p. 289ff; this case has been approved by Manson, J.; R. v. Crown Zellerbach Canada Ltd., supra, n. 29 p. 22.
74. Chronological Table and Index of Statutes, 1st. ed., (London: Queen's Printer, 1870) discussed in Chapter V, infra, n. 24. p. 119.
75. Coté, op. cit. (n. 5 p. 19), p. 56: Roberts-Wray, supra n. 4, p. 565ff, agree with A.E.W. Park, The Sources of Nigerian Law. (London: Sweet & Maxwell, 1963) @ p. 20, where he presents Allott's argument, and rebuts it. The reference is to Anthony N. Allott, Essays in African Law, with special reference to the law of Ghana (Butterworth's African Law Series No. 1) (London: Butterworth & Co. Publishers Ltd., 1960).
76. Anthony N. Allott, Judicial and Legal Systems in Africa (London: Butterworths, 1970 - 1st ed. 1962) (Butterworth's African Law Series No. 4), Preface, p. vi, discusses the revision of the final appeals system "One of the factors which used to keep the legal systems of common law African countries together has thus disappeared."
cf. Hector Hughes, National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations. (London: P. S. King & Son, Ltd., 1931.)
77. Mark R. MacGuigan, "Precedent and Policy in the Supreme Court," Canadian Bar Review (1967), vol. 45, p. 627 @ p. 657.
Attorney-General of Ontario v. Canada Temperance Federation (1946) 62 T.L.R. 199, Judicial Committee not bound by previous judgments.
Park, op. cit., p. 23 as to the J.C.P.C. in respect of a Nigerian appeal (where the reception date is 1900) in the case of United Africa Co. Ltd. v. Saka Owoade [1955] A.C.130, decided on the basis of the rule established in Lloyd v. Grace, Smith and Co. [1912] A.C. 716. He also notes that it would be possible to preclude such reference, if desired.

- 78 The "old" American colonies did proscribe case law after the revolution by statute, particularly New Jersey, Kentucky, and Pennsylvania, v. Brown supra n. 9 p. 41. cf. Côté, supra (n. 5 p. 19) @ p. 57 n. 185 regarding mercantile law.
- 79 R. v. Carriere, Martin & Bier, (1955) 113 C.C.C. 11.
- 80 [1963] 40 D.L.R. (2d) 843 (B.C.S.C.), Verchere, J. @ 849. The case was appealed and the decision reversed on other grounds 50 D.L.R. (2d) 338 and [1966] S.C.R. 69. The Rule is given (1867) L.R. 4 Eq. 295.
- 81 (1918) 38 D.L.R. 601; (1917) 3 W.W.R. 849 (Alta. S.C., App.Div.), where it was decided that local conditions were an exception to the rule. cf. O'Keefe and Lynch of Canada Ltd. v. Toronto Insurance and Vessel Agency Ltd. [1926] 4 D.L.R. 477; 59 O.L.R. 235 (H.Ct.) Rose, J., who rejected a custom on the basis that it had not been shown it had been established before the reception date. Re Bataray's Prohibition Application, 51 W.W.R. (N.S.) 449 (S.C.C.) Simly. Keewatin Case Court of Appeal. v. n. 84 infra.
- 82 v. n. 77.
- 83 Côté, loc. cit.; Allott, p. 51; Roberts-Wray, op. cit., p. 572. cf. O'Keefe & Lynch v. Toronto Insurance Vessel Agency [1926] supra, n. 81.
- 84 Keewatin v. Kenora (1908) 16 O.L.R. 184 (C.A.); 16 O.L.R. 184; Clarke v. City of Edmonton [1930] S.C.R. 137; (1929) 4 D.L.R. 1011; Polakoff v. Winters Garment Co., 62 O.L.R. 40; [1928] 2 D.L.R. 277; dist. Kuzych v. White, [1949] 4 D.L.R. 662; affirmed [1950] 2 W.W.R. 255.
- 85 Uniacke v. Dickson, supra n. 73.
- 86 The navigability of Canadian rivers, to the point of considering them to be a highway, has been developed in history as well as in law, v. Innes, op. cit., n. 20 p. 21. Ad medium filum presumption is not applicable to Lake Erie, Carroll v. Empire Limestone Co. (1919) 45 O.L.R. 121.
- 87 D. J. Thom, "Riparian Rights," The Canadian Surveyor, (July, 1931, p. 7. The English law was applied, but the presumption of ownership rebutted by size and navigability. Re British Columbia Fisheries (1913), 47 S.C.R. 493; [1914] A.C. 153; 83 L.J.P.C. 169, law of England as to the rights of the public to fish in tidal waters is the law of the Province.
- 88 Re Iverson and Greater Winnipeg Water District (1921) 57 D.L.R. 185 (Manitoba C.A.)

- 89 (1907) 13 O.L.R. 237, appeal citation, n. 84; which case is distinguished by the Iverson Case.
- 90 Canadian Exploration v. Rotter [1961] S.C.R. 15. Locke, J. traces English Law as to riparian ownership.
- 91 Esquimalt Waterworks v. City of Victoria, (1906) 12 B.C.R. 302, Duff, J. (as he then was) was restored on appeal to the Privy Council [1907] A.C. 499. In re Milsted (1907-8) 13 B.C.R. 364, riparian rights exist in this Province, subject to being diminished or even wiped out by a water record granted under the Water Clauses Act. West Kootenay Power and Light Co. v. City of Nelson (1905) 12 B.C.R. 34, Martin, J.
- 92 At least ten statutes, most of which have been amended several times, are in force in British Columbia as relate to water: Ditches and Watercourses Act, R.S.B.C. 1960 c.117; Drainage Dyking and Development Act, R.S.B.C. 1960 c. 121; Energy Act, S.B.C. 1973 c. 29; Ecological Reserves Act, S.B.C. 1971 c. 16; Health Act, R.S.B.C. 1960 c. 170; Land Act, S.B.C. 1970 c. 17; Pollution Control Act, R.S.B.C. 1960 c. 289; Power Act, R.S.B.C. 1960 c. 293; Water Act, R.S.B.C. 1960 c. 405; Water Utilities Act S.B.C. 1973 c. 91.
- 93 [1959] S.C.R. 513, 18 D.L.R. (2d) 81, affirming [1956] O.R. 801, 5 D.L.R. (2d) 309, which was varied in part, see [1955] O.R. 565, [1955] 4 D.L.R. 408. Not appld. Corneillie v. Senkiw, 24 W.W.R. 152 (Manitoba); Followed, Rowan v. Mann and Mann, 19 D.L.R. (2d) 163.
- 94 [1947] A.C. 341, considered Atkinson v. Fleming, [1955] O.R. 565, and distinguished on appeal (n. 93); Applied Paterson v. Hardy 62 W.W.R. 219, and Lane v. Biel, [1971] 2 W.W.R. 128.
- 94A [1959] S.C.R. 513, @531ff. He approves Noble v. Calder [1952] O.R. 577. cf. Anglin, J. in Keewatin (n. 59) as to right of navigation jurae naturae in Canadian navigable rivers. (cf. on appeal, n. 84).
- 95 (1910) 15 B.C.R. 367, Irving, J.A.
- 96 Else-Mitchell, op. cit. (n.3), p. 6.
- 97 Supra n. 73. v. Re MacIsaac and Beretanos et al, (1972) 25 D.L.R. 25 D.L.R. (3d) 610 (Prov.Ct. B.C.) @ 136, Levy Prov. Ct. J., as to s. 46 of former Landlord and Tenant Act (R.S.B.C. 1960, c. 207,s.46), "In legislating s. 46, the provincial legislature must have considered the common law right to privacy, and the need to incorporate that right in a statute, thereby creating a statutory tort." Disapproved Peter Burns, "The Law and Privacy: The Canadian Experience," 54 The Canadian Bar Review (March 1976) p. 1 @ p. 25. The matter is now regulated by Statute of the Province (S.B.C. 1968, c. 39).
- 98 (1924) 4 D.L.R. 635 (Alberta S.C. App. Civ.), the reason for the rule has been destroyed.
- 99 In re Simpson Estate, [1927] 4 D.L.R. 817; (1927) 3 W.W.R. 543; 23 Alta L.R. 374. The Rule is found (1591) 1 Co. Rep. 93B; 76 E.R. 206. The Simpson case was affirmed on other grounds, [1928] 3 D.L.R. 773.

- 100 Doe. Anderson v. Todd (1845) 2 U.C.Q.B. 82.
- 101 Coke, Sir Edward, First Part of the Institutes of the Laws of England; or, Commentaries upon Littleton. 1894 (15th ed.), 97, 142.
- 102 Brown, op. cit., passim.
- 103 Charles Kingsley Meek, Colonial Law (a Bibliography) (London: Oxford University Press, for Nuffield College, 1948) Preface.
- 104 The revision of the English statutes will be discussed in Chapter V (Part III) infra, p. 119.
- 105 The phrasing of the English Law Act, v. Schedule A, I.
- 106 36 & 37 Vict., c. 66 (Imp.). See also: Appellate Jurisdiction Act, 1876, 39 & 40 Vict., c. 59 (Imp.).
- 107 John Delatre Falconbridge, Banking and Bills of Exchange. (Toronto: Canada Law Book Company Limited, 1956, 6th ed.) 10-11.
- 108 Earl of Exford's Case, (1615) 1 Ch. Rep. 1.
- 109 Cote, op. cit., (n. 5, p. 119), p. 58.
- 110 v. Appendix A, I, p. 209.
- 111 Farr, op. cit., p. 7. The Ordinance received Royal assent Nov. 14, 1861.
- 112 Farr, op. cit., p. 7, n. 21; and Appendix A, III, p. 215. Vancouver Island Acts 1859-1863 (Victoria, V. I.: Printed "Evening Express" office. 1864), XXX The Vancouver Island Civil Procedure Act, 1861, p. 99ff.
- 113 Loc. cit.
- 114 Douglas Proclamation 8 June, 1859, Appendix A, III v. p. 216.
- 115 C.S.B.C. 1888, c. 68; This statute is specifically dealt with in the Report of Theodore Davie to His Honour Edgar Dewdney, Lieutenant Governor of British Columbia, Draft Revised Statutes of British Columbia 1896, p. 4, in in respect of legislation by reference.
- 116 being R.S.B.C. 1897, c. 56 (Supreme Court Act);
R.S.B.C. 1897, c. 102 (Insolvent Estates Act);
and R.S.B.C. 1897, c. 6 (Aliens Act).
- 117 Cote, op. cit. p. 59ff.
- 118 (1857) 8 E. & B. 610; 120 E. R. 228 (Q.B.).
- 119 (1874) 1 B.C.R. 25, discussed W.H.P. Clement, The Law of the Canadian Constitution (Toronto: The Carswell Company, Limited 1916 (Third Edition) p. 275.

- 120 3-4 Vict. c. 86 (Imp.).
- 121 In some cases, the jurisdiction was given to the Governor to exercise.
- 122 Côté, loc. cit.,
In the older colonies the Governor acted.
- 123 Côté, op. cit., p. 60.
- 124 v. supra (n. 29, p. 22) @ p. 3-4.
- 125 S.B.C. 1871, Appendix, No. 35.
- 126 Côté, op. cit., p. 61. But the property rights and legislative competence may not always be in some legislature, v. infra p. 85.
Farris, C.J.B.C., Reference The Strait of Georgia (B.C.)
Supra (n. 1, p. 19), @ 102:
" At the time that the present boundaries of British Columbia were established, the Crown in the Right of the Colony owned in fee all the unalienated land and all the mines and minerals therein: See A.G.B.C. v. A.G. Can. (1889), 14 App. Cas. 295 at 301:
"The title to the public lands of British Columbia has all along been, and still is, vested in the Crown; but the right to administer and to dispose of those lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the Province before its admission into the federal union."
- 127 Supra (n. 1, p. 19).
- 128 The common law of England as to precious metals was applied
Attorney General B.C. v. Attorney-General Canada (1889) 14 App. Cas. 295, which has been approved and referred to several times.
- 129 British North America Act, 1867, supra (n. 11, p. 20).
Diefenbaker, John G., The Right Honourable, The Years of Achievement 1957-1962. One Canada, (Memoirs of John G. Diefenbaker) (Toronto: Macmillan of Canada, 1976) pp. 56ff.

- 130 Op. Cit., p. 57.
- 131 Ibid., p. 58.
- 132 R. v. Liverpool Justices; Ex. p. Molyneux [1972] 2 Q.B. 384; [1972] 2 All E.R. 471; Reference re Offshore Minerals (B.C.) 62 W.W.R. 21, [1967] S.C.R. 792, 65 D.L.R. (2d) 353 cf. Court of Appeal as to "internal waters" in Reference re Strait of Georgia, (B.C.) supra.
- 133 v. D.P. O'Connell and Ann Riordan, ed., Opinions on Imperial Constitutional Law. (Melbourne: The Law Book Company Limited, 1971), "Colonial Admiralty Jurisdiction", "Powers in the Territorial Sea", particularly opinion of J.T. Woodroffe, A. Phillips, 26 January, 1893, p. 202.
- 134 Originally the Governor was appointed Vice Admiral and Douglas used this as one of his titles in the Vancouver Island Colony.
- 135 Loc. cit., p. 240, Note to Clause 8.
O'Connell and Riordan, op. cit., p. 202, tracing the history of the admiral's jurisdiction, as does Wm. Holyman v. Eyles, [1947] S.R. (Tas.) 11.
- 136 3 & 4 Wm. IV, c. 41 (Imp.) Vice Admiralty Court.
- 137 12 & 13 Vict. c. 96 (Imp.)
- 138 O'Connell and Riordan, Opinion (Canada) 1883; op. cit., n. 133, The Practice was in the early colonial period, to scrutinize legislation before it came into operation, avoiding the dissatisfaction created by amendment or repugnancy. In this way uniformity and a measure of political control was effected. cf. special case of Canadian legislature, Merivale to Desart, 6 March, 1852, "... on a somewhat different footing from those ordinary chartered colonies, under the provisions of the Canada Union Act. They require no confirmation by the Crown, except in cases where they are specially reserved for the Crown's assent."
- 139 The Colonial Courts of Admiralty Act 1890 53 & 54 Vict. c. 27 (Imp.).
- 140 Opinion 27 May 1920 (Canada), O'Connell, op. cit., p. 109 @ 110.
- 141 v. Appendix A VI 2, p. 225, particularly s. 3 and 6.
- 142 Infra, p. 82, 85.
- 143 Falconbridge, Banking and Bills of Exchange, op. cit., p. 426.

- 144 Supra, p. 51.
- 145 White Book: The Annual Practice First published in 1883.
Preface to Fourth ed. of Supreme Court Practice, 1975, being
100th Anniversary of 1875 Judicature Act, (2 v. London, Sweet
& Maxwell 1975) p. vii.
Bullen and Leake and Jacob's Precedents of Pleadings. The Common
Law Library, No. 5 (London, Sweet and Maxwell 1975,) Foreword by
146 Lord Denning, M.R. First published 1860 as a collection of pleadings.
Coté, op. cit., p. 76.
- 147 Ibid., p. 77.
- 148 Ibid., p. 62.
- 149 relating to Upper Canada.
- 150 Supra, p. 32ff.
- 151 Supra, p. 28, n. 22.
- 152 Roberts-Wray, op. cit., p. 544.
- 153 W. C. Ekow Daniels, The Common Law in West Africa,
(Butterworth's African Law series vol. 9, London:
Butterworths, 1964), p. 327.
- 154 (1914) 20 B.C. R, 243, approving Vacher [1913] A.C. 107
@ 113 Vicount Haldane, L. C. Also Bouck, J., quoted p. 68 infra.
- 155 [1927] 3 W.W.R. 534 (Alta. C.A.), affirmed for other
reasons Simly, Re Budd (1958) 24 W.W.R. 383 (Alta. S.C.)
[1928] S.C.R. 329, Coté, op. cit., p. 64, n. 248 re Doyle
case.
- 156 Coté, op. cit., p. 65, Roberts-Wray, op. cit., p. 546.
- 157 This is the date chosen in the most recent British Columbia
case, The Horse and Carriage Inn Ltd. v. Baron (1975)
53 D.L.R. (3d) 426, discussed infra p. 64ff.
- 158 (1839), Legge 140 at p. 153, Stephen, J.

- 159 (1909) 14 B.C.R. 142.
- 160 MacKenzie v. MacKenzie (1970) 73 W.W.R. 206, McFarlane, J.A.
@ pp. 210-211.
- 161 Similarly, Hock v. Hock (1970) 75 W.W.R. 87, McFarland, J.
this is a consideration of circumstances at the date of the
case, and not at the reception date.
- 162 Gilbert D. Kennedy "Introduction of English Laws: So Far As
The Same Are Not From Local Circumstances Inapplicable,"
U.B.C. Legal Notes(1953) vol. 2, 419 @ 423. cf. Bouck, J. p. 64
after English Law Act Amendment.
- 163 Attorney General of Canada v. Ritchie Contracting & Supply Co.
et. al. (1914) 20 B.C.R. 333 @ p. 359 McPhillips, J.A.
cf. Hunter, C. J. as to "latency" in Attorney General B.C. v.
Canadian Pacific Railway (1905) 11 B.C.R. 289 @ 296.
- 164 Supra (n. 29, p. 22), 111 c.c.c. @ p. 51.
- 165 (1908) 13 B.C.R. 486 @ 507.
- 166 Supra p. 157
- 167 8 & 9 Vict. c. 106.(Imp.)
- 168 R.S.B.C. 1960, c. 129: v. Appendix A I as to various forms
of English Law Act.
- 169 v. Appendix A V. Note particularly that the 1872 Statute
applied only to legislation enacted after 35 Victoria in
British Columbia.
- 170 As to interpretation in British Columbia, cf. discussion of
New South Wales Law, infra p. 162.
where the date of reception is decisive.
Similarly Kennedy interpretation before 1960 Amendment. Supra, n. 162.
- 171 The various forms are set out in Appendix A, I.
- 172 Roberts-Wray, op. cit., p. 555. See also Woinarski, supra
n. 24, p. 29. As to being local as confined to a particular
locality or institution in England, v. Clement supra (n. 119,
p. 101) 2nd p. 51; Cote, supra (n. 5, p. 19) p. 71ff as to
this question and as to capability of enforcing in only a
portion of the Province.

- 173 Cote, op. cit., pp. 68-9.
- 174 (1816), 2 Mer. 143, considering, 9 Geo. II c. 36, (1735) (Imp.)
As to criminal law: Clement, supra (n. 119, p. 101), p. 291,
as to eliminating applicability and leaving sole test "Is the
Imperial Statute local in the sense above indicated?" After
40 Geo. III c. 1 (U.C.), later superceded by Code.
- 175 Ibid., p. 160.
- 176 In re Pearse (1903) 10 B.C.R. 280, Drake, J. approving Jex v.
McKinney (1889) 14 A.C. 77 (British Honduras re Mortmain).
& numerous other cases, unless provided differently as in Ontario.
- 177 Doe. Anderson v. Todd, 2 U.C.Q.B. 82, @ p. 83, Robinson, C. J.
Mercer v. HEWSTON (1859) 9 U.C.C.P. 349.
- 178 Re Creery, (1960) 39 W.W.R. 620 (B.C. Co.Ct.), Clearihue, C.C.J.
- 179 Attorney General ex rel. Kent v. Ruffner (1906) 12 B.C.R.
299, @ 301, Irving, J.
- 180 Hinton Electric Co. v. Bank of Montreal (1903) 9 B.C.R. 545,
Hunter, C. J. considered 16-17, Vict. c. 59 (Imp.).
- 181 (1889) 14 App. Cos. 77; 58 L.J.P.C. 67 @ 69. Referred to in Sheppard
Case (1908) 13 B.C.R. 513 as "Rex v. McKinney". Jex Case followed
Rex v. Simpson [1927] 4 D.L.R. 17.
- 182 Supra n. 157, Bouck, J. @ p. 436.
- 183 Horse & Carriage Inn Ltd. v. Baron [1975] 53 D.L.R. (3d) 426,
Bouck, J. @ p. 433.
- 184 Supra, n. 178
- 185 Penner v. Penner [1947] 4 D.L.R. 879, as to 4 Geo. IV c. 76 (Imp.)
- 186 Robinson, C. J. in Shea v. Choat (1846) 2 U.C.Q.B. 211 (C.A.)
approved by Manson, J. Regina v. Columbia Paper Co. Ltd.,
supra, n. 29, p. 22. Clement, op. cit., (n. 119, p. 101)
2nd ed., p. 49 as to headnote this case being misleading.
- 187 Uniake v. Dickson (1848) 2 N.S.R. 287, @ pp. 289-291.
- 188 Appendix A, I., infra p. 209.
- 189 [1908] A.C. 573; 77 L.J.P.C. 121 sub nom. Watts v. Watts,
reversing 13 B.C.R. 281. The quotation is at p. 287.

190. Clement, supra (n. 119, p. 101), 1916 (Third Edition pp. 282, 297) 1904 (Second Edition p. 46).
191. Bland v. Agnew [1932] 3 W.W.R. 222 (B.C.C.A.).
192. M. falsely called S. v. S., 1 B.C. (pt 1) p. 25; Scott v. Scott, 4 B.C.R. 316 Watt v. Watt (sub-nom Watts) 1908, A.C. 573; 77 L.J.P.C. 121, cf. dissenting judgment of Begbie, C. J. in S. v. S..
193. The Act (slightly amended) was first enacted in 1897 and appeared as a British Columbia enactment v. Kennedy supra (n. 162, p. 105), p. 420: As to the prohibition section, useless until 1938, was it (1) as both machinery and the right of appeals missing, "from local circumstances inapplicable" (Kennedy) or (2) applicable but dormant (C.A. Minority Densmore Brown v. Brown (1956), 20 W.W.R 321; 6 D.L.R. (2d) 693 (B.C.C.A.)). This was the result in the Supreme Court of Canada, although they did not deal with the applicable but dormant theory.
194. Kennedy, supra (n. 162, p. 105) p. 421.
195. Martin, J. (1908), 13 B.C.R. 487 @ 491.
196. Sheppard v. Sheppard (1908) 13 B.C.R. 487 @ p. 496-7 (Martin, J., as he then was).
197. Loc. cit., @ p. 491ff discusses Begbie, C. J. "refuse to join in the exercise of the alleged jurisdiction" but actually did exercise it; also Clement, J., dissenting judge in Sharpe v. Sharpe, Martin J., considered Begbie, C. J.'s bachelorhood a factor and the Roman Catholic convictions of other judges. At p. 495 discusses the signing of the Divorce rules.
198. Gray, J., S. v. S., supra n. 192, @ p. 31, followed in Sheppard Case. Martin, J. @ p. 504, difficulty reconciling Begbie, C. J. in the Sharpe Case with his subsequent decision R. v. Ah Pow (1880), 1 B.C.R. (pt 1) p. 147.
199. (1875), L.R. 6 P.C. 381 @ p. 393 approved Sheppard Case. Martin, J., supra n. 196, @ p. 512.

200. Rand, J., 10 D.L.R. (2d) 561 @ 567 (discussing Watts sub. nom. Watt) in Hellens v. Densmore (1956) 5 D.L.R. (2d) 203; 19 W.W.R. 252 (B.C.C.A.); on appeal sub. nom. Hellens (falsely called Densmore) v. Densmore 10 D.L.R. (2d) 561 (S.C.C.).
- Dr. Gilbert Kennedy, "Case and Comment: Densmore v. Densmore," (1956) 34 Canadian Bar Review p. 825, @ 829-30.
- Dr. Kennedy further examined the problem, "Introduction of English Laws: 'So Far as The Same Are Not From Local Circumstances Inapplicable,'" supra (n. 162, p. 105).
- Note: The Densmore case was reversed by the Supreme Court of Canada after the publication of these articles.
- 201 Kennedy, supra (n. 200) p. 830.
- 202 Kennedy, supra (n. 162, p. 105) p. 202.
- 203 10 D.L.R. (2d) 561 @ 568.
- 204 Densmore Case supra n. 200, referring to the Sheppard Case 13 B.C.R. 487 @ p. 503-4.
- 205 Supra, n. 200, 10 D.L.R. (2d) 561.
- 206 Loc. cit., p. 580.
- 207 Kennedy, loc. cit.
- 208 (1959), 9 U.C.C.P. 349; discussed by Kennedy, op. cit. @ 838 & 423, respectively.
- 209 Martin, J., Sheppard Case, supra n. 196 @ p. 511.
- 210 Supra (n. 11, p. 20).
- 210A E. A. Drieger, op. cit. (n. 10, p. 19) p. 706 re "pith and substance" where a future provincial statute is involved (as compared with one already in force).
- 211 Under a s. 91 head. Canada may more properly be described as having a unitary constitution with federal features, based on

the union of formerly autonomous colonies. The problems were foreseen and are outlined by A. H. F. Lefroy, The Law of Legislative Power in Canada, Toronto: The Toronto Law Book and Publishing Company, Limited, 1897-1898.

- 212 Supra n. 11, p. 20 v. Appendix A IV.
Robert H. Barrigan, "Time Limitations on Dominion Statutory Causes of Action," 40 Canadian Patent Reporter, 1964 82 @ p. 84.
Nanaimo Community Hotel Ltd. v. Board of Referees, 1945 2 W.W.R. 145, 61 B.C.R. 354, 1945 C.T.C. 125, affirming 60 B.C.R. 558, 1944 C.T.C. 105 - 1944 4 D.L.R. 638 (sub. nom. Re Nanaimo Community Hotel Ltd.) C.A. as to the Federal government establishing Federal Courts under s. 101, notwithstanding s. 129 and 2. 92.
- 213 Re Constitutional Questions Determination Act: Re Supreme Court Act Amendment Act, 1964, (1964) 50 W.W.R. 193 (B.C.C.A.) appeal allowed S.C.C. (1965) 51 W.W.R. 528. The Quotation is at p. 533, Ritchie, J.
- 214 (1890) 2 B.C.R. 12, a decision of Drake, J.
- 215 A decision of Ladner, C.C.J., May 12, 1975, Reported in B.C. Decisions, Civil Cases, v. 2. (#18829, Vancouver Registry).
- 216 Supra n. 200, Kerwin, C.J.C., @ p. 566.
- 217 Loc. cit. 34 Canadian Bar Review, p. 826. Clement, J. in Watt v. Watt (1907) B.C.R. 281 (reversed J.C.P.C. approving Martin, J. [1908] A.C. 573, in Sheppard v. Sheppard who had set out how it was enacted in British Columbia but based decision on 1857 English Act. But, Whittaker, J. Teagle v. Teagle (1952) 6 W.W.R. (NS) 377; [1952] 3 D.L.R. 843 applied British Columbia and not English Act. British Columbia began amending Act after 1936, with some justification, where procedural.
- 218 Sheppard v. Sheppard (1908) 13 B.C.R. 487 @ 518-9.
The Fisheries case: Attorney General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia (1898) A.C. 700.
- 219 An Act respecting the Revised Statutes of Canada, 49 Vict. c. 4 (Canada), see Appendix A I (iii), infra p. 210.

- 220 Appendix A IV.
Re Bowater's Newfoundland Pulp and Paper Mills Ltd., 1950
 S.C.R. 608, 1950 4 D.L.R. 65.
- 221 (1893) 3 B.C.R. 30. Drake, J. (B.C.S.C.) The Provincial
 law in question was 1 & 2 Vict. c. 110 s. 17. The Federal
 enactment is 49 Vict. c. 44 (Can.). Discussed by Kennedy,
supra (n. 162, p. 105), p. 422 "... the provincial legis-
 lation was validly in force in the province before the
 Federal legislation was enacted."
- 221A 20 & 21 Vict. c. 54 s. 12 (Imp.) 221B [1971] 4 W.W.R. 148,
 221C as to the Interpretation Act, see Appendix A, pp. 223-4. @ p. 151.
 221D v. Appendix A, iii, p. 210. 221E [1976] W.W.D. 41. ***
 222 Castles, supra (n. 24, p. 3) @ p. 30.
 223 Regina v. De Banou 67 W.W.R. 54; 1969 2 D.L.R. (3d) 424;
 1969 3 C.C.C. 157 (B.C.C.A.). The Herbalists Act 1542
 is 34 & 35 Hen. VIII c. 8.

 221E Sask. law: Nykiforuk v.
 868 Kohut [1949] 1 W.W.R.
- 224 Sir Frederic Russell, "Rough Notes on Colonial Relations with
 reference to Mr. Torrens' Motion," 25 April, 1870, C.O. 885/3,
 O'Connell & Riordan, op. cit., p. 5 @ 5-7. 708
- 225 D. B. Swinfen, Imperial Control of Colonial Legislation 1813-
 1865. Oxford: Clarendon Press, 1970 (Copyright Oxford
 University Press, 1970), p. 1-2.
- 226 Ibid., p. 12: "This 'old and established form of expression'
 was considered to mean that counsel was to report whether the
 acts were such that the governor was authorized by his Com-
 mission and Instructions to pass them; whether, in the terms
 of 7 & 8 Wm. III, c. 22, s. 9, they were repugnant to any law
 made in the kingdom 'so far as such law may mention or refer
 to the plantations'; and whether each act was so framed as to
 give 'full and entire effect to the purposes with which the
 colonial legislature may have passed it.'"
- 227 Chalmers, George, ed., Opinions of Eminent Lawyers on various
 points of English Jurisprudence Chiefly concerning the Colonies....
 Collected and Digested from the originals in the Board of Trade,
 and other Depositories. (London, Printed for Reed and Hunter
 1814) (Republished Farnborough: Gregg International, 1971).
 D. P. O'Connell and Ann Riordan, Opinions on Imperial
 Constitutional Law. Melbourne, Australia: The Law Book
 Company, 1971, p. 1.

228 (1839) s St. 2 R. (N.S.) 963 @ p. 982.

229 Supra (n. 44, p. 95)
A. B. Harvey, Q.C. (1954) 32 Canadian Bar Review 333.
A consideration based on the divorce cases; and
British Columbia cases are analyzed.

230 J. T. Woodroffe, A. Phillips, Opinion of the Advocate
General and the Standing Counsel to the Government of India,
26 January, 1893, Canada (India) C.O. Law Officers' Opinions
Vol. 5, No. 28a, O'Connell and Riordan, op. cit., p. 202
@204:

"The origin and nature of ... territorial jurisdiction
have been fully discussed, not only by the publicists,
but, in the Franconia case (the Queen v. Keyn, L.R. 2,
Exchequer Division 63) by all the greatest authorities
amongst the English Judges. Cockburn, C. J. thus
expresses himself:

' It is true that from an early period the Kings of
England, possessing more ships than their opposite
neighbours, and being thence able to sweep the channel,
asserted the right of sovereignty over the narrow seas
... All these vain and extravagant pretensions have
long since given way to the influence of reason and
common sense. If, indeed, the sovereignty thus
asserted had a real existence and could now be main-
tained, it would be, of course, independently of any
question as to the three-mile zone, conclusive of the
present case. But the claim to such sovereignty, at
all times unfounded, has long since been abandoned.'"

Ibid., p. 85, an 1855 Opinion is quoted:

"We conceive that the colonial legislature cannot
legally exercise its jurisdiction beyond its territorial
limits--three miles from the shore--or, at the utmost,
can only do this over persons domiciled in the colony
who may offend against its ordinances even beyond those
limits, but not over other persons."

Today the question of the extraterritorial rule is important,
particularly with respect to litigation pending between
British Columbia and Canada.

231 33 & 34 Victoria c. 90 (Imp.)

- 232 57 & 58 Vict. c. 60 (Imp.). This Act is specially provided for in the Statute of Westminster, supra (n. 44, p. 95).
- 233 British North America Act, 1867, s. 132 (supra n. 11, p. 20).
- 234 Colonial Office Circular Despatch, Edward George Stanley (14th Earl of Derby), 16 December 1842, O'Connell and Riordan, op. cit., p. 89.
- 235 [1920] A.C. 184, [1919] 3 W.W.R. 167, 48 D.L.R. 218, rev. 27 B.C.R. 194, 47 D.L.R. 487, which affirmed [1919] 1 W.W.R. 1068 considering the Workmen's Compensation Act, 1916, c. 77. (B.C.)
- 236 [1934] 3 W.W.R. 84, 48 B.C.R. 481, 62 C.C.C. 286, [1934] 4 D.L.R. 409, affirming [1934] 1 W.W.R. 491 (C.A.) considering the Deserted Wives' Maintenance Act, R.S.B.C. 1924 c. 67. Leave to appeal to the Supreme Court refused.
- 237 The Law Officer's opinions deal extensively with this point.
- 238 Supra n. 1, p. 19.
- 239 Op. cit. at p. 117, (quoting Offshore opinion at p. 27-8).
- 240 He concluded p. 117
as did McIntyre, J.A., at p. 124,
"The presumption must be that the colonies did not extend beyond low water. Then it is a matter of examining the wording to see whether the presumption is displaced. I have already expressed the view that the terms used are not helpful to the province's argument and that view is supported by the recent decision in New South Wales v. Australia." v.DA A. MacRae, "Extra-Territorial Operation of Dominion Legislation," (1932) The Canadian Bar Review, vol. 10 p. 601.
- 241 Loc. cit.
- 242 Loc. cit.,
Seaton, J.A., at p. 113-4,
- 242A Settlement has been offered to the Eastern Maritime Provinces, except Newfoundland which was represented in this case.
- 243 v. supra n. 126 (at p. 113-4).

244. Attorney General for Canada v. Attorneys General for Ontario, Quebec and Nova Scotia (1898) A.C. 700, on appeal from 26 S.C.R. 444.
245. St. Catherine's (Catharine's) Milling & Lbr. Co. v. R., (1888) 14 App. Cas. 46, 4 Cart. 107, affirming 13 S.C.R. 577, which affirmed 13 O.A.R. 148, which affirmed 10 O.R. 196. Similarly Ontario Mining Company v. Seybold, 1903 A.C. 73, affirming 31 O.R. 386.
246. (1809), 6 Cranch, 22, approved Sheppard case, Martin, J. supra (n. 196, p.), @ p. 525.
247. Sheppard v. Sheppard (1908) 13 B.C.R. 487 @ 493.
248. Mark R. MacGuigan, op. cit., p. 665. The quotation is from Edward H. Levi, An Introduction to Legal Reasoning (1961) p. 3.
249. Jamieson v. Tytler [1935] 4 D.L.R. 706, after finding no jurisdiction to entertain Matrimonial appeals and raising the question as to the soundness of the decision in Scott v. Scott (1891) 4 B.C.R. 316, said
 "... but it has been given effect to for so long that, in our opinion, we should not disturb it till our adoption of it has been declared erroneous by a higher tribunal, or till apt legislation has been passed making it our duty to do so"
Clement, op. cit. (n. 119, p. 101) 2nd ed., p. 51 as to acquiescence and cases referred to Doe A. Anderson v. Todd. Mr. Justice Patterson, "It has been acquiesced in too long and has for too long a period governed titles to land in this province to be now interfered with by any authority short of legislative enactment"
250. Supra n. 198 cf. Halliburton, C. J. Uniacke case supra (n. 73, p. 98) loc. cit.
251. v. Infra Schedule A I.
252. Supra n. 198.

- 253 Robinson, C. J., Shea v. Choat, (1845) 2 U.C.Q.B. 211.
B.C.: Frey v. Fedoruk [1949] 2 W.W.R. 604 (S.C.C.)
Cartwright, J. - if any course of conduct is now to be
declared criminal, not up to the present so regarded, it
should be so declared by parliament and not by the Courts.

Part III - Statute Law Revision and
Legislative Reform

V. IMPERIAL STATUTE LAW REVISION AND REFORM

1. Historical

(a) The need for reform

The reception statutes relate primarily to the Law of England before any modernization took place. For British Columbia, the legislation to be considered for applicability spanned over six hundred years from 1225 to 1858 (the Statutes of the Parliament of England and Great Britain from the Third Year of King Edward the Second to the Twenty-second Year of Queen Victoria). It was to be found in ninety-eight volumes of the Statutes which were rarely available in the Colonies. Begbie, C. J. recognized the problem of accessibility when he said:

"An Englishman going to found a Colony may be supposed to carry the Statutes (in the form of Chitty) in his hands" 1

Chitty's Collection of Statutes with Notes thereon,² containing "All the Statutes of Practical Utility in the Civil and Criminal Administration of Justice to the present time" was first published in 1829 by Joseph Chitty. Later editions were published by Editors, the Second in 1853 and the Third in 1865 being relatively close to the reception date of 1858 fixed for British Columbia. Unless such a collection was used, it was necessary to consult the Statutes of the Realm to research Acts of Parliament. In addition to this huge volume of legislative enactment, there were also Orders-in-Council

material to the Law of England to be considered.

The availability and certainty of the Law of England was a problem in England as well as in the colonies.

(b) The impetus for reform

In 1542 the Irish Parliament petitioned the King to print a collection of Irish statutes.³

In England, in 1549, the House of Commons proposed to King Edward VI that the laws should be codified.⁴ In 1551, the King, when only a boy of fourteen, in his Discourse on the Reformation of Abuses, proposed; presumably as advised by his Law Officers,

"I have shewed my opinion heretofore what statutes I think most necessary to be enacted this session. Nevertheless, I would wish that beside them hereafter, when time shall serve, the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them; which thing shall much help to advance the profit of the commonwealth." 5

Sir Nicholas Bacon, Lord Keeper, in the reign of Elizabeth I proposed reducing, ordering and printing the statutes of the realm, in terms which have been described as the first "codification movement", as follows:

"First, where many lawes be made for one thing, the same are to be reduced and established into one lawe, and the former to be abrogated. Item, where there is but one lawe for one thing, that these are to remain in case as they be. Item, that all the Acts be digested into titles and printed according to the abridgement of the statutes. Item, where one part of the Acte standeth in force and another part abrogated, there shall be no more printed, but that that standeth in force." 6

James I was sympathetic to reform, and in a speech delivered in 1607, he expressed the desire that "... by parliament our lawes might be cleared and made knownen to all the subiects" In 1609, he referred to the matter of "divers crosse and cutting statutes, and some so penned that they may be taken in divers, yea, contrary sences"⁷ Sir Francis Bacon, then the Attorney General, submitted a proposal for the digest or recompiling of the common law and reforming and recompiling of statute law.⁸ The reform contemplated was to be of great scope, particularly as to statute law. A manuscript exists in the British Museum attributed to the Commission that was appointed in 1610.⁹ Further committees were appointed in the time of the Commonwealth and many great names in legal reform were involved including Sir Matthew Hale and Ashley Cooper, Lord Shaftesbury.¹⁰

(c) Statute law reform

Although there has never been an official legislative revision of statutes in England, substantial efforts have been made from time to time to abridge the statute books and to make legislation more readily accessible. These efforts had a bearing on the availability of statutory materials in the colonies and also on developing a methodology of reform.

The statutes circulated originally in manuscript form, but after the invention of the printing press many collections of statutes were published, commencing in 1485.¹¹

In 1796, two reports of Committees of the House of Commons

called attention again to the need for revision, and Parliament, four years later, appointed the First Commission of Public Records under whose authority The Statutes of the Realm were published.¹² It is the authoritative edition of the English statutes to the end of the Reign of Queen Anne, including every law "as well those repealed or expired as those now in force". This Commission distinguished for the first time between public general Acts, local and personal Acts, and private Acts.¹³

Ruffhead's Edition,¹⁴ a private edition of the Statutes, extended from Magna Carta (which appears in Ruffhead as 9 Henry III and in the Statutes of the Realm as 25 Edward I) and initially consisted of 18 volumes to 1800. Thirty more volumes were added by various editors, taking the edition up to 1869. Ruffhead shared the view of the Commissioners of Public Records that all statutes should be printed and not merely those in force.

The edition by the Record Commissioners, known as the Statutes of the Realm (to the end of the Reign of Queen Anne) and the Ruffhead Edition by Serjeant Runnington (to the end of the session of 25 George III) are the basis for the first revision of statute law.¹⁵

There is one period not included in the Statutes of the Realm, the period of the Interregnum, from 1640 to 1660.¹⁶

Legislators, unlike judges, have not been required to fit legislation within the existing framework of the King, and later Parliament, continued to pass Acts and repeal others without substantial consolidation or revision. Prolixity and fragmentation

of law were the result, and reform was a complex matter.

2. Methods of Statute Law Reform

(i) REVISION

The Statute Law Committee was appointed in 1865¹⁷ to supervise the production of the Statutes Revised. Revision entails examination of the Statute Roll, editing it in revised form, and omitting repealed statutes.

Three editions of the Statutes Revised have been published with the authority of this Committee and its successors;

1. the first, to the end of 1878, consists of eighteen volumes, replacing the 118 volumes then in force, and was published between 1870 and 1873 and completed in 1885; 18
2. the second, to the end of 1886, consists of sixteen volumes and was published between 1888 and 1900. Eight more volumes were added in 1909 and 1928, bringing the work up to the year 1920. 19
3. the third, published in 1950, substituted 32 volumes for the statutes from 1235 to 1948. With index, the set comprises 35 volumes. 20

These revisions increased assessability to "living" law, but are of limited value to historians or those attempting to ascertain the law at a fixed date prior to the revision.

(ii) INDEXING

In conjunction with the 1865 revision of the statutes, the Queen's Printer published in 1870 a Chronological Table and Index to the Statutes in Force.²¹ Prior to this publication, it was virtually impossible to ascertain which statutes were in force in England in any given year. The Chronological Table and Index of

Statutes²² is still published today, its form consisting of two parts:

1. a Chronological Table listing both the subject matter and the present status of all the statutes, showing total or partial repeals thereof; and
2. an alphabetical Index to the contents of the statute books, arranged by subject.

From the Table and Index it would be possible to determine the statute law in force in England in any particular year, subject to considering Orders-in-Council affecting the statute law.

This Table has an additional value, in enabling one to assess the validity of work in another jurisdiction for British Columbia. For example, a glance at the present status column in the Chronological Table indicates that the work of the Alberta Institute of Law Research and Reform²³ relative to an 1870 reception date is not entirely valid in British Columbia as to statutes in force. Much work was done in the 1860's in expurgation, as a part of the 1865 revision, and Alberta has the benefit of this expurgation.

(iii) EXPURGATION

In 1856 the Imperial Parliament began deletion from the Statute Books of statutes which were not in use. More than one hundred were eliminated in the 1856 "sleeping statutes"²⁴ Act. However, more than thirty Statute Revision Acts were passed between 1861 and 1898. The Statute Law Revision Act, 1863,²⁵ which became the prototype of subsequent legislation, was introduced by Lord Westbury in a speech which explained the principles of the Act and laid out the

rules to be followed by draftsmen to clear the statute book of superfluous and unnecessary matter. The Act's preamble is very wide:

"Whereas, with a view to the Revision of the Statute Law and particularly to the Preparation of a revised Edition of the Statutes, it is expedient that certain Enactments (mentioned in the Schedule to this Act) which have ceased to be in force otherwise than by express and specific Repeal, or have, by Lapse of Time and Change of Circumstances, become unnecessary, should be expressly and specifically repealed:"

Its ambit is limited to England by Section 2, and in other respects by the wide protections restricting repeal by Section 1, as follows:

"1. The enactments described in the Schedule to this Act are hereby repealed, subject to the Exceptions in the Schedule mentioned:

Provided, that where any Enactment not comprised in the Schedule has been confirmed, revived, or perpetuated by any Enactment hereby repealed, such Confirmation, Revivor, or Perpetuation shall not be affected by such Repeal;

and the Repeal by this Act of any Enactment shall not affect any Act in which such Enactment has been applied, incorporated, or referred to;

and this Act shall not affect the Validity or Invalidity of anything already done or suffered,--or any Right or Title already acquired or accrued, or any Remedy or Proceeding in respect thereof,--or the Proof of any past Act or Thing;

nor shall this Act affect any Principle or Rule of Law or Equity, or established Jurisdiction, Form or Course of Pleading, Practice, or Procedure, or existing Usage, Franchise, Liberty, Custom, Privilege, Restriction, Exemption, Office, or Appointment, notwithstanding that the same respectively may have been in any Manner affirmed, recognized, or derived by, in, or from any Enactment hereby repealed;

nor shall this Act revive or restore any Jurisdiction, Office, Duty, Franchise, Liberty, Custom, Privilege, Restriction, Exemption, Usage, or Practice, not now existing or in force." 26

Although a huge expurgation took place, no attempt was made to remove "any living enactment". The philosophy of the wide ambit of the saving clause was formulated in an 1891 Parliamentary Memorandum, as follows:

"Although the Statute Law Revision Acts in form specifically repeal enactments, their principle is merely to authorize the omission from an authorized statute-book of enactments already dead. And this is also their legal effect, for not only have great pains been taken to leave untouched all enactments as to the present operation of which there was any reasonable doubt but each Act contains a saving clause of a very wide character. The terms of this clause ... are so wide that, even if a mistake were made of including in a Statute Law Revision Act any living enactment, the operation of the saving clause in the Act would continue the effect of that enactment as a principle to be recognized by the Courts of Law. It may be said that, if this is the operation, the Statute Law Revision Act is useless as it does not get rid of the law. But this is not so; the saving clause is merely a precaution against a mistake The statute law is thus made more intelligible in form and is reduced to a more moderate compass without producing any real change in the law." 27

British Columbia does not benefit from these Acts directly. However, the immediate classification as "sleeping" of a statute in force in 1858 should have great weight if a similar effort were made in this jurisdiction.

(iv) CONSOLIDATION

This is not merely a mechanical process but involves reconciling differences of language obscurities and inconsistencies of different periods, in statutes spanning seven centuries. The process is laborious. The consolidator must consider both adaptat-

ion to modern conditions and the effects produced on the operation of a statute by changes in the rules of substantive law, rules of procedure or of social conditions. The consolidator deals only with legislation but considers the interpretation by judicial decision

"the work of consolidation requires intimate acquaintance with past as well as with existing laws and institutions; involves the rewriting, and not merely the placing together of laws; the substitution of modern for antiquated language and machinery, the harmonizing of inconsistent enactments, and yet the performance of this work in such a way as to effect the minimum of change in expressions which have been made the subject of judicial decisions and on which a long course of practice has been based." 28

(v) CODIFICATION

Codification has had limited success in England, associated with the names of Sir Mackenzie Chalmers and Sir Frederick Pollock in matters of a commercial nature.²⁹ The following statutes were the result:

Bills of Exchange Act, 1882;
Partnership Act, 1890;
Sale of Goods Act, 1893; and
Company Law Consolidation Act, 1908. 30

Codification is the process of collecting and arranging in systematic form the whole of the law as to a given subject, whether found in statutes or in case law.

The movement for codification was led by Jeremy Bentham³¹ who attacked the confusion of the statute books and advocated reform by way of codification. He succeeded in influencing the development of the Continental codes, having particular influence with respect to

the French Penal Code and the Russian Codification movement. He had little success in England.

It has been said that for codification to be successful, two elements must be found: an enlightened sovereign, unhampered by the past; and a country powerful enough to exercise inescapable influence over others and spread the Code's influence.³² Both elements were found in France after the Revolution and are found in modern African nations. This political climate was not to be found in England where a deeply-rooted system of developing law had continued since the thirteenth century, combined with a relatively stable monarchy. The codification movement has had some success in colonies for special reasons which will be noted in Chapter VI.

Bentham's disciples again raised the matter in the liberal climate of 1832 which produced the Reform Act.³³ The then Lord Chancellor, Lord Brougham, appointed a Commission with instructions:

"(1) To digest into one statute all the statutes and enactments touching crimes and the trial and punishment thereof, and also to digest into one another statute all the provisions of the common or unwritten law touching the same;

(2) To inquire and report how far it might be expedient to combine those statutes into one body of the criminal law; and

(3) Generally to inquire and report how far it might be expedient to consolidate the other branches of the law of England." 34

This Commission made seven reports and eventually dissolved in 1845. It was succeeded by another that also made seven reports, the last published in 1849. A Criminal Law Bill was twice presented to the

House by Lord Brougham who made the following plea on behalf of codification:

"In England more than any other state, more even than in Rome, when Justinian began his labours at a time when the civil law was said to be a burden for many camels, this process (of digesting the law) has become absolutely necessary, because our law, whether made by parliament, or existing in tradition, or declared by the judges, has attained an unprecedented bulk. The reports of cases in the courts fill 500 volumes, the statutes nearly 40, of between thirty and forty quarto pages -- while Napoleon's whole codes, five in number, crept into 750 duodecimo pages. Well might he boast that he should descend to future times with his code in his hand!" 35

Inconceivable as it now appears, it was not until 1853 that the Judges were consulted with respect to the proposed digest of Criminal Law, which by then had taken the form of two Bills. Twenty years of work and great expense were to be fruitless, with the Judges finding no uncertainty in the law as it was, nor need for such drastic measures.³⁶

In 1877, Sir James Fitzjames Stephen returned to England having completed his Digest of Criminal Law for India.³⁷ He was asked to draft a Criminal Code and a portion of this draft was introduced in the Commons in 1878 as the Criminal Code (Indictable Offences) Bill. It met with an argument about abandoning legislative power:

"To request the House to adopt the proposed changes in the criminal code on the faith of three or four gentlemen, however eminent they might be, was, equivalent to asking the House to abandon its position as representing and legislating for the country." 38

This argument succeeded in deflecting the Bill and generally bringing

the codification movement relating to the criminal law to a halt.

3. The Law Commission Act, 1965

Statute reform continues today with progress being made in expurgation and indexing. The Statute Law Committee continues to function and has adopted the modern practice of referring all consolidation Bills to a Joint Select Committee set up by both Houses. Minor amendments, corrections and improvements are now facilitated by the Enactments (Procedure) Act, 1949.³⁹ The continuing work is now stimulated by the Law Commission appointed pursuant to an enabling Act passed in 1965.⁴⁰

The First Report of that Commission formulates the modern need of English Law in these words,

"English Law, in its history and substance, exhibits a great respect for both the concept and the application of the rule of law. If our law is to survive as one of the great legal systems of the world, it is necessary that a proper balance be struck between that concept and the administrative techniques of a highly developed industrial society." 41

The First Programme included provision for resolving anomalies, obsolescent principles or archaic procedures; the modernization of the law of Northern Ireland; and the consideration of statutory interpretation. Its Tenth Report, for the period 1974 - 1975, records the work of the Commission in the repeal of obsolescent Acts and its work with the Joint Committee on Bills, but reports that the present pace of the consolidation programme does not keep abreast of the impact of new legislation on the Statute Book.⁴²

4. "Forgotten amendments" to the Canadian Constitution

It would be expected that in Canada the methods of Imperial statute law reform would be instructive, and that if such reform were undertaken the "sleeping statute" classification would be reflected in our own legislation. One effect of the Statute Law Reform Acts of 1893, 1898, and 1927 was to amend the Canadian constitution by deleting provisions of The British North America Act, 1867.⁴³

Gérin-Lajoie in his study Constitutional Amendment in Canada,⁴⁴ records that these amendments were made it seems without Canadian knowledge and were overlooked until an Article on the subject was published in 1942 by Scott.⁴⁵ The safeguards of the Statute Law Reform Acts operate to prevent error as a result of such amendment, but the very existence of these, apparently unpublished and unnoticed in Ottawa, is another reason for resolving and defining Imperial statute law in Canada.

VI. THE REFORM OF PROVISIONS FOR RECEPTION OF ENGLISH STATUTES BY LOCAL LEGISLATION

Ascertaining which English statutes are received has always been a problem for lawyers in the various jurisdictions where English Law has been introduced. A determination of applicable English statutes is complicated by the further necessity of considering the law in force in the particular jurisdiction at the reception date and subsequent legislative enactments. Even when these matters have been determined, the Courts may declare a particular statute is not in force due to local circumstances.

Reform begins with a determination of which English statutes may be in force. Several jurisdictions have effected reform in this way, combined in some cases with a repeal of other English statutes. Complete repeal of all statutes save those provided in the reform statute, has been undertaken in Victoria, Australia, on a most comprehensive basis.⁴⁶ Similar reform has been undertaken in the Bahamas,⁴⁷ Western Nigeria,⁴⁸ and Gibraltar,⁴⁹ and in the following American States: North Carolina, Michigan, Virginia, New York, New Jersey, Vermont, Mississippi, Tennessee, and South Carolina.⁵⁰ Ontario⁵¹ has consolidated the statutes relating to property and civil rights and made a listing of proprio vigore legislation. In still other jurisdictions, partial reform has been effected with some Imperial statutes being repealed, and others incorporated into local legislation. The effectiveness depends on the decisiveness of the reform legislation. British Columbia is such a jurisdiction.

1. Incomplete reform: consolidation and listing

(a) British Columbia

British Columbia is one of seven jurisdictions in Canada⁵² that have a reception statute of general application. The history of the Province as it is today is somewhat complex, and has been previously referred to.⁵³

In 1896, in connection with the revision and consolidation of the Laws of British Columbia, Theodore Davie was appointed a Commissioner to revise and consolidate a new edition of the Laws of British Columbia and of "the Statute Law of England in force and applicable to this Province".⁵⁴ The undertaking of this herculean task is explained, as, by implication, is the impossibility of its completion, in his First Report, made in 1896,

" When it was decided by the Legislature to enter upon this revision, it was believed that a similar work said to have been carried into execution in the Colony of New Zealand would afford a precedent, and much facilitate the labours of the Commission, but it appears that no such revision has been carried out there. The "Revision of Statutes Act, 1879" (N.Z.) directed that the Commissioners appointed under that Statute should include in a new edition of Statutes "such enactments of the Imperial "Parliament in force in this Colony as, from their general interest and importance, the "Commissioners may think it desirable should be so included." The New Zealand Commissioners therefore collected, without revision or change, certain Imperial Statutes, occupying a book of about five hundred pages."

This Report indicated that the English Statutes would be dealt with in two ways:

- (1) "... The enactment of law by mere reference to Statutes of the Imperial Parliament or otherwise has been completely discarded. In those cases where the law is now given by reference only to Imperial Statutes, the Statute or

law, so formerly referred to, itself has been reproduced, with necessary variations"

- (2) "... Some Imperial laws have been introduced without change, amongst which may be mentioned "Magna Charta" and the "Companies Acts," the latter of which have been so introduced as preliminary to revision." 55

(i) R.S.B.C. 1911

The Revised Statutes of the Province continued the work in respect of the Imperial Statutes. A Table of Imperial Acts Consolidated was published in Volume IV,⁵⁶ a further Volume of the 1911 Statutes published in 1913, which consisted of two Parts:

Part I, being "A collection of some English Statutes not consolidated with the "Revised Statutes of British Columbia, 1911," useful for reference and arranged chronologically, and of certain Orders in Council and Proclamations."

The following explanation is given with respect to the list:

"Some of these Statutes were published in an Appendix to the Revision of 1871. Others were published in the preliminary part of the revision of 1897. Others have been added by the Commissioners.

This compilation does not purport to be an exhaustive collection of English Acts that may be applicable in the Province of British Columbia.

The insertion of any Act or part of any Act in this compilation, or the omission therefrom of Acts or parts of Acts, must not be taken as an expression of opinion on the part of the Commissioners with respect to the applicability of those inserted, or the inapplicability of the great number of Acts omitted. The judicial tribunals of the country can alone determine these questions."

57

This explanation renders it of little value, other than as a reference list as at 1913, and unfortunately, the explanation deprives it of any value as a complete reference list.

The 1911 Revision also dealt with Colonial and Provincial law.

Part II of Volume IV is described as "Consisting of a list of Ordinances and Acts passed by the Colonial and Provincial Legislatures not repealed and not included in the Revised Statutes, some of which Ordinances and Acts, being of a quasi-public character, are printed in full; the titles of the others with the date of their passing only being given."

The following protection is included with respect to Part II:

"Some of these Ordinances and Acts are possibly obsolete, others perhaps indirectly repealed, others again expired by effluxion of time. In the opinion of the Commissioners the Courts or the Legislature are the proper authorities to make any declaration on the subject." 58

What then is the effect of the consolidation and listing?

- (1) the Imperial statutes incorporated in the British Columbia enactments, listed in the "Table of Imperial Enactments consolidated with the Revised Statutes, 1911" become law in British Columbia, if they were not previously. 59 A similar list was published in 1897.
- (2) The collection of English statutes not consolidated, being Part I of Volume IV, is neither complete nor authoritative. "The judicial tribunals of the country alone can determine these questions."⁶⁰
- (3) The list of Colonial and Provincial Ordinances and Acts is a handy reference list, but the provisions appended to the list deprives it of authority for any proposition except that those Ordinances and

Acts listed had not been repealed in 1913.⁶¹

(ii) Subsequent reform

Further reform was made in the Obsolete Statutes Repeal Act, 1922,⁶² and in the various changes in wording to the English Law Act⁶³ which have been made at the time of various statute revisions, presumably, under the umbrella authority of modernizing language.

(iii) Law Reform Commission

The Law Reform Commission of British Columbia was established by the Law Reform Commission Act in 1969 and began functioning in 1970.⁶⁴ The fourth general topic of the Commission's original programme was the applicability of pre-1858 English statute law in British Columbia. A "Perspective" published in 1976 by the former Director of Research to the Commission comments with respect to this portion of the programme:

"This has always been a project conducted by a member of the Commission's full-time staff, and although circumstances have never permitted it to be accorded an urgent priority, work proceeds when time allows...." ⁶⁵

(b) Ontario

Like British Columbia, Ontario has made statutory provision to supplement the rather complicated legislative history of the Province.⁶⁶ The present provision for English Law is found in The Property and Civil Rights Act,⁶⁷ and is in these terms,

"In all matters of controversy, relative to property and civil rights, resort shall be had to the laws of England as they stood on the 15th

day of October, 1792....."

This provision succeeds a 1792 Statute which established English Law, in the following terms:

"... from the after the passing of this Act, in all matters of controversy relative to property and civil rights, resort shall be had to the Laws of England as the rule for the decision of the same.

...

Provided always, and be it Enacted by the Authority aforesaid, That nothing in this Act contained, shall vary, or interfere, or be construed to vary or interfere with any of the subsisting provisions respecting ecclesiastical rights and dues within this Province or with the forms of proceedings in civil actions, or the jurisdiction of the Courts already established, or to introduce any of the Laws of England respecting the maintenance of the poor, or respecting bankrupts." 68

Various other Statutes made provision with respect to equity, chancery and surrogate matters. The complicated situation is summarized in the Preamble to the 1902 Statute authorizing the Imperial Statutes relating to property and civil rights to be incorporated into the Statute Law of Ontario:

"WHEREAS under and by virtue of divers Acts of the Provinces of Upper Canada, Canada, and of this Province, certain Imperial Statutes became part of, and were incorporated into, the Statute Law of this Province so far as the same were applicable to the circumstances thereof; and whereas, since the incorporation of such Statutes some of the same have become obsolete, or have in effect been superseded by subsequent legislation; and some of the said Statutes were enacted in Latin, or Norman French, or in language which has become antiquated and obscure; and whereas it is desirable that all such Imperial Statutes as relate to property and civil rights should be revised, classified, and consolidated, as part of the Revised Statutes of Ontario; and whereas such revision, classification, and consolidation have been made accordingly; and whereas it is expedient to include in such consolidation certain statutes of the present session passed in substitution, or amendment, of certain of the said Imperial Statutes: - "

On, from and after such day the same shall accordingly come into force and effect as law by the designation of "The Revised Statutes of Ontario, 1897, Volume III," to all intents as though the same were expressly embodied in and enacted by this Act to come into force and have effect on, from and after such day, and on, from and after such day all the enactments in the said several Acts and parts of Acts in Schedule A to the said Roll mentioned as repealed shall stand and be repealed save only as hereinafter is provided."." 69

Several sections follow Section 6 making the usual provisions and protections in respect of statute consolidation and revision and providing that the said volume shall not affect legislation already in force in the Province.

(i) 1902 Revision

By Proclamation, the Revised Statutes of Ontario, 1897, Volume III, was proclaimed as having the force of law from and after 2 June, 1902, and provided a solution to the problem which had been described in the Preamble of the 1902 Statute,⁷⁰ except as to proprio vigore legislation and legislation within the competency of the Federal government.

After the Revision, the law of Ontario included those Imperial enactments listed in Schedule A which were enacted as Ontario statutes numbered as listed in Schedule B.⁷¹ Those statutes listed in Schedule C continued to have the same force as they had prior to the Revision. The Volume was in two parts but the statutes are dealt with in three different ways:

(a) Statutes of the Province of Ontario, Chapters 322 to 342 inclusive were published, being the proposed revision and

consolidation of all Imperial Statutes relating to property and civil rights which were incorporated into the law of Ontario by virtue of provincial legislation. These were as follows:

Section XVIII. CONSTITUTIONAL RIGHTS AND LIBERTIES
OF THE PEOPLE.

- c. 322 An Act respecting certain rights and liberties of the people
- 323 An Act concerning Monopolies, and dispensation with penal laws, etc.

Section XIX. ADMINISTRATION OF JUSTICE (2).

1. PROCEDURE IN CIVIL MATTERS.

324 Administration of Justice

2. ADMINISTRATION OF JUSTICE IN CRIMINAL MATTERS.

- 325 Justices of the Peace, power of, to administer oaths
- 326 Constables, actions against

Section XX. MISCELLANEOUS OFFENCES

- 327 Champerty
- 328 Buying and selling offices
- 329 Excessive gaming

Section XXI. LAW OF PROPERTY (2).

- 330 Real Property
- 331 Uses and Trusts
- 332 Accumulation of Profits or produce of Real or Personal estates. (Commonly called "The Thellusson Act".)
- 333 Mortmain, and the disposition of land for charitable uses
- 334 Fraudulent deeds, gifts, devises, alienations, &c
- 335 Distribution of Intestates' Estates
- 336 Relief of Trustees
- 337 Executors, and Administrators

Section XXII. MERCANTILE LAW.

- 338 Prevention of Frauds and Perjuries
- 339 Insurance (2)

Section XXIII. LAWS AFFECTING SPECIAL CLASSES OF
PERSONS (2)

- 340 Infants (2)
- 341 Lunatics (2)
- 342 Landlord and Tenant (2)

These enactments were explained by listings in

SCHEDULE A "... Imperial Acts, and parts of Imperial Acts, relating to property and civil rights appearing to be in force in Ontario at the end of the year 1897, by virtue of Provincial Legislation, which have been revised, consolidated, and (if, and so far as they were in force in the Province of Ontario, and within the legislative authority of the Province) repealed from the day upon which the Consolidated Statutes comprised in volume 3 of the Revised Statutes of Ontario, 1897, take effect, including Acts repealed by the Mortmain & Charitable Uses Act, 1902, and the Statute Law Revision Act, 1902." and 72

SCHEDULE B showing where the Acts listed in Schedule A have been consolidated in the Revised Statutes of Ontario, 1897, Volume III. 73

In addition to the usual protections on consolidation and repeal, the Act authorizing The Revised Statutes, 1897, provided as follows:

"12. The insertion of any Act in the said Schedule A or B shall not be construed as a declaration that such Act or any part of it was, or was not, in force immediately before the coming into force of the said Statutes." 74

However, after the 1902 Statute, the Schedules have the force of statutes, as provided by section 4:

" So soon as the said incorporation of such Acts and parts of Acts with the said statutes ... the Lieutenant-Governor may cause a correct printed roll thereof ... which roll shall be held to be the original thereof and to embody the several Acts and parts of Acts mentioned as repealed in the amended Schedule thereto annexed, and shall be deemed to include and comprise all provisions contained in any Imperial Statute relating to property and civil rights which have heretofore been incorporated into the statute law of this Province, and which at the time of the passing of this Act remained in force except only those referred to in Schedule C to the said consolidated Acts annexed" 75

(b) SCHEDULE C lists "Imperial Acts, and parts of Imperial Acts, relating to property and civil rights appearing to be in force in Ontario by virtue of Provincial Legislation which are not repealed, revised or consolidated". 76

The Schedule is as follows:

Chapter	Title of Act	Subject of Act
17	52 Hen. 3 (St. of Marlbridge).	Guardians in Soccage.
2	31 Car. 2.	<u>Habeas Corpus</u> Act.
5	7 Anne.	British subjects born abroad.
12		Ambassadors.
21	4 Geo. 2.	British subjects born abroad.
23	24 Geo. 2	Correction of the Calendar.
21, ss.1,2	13 Geo. 3	British subjects born abroad.
49	21 Geo. 3	The Lord's Day Act.
		In addition to the above, (1) all Acts or parts of Acts in force relating to Marriage; and (2) all Acts or parts of Acts in force relating to ecclesiastical property, and the rights of persons therein.

The Habeas Corpus Act appears in the Schedule C list which is in force in accordance with the provisions of section 4, and appears in Part III of the Appendix, where its provisions are extended, with the following note:

"This Act was introduced into Upper Canada, and is still in force, but has not been revised, because it deals only with cases of commitment or detainer for criminal or supposed criminal matter (sic.), (see preamble of R.S.O. c. 83). It is therefore printed as the Act now appears in the Imperial Revised Statutes, omitting only sections 10 - 14, which are inapplicable." 77

(c) The Appendix to The Revised Statutes of Ontario, 1897,

Volume III, is in four parts of which three relate to legislation in force proprio vigore.

Part I. lists seven constitutional acts:

The Petition of Right
 The Bill of Rights
 The Act of Settlement
 The Quebec Act
 The Constitutional Act, 1791
 Act to remove doubts as to Validity of Colonial Laws
 Act respecting the establishment of Provinces in the
 Dominion of Canada 78

Two things should be noted with respect to these:

- (i) they are all in force proprio vigore and the list is not complete. Subsequent revisions of Statutes in Ontario, including the 1970 Revision, refer to a further list published in the 1859 Consolidated Statutes of Canada, and recommend that these too should be provided for in Ontario legislation.
- (ii) the listing is duplicated in the list in Part IV of the Appendix.

Part II. lists seven further statutes in force proprio vigore in Ontario, all relating to Evidence and all duplicated in the list in Part IV of the Appendix.

Part III. is the Habeas Corpus Act previously referred to.

Part IV. is a "TABLE OF IMPERIAL STATUTES (OTHER THAN THOSE RELATING TO CRIMINAL LAW INTRODUCED BY "THE QUEBEC ACT," 1774,) APPEARING TO BE IN FORCE IN CANADA EX PROPRIO VIGORE, AT THE END OF 1901". 79

with the following proviso:

"NOTE.--This Table is not to be considered as exhaustive, or exclusive. It is intended for convenience of reference."

Volume 3 is the work of Holmsted, the Senior Registrar of the High Court, under the supervision of a Committee composed of

five members. A contemporary review presumes that the Committee made the decision as to what statutes were to be included and the form of the revision. The review notes the need of a similar revision by the Federal government in respect of criminal law.⁸⁰ When the revision of criminal law was undertaken by the Federal government, it was in the form of a Code,⁸¹ modelled on the Code which had been drafted for India. The enactment of chapters 322 to 342 inclusive was in fact a similar consolidation of English Law, but was not a complete consolidation of Ontario law as it did not at that time amalgamate these provisions with the Ontario legislative provisions then in force.

(ii) Further consolidation

A further consolidation has taken place and only five of the twenty-one chapters consolidated in 1902 remain as a separate enactment. There appears to be no particular reason why these five have not been incorporated into the Revised Statutes of Ontario as consolidated Statutes. They are:

- 322 An Act respecting certain rights and liberties of the people
- 323 An Act concerning Monopolies, and dispensation with penal laws, etc.
- 327 Champerty
- 330 Real Property
- 331 Uses and Trusts

(iii) Ontario Law Reform Commission

Gosse,⁸² in 1969, as Counsel for the Ontario Law Reform Commission⁸³ prepared a memorandum for the Commission as to the proposed study of the "Application of Imperial Statutes in Ontario".

He suggested three avenues which the study could take:

- "(a) a review of the 1902 treatment of Imperial Statutes to ensure that it has done what it purported to do; and
- (b) a review of the Imperial Statutes which were consolidated in 1902 with a view to revising outdated law or language; and
- (c) an investigation of those Imperial Statutes in force ex proprio vigore in Ontario, dealing with matters within provincial jurisdiction, with a view to recommending repeal, revision and consolidation into the provincial statutes."

he added,

"It would be possible, of course, for such a study also to include an examination of Imperial Statutes which are in force in Canada but which relate to matters within federal jurisdiction." 84

Gosse had previously considered "The Reception of English Property Law in Ontario" and his unpublished material was made available to the Commission for their information, and was referred to in the 1969 Memorandum.⁸⁵ It was his opinion that:

- (1) the 1902 Revision was all-inclusive, and "... it appears that an English statute which was overlooked in the classification would not have continued to be law in Ontario after 1902, ..."except those in force ex proprio vigore and those statutes referred to in Schedule C; 86 and
- (2) the effect of a statute included in the 1902 consolidation, if it was not part of Ontario law before that date, by the operation of s. 5 and s. 6, was to be part of the Ontario law.

Gosse noted however, one situation at least where Imperial Statutes may still be looked to, providing the example of the

"Nullum Tempus Act of 1769 (9 Geo. III, c. 16, otherwise known as the Crown Suits Act), is applicable in actions between a subject and the Crown in right of Canada. (See,

(for example, Attorney General of Canada v. Krause, [1956] O.R. 675 and also Anger and Honsberger, Canadian Law of Real Property, at p. 779.) The provincial legislature cannot interfere with such rights. On the other hand, the Crown in right of Ontario would be bound by the provincial Limitations Act, which includes provisions from the Nullum Tempus Act which were incorporated into the former statute in 1902.⁸⁷

2. Codification

(1) Codification of particular aspects of law

Supersession by statute, or Codification by the local legislature has been effected in Canada with the Criminal Code⁸⁸ and in India, with the Penal Code, Contracts Act, and Evidence Act.⁸⁹

Codification has been accomplished in more limited matters in the Offences against the Person Ordinance enacted in Gibraltar in 1934⁹⁰ and in the Civil Wrongs Law of Cyprus.⁹¹

(2) The American colonies

Initially the American Colonies on separation from England adopted one of the following methods to deal with the British statutes:

1. No reference to statutes, but provision that the laws heretofore in force (or in force in prior jurisdiction) to continue;
2. Provision that the common law and British statutes were or were to continue in force;
3. Provision that the common law and British statutes as of a particular date were in force;
4. Provision that English statutes enacted prior to 1607 "of a general nature" were the rule of decision;
5. Provision that the common law relative to crimes to be in force⁹²;

As the individual States were organized, some provisions for English Law changed, and the following were added:

6. Continuance of general provision that common law and British statutes were in force supplemented by non-statutory list authorized by the legislature.

7. Provision repealing British (or English) statutes upon completion of statutory revision
8. Provision repealing English statutes without completion of statutory revision 93

Without developing a detailed history of the refinement of statute law in the "old" American colonies, it is perhaps sufficient to indicate that the trend was in general codification in most States.⁹⁴

One State, New York, where codification began after several preliminary listings had been made, is of particular interest as it illustrates three tangents of the English Law question,

- (1) the problem of colonies wishing to adopt English Law passed after settlement or conquest. (New York, while actually being a conquered colony, has been always treated as if it had been settled.)
 - (2) the procedure adopted in what was intended to be a full legislative reform of statute law (option 6); and
 - (3) the difficulty of unseating settlers' law.
- (a) North Carolina: general provision with a non-statutory list authorized by the legislature

North Carolina in 1749 had attempted to incorporate many English Statutes into its law by reference. This Act was disallowed in 1754.⁹⁵ After rebellion, North Carolina first provided that the common law and British statutes were in force, and they continued in force between 1778 and 1837, when the Statutes were revised. Several lists were published in North Carolina in this period:

- (1) In 1791, Francois-Xavier Martin was appointed and prepared a Collection of the Statutes of the Parliament of England in force in the State of North Carolina. His list was approved by the General Assembly in 1804, but was disapproved in the Preface to the Revised Statutes

1837, as being:

"...utterly unworthy of the talents and industry of the distinguished compiler, omitting many important statutes, always in force, and inserting many others, which never were, and never could have been in force, either in the Province or in the State of North Carolina"96

- (2) A fragmentary list was published in 1814 and 1815. This list, "An Abridgement of the Statute Law of Great-Britain, Now in Force in North Carolina," is not mentioned in the Preface to the Revised Statutes of 1837. 97
- (3) In 1817 the Assembly authorized and appointed Commissioners to prepare another list. The lengthy Report of the Commissioners was ordered published and "was not either sanctioned by law or disapproved" 98

The General Assembly in the course of statutory revision of 1836-1837, enacted legislation which effectively repeals any English statutes in force,

"An Act Declaring What Parts of the Common Law Shall Be In Force In This State" declared:

... all such parts of the common law, as were heretofore in force and use within this State, or so much of the said common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State. 99

and "An Act Concerning The Revised Statutes provided inter alia,

... all the statutes of England or Great Britain heretofore in use in this State, are hereby declared to be repealed and of no force and effect from and after the first date of January next" 100

These provisions have apparently been more effective than those made in New York.

(b) New York; the revision-repeal method

In view of the extensive revision and repeal undertaken by New York, it is of interest that the Colony of New York Act of 1767,¹⁰¹ passed December 24, 1767, had purported to adopt a large quantity of English legislation not extended to the Colony. The 1767 Act was in the following terms:

" WHEREAS divers Acts of Parliament passed since the Establishment of a Legislature in this Colony, have nevertheless been practised upon us extending to this colony; tho' they are not declared in the said Acts to extend to the Plantations: and sundry Acts have been since passed, which it would be expedient to extend to this Colony; And it being conducive to the common Weal, as well as agreeable to his Majesty's most gracious Intentions; that the Laws of this Colony should conform as nearly as Possible to the Laws of England; therefore and to prevent all Doubts and Scruples relative to former proceedings, whether Consonant to the Law as it stood before or since the passing such modern Statutes.

BE it enacted by his Excellency the Governor, the Council and the General Assembly and it is hereby enacted by the Authority of the same; that the several Acts of Parliament or so much thereof as are hereinafter particularly mentioned shall be deemed to be in full Force and Effect within this Colony:"

This Act was disallowed by Imperial Order in Council of December 9, 1770.

The Report of Richard Jackson, counsel to the Commissioners of Trade and Plantations reads in part,

"That nothing can be more obvious than that such a Cumulative Act deprives both the Crown and the Governor of that distinct approbation or dis-approbation that is essential to the Constitution of the Province, and to all similar constitutions and that the perusal of the Acts of Parliament (sic.) themselves, make it palpable that such an introduction by way of reference will frequently occasion great difficulties in the Construction, and those sometimes such as ought to be left to a Court of Justice to decide." 102

After rebellion, New York had made provision that the common law and British statutes as of April 19, 1775, were in force.¹⁰³ This situation prevailed between 1777 and 1788.

On the 15th April, 1786, the New York legislature passed "An act for revising and digesting the laws of this state," appointing Samuel Jones and Richard Varick inter alia

"to collect, and reduce into proper form, under certain heads or titles of bills, all the statutes, and lay the same bills before the Legislature of this state, from time to time, as they shall prepare the same; ...that such of them as shall be approved of by the Legislature may be enacted into laws of this state; to the intent that when the same shall be completed, then, and from thenceforth, none of the statutes of England, or of Great Britain, shall operate, or be considered as laws of this state." 104

Several bills were passed at the sessions in 1787 and 1788, and the following English statutes were said to be re-enacted:

Quia emptores, as "An ACT concerning Tenures," 20 February 1787; the statutes of Marlbridge and Gloucester, in "an ACT for preventing Waste," 30 January, 1787;

Servants imbezzeling (sic) their masters goods to the value forty shillings, or above ... as "An ACT declaring it to be a Felony in Servants to embezzle their Master's Goods," February 7, 1787; and

the Statute of Frauds, as "an ACT for the Prevention of Frauds." February 8, 1787; and

An act to reduce the rate of interest ...as "An ACT for preventing Usury," February 8, 1787. 105

Two other enactments are believed to be based on English Law:

"An ACT concerning Uses," and

"An ACT concerning Amendments and Jeofails." 106

Virginia was the first State to initiate a revisal-repeal system of dealing with the English statutes. The method is said to

have originated with Thomas Jefferson who worked on the revision statutes for Virginia between 1776 and 1779.¹⁰⁷ Virginia did not complete the work until 1792, however, in New York, the Legislature passed "An Act for the Amendments of the Law, and the better Advancement of Justice," on February 27, 1788. The first thirty-five sections "dealt primarily with procedural matters including the granting of bail," with three sections modifying or repealing certain technical real property practices." The final section reads:

And be it further Enacted by the Authority aforesaid,
That from and after the first day of May next, none
of the Statutes of England, or of Great-Britain, shall
operate or be considered as Laws of this State." 108

The New York Constitution of 1821 made reference to the amendment of law of the colony:

"Such parts of the common law, and of the acts of the legislature of the Colony of New York, as together did form the law of the said colony on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the congress of the said colony, ... which have not since expired, or been repealed or altered; and such acts of the legislature of this State as are now in force, shall be and continue the law of this State, subject to such alterations But all such parts of the common law, and such of the said acts or parts thereof as are repugnant to this constitution, are hereby abrogated." 109

The Act of 27 February 1788 was within this definition and therefore was continued, subject to the proviso in the constitution. However, the legislature further enacted "An ACT concerning the Revised Statutes," 10 December, 1828, which provided:

" 3. None of the statutes of England or Great Britain shall be considered as laws of this state; nor shall they be deemed to have any force and effect in this state, since the first of May in the year one thousand seven hundred and eighty-eight.

4. No statutes passed by the government of the late colony of New York, shall be considered as law in this state."

110

In 1833, in Bogardus v. Trinity Church, Chancellor Walworth, when considering a tenancy of the parties as tenants in common, created in 1705, referred to two English statutes of limitation in force in the colony of New York, in 1705, and said,

"... (These statutes have been) brought hither by our ancestors, who emigrated to this country from England, where these statutes were then in force, and settled in this state as an English colony. It is a natural presumption, and therefore is adopted as a rule of law, that on settlement ... they carry with them the general laws of the mother country which are applicable to the situation of the colonists in the new territory; ... The common law of the mother country as modified by positive enactments, together with the statute laws which are in force at the time of the emigration of the colonists, become in fact the common law, rather than the common and statute law of the colony. The statute law of the mother country, therefore, when introduced into the colony of New York by common consent, because it was applicable to the colonists in their new situation, and not by legislative enactment, became a part of the common law of this province"

111

Brown notes the logical consequence of this decision, the courts must consider the question of what English statutes could be considered to be in force as part of the common law of the state at the time it broke away from Great Britain.¹¹² What was the effect of the reenactment?

This matter was considered in the 1859 case Van Rensselaer v. Hayes, where the statute being considered was the Statute of Quia Emptores,¹¹³

"The fact that the statute we are considering was reenacted in this State in 1787, has no tendency to show that it had not the force of law prior to that time. Indeed, the contrary inference is nearly irresistible, when it is seen how it came to be reenacted. The compilation of statutes prepared by Jones and Varick, and

enacted by the Legislature, ... was made in pursuance of an act passed in 1786... The Statute of tenures was not, therefore, understood as introducing a new law, but was the putting into a more suitable form certain enactments which it was conceived had the force of law in the Colony, and which the constitution had made a part of the law of the State" 114

It would appear that, at least in New York, the term "common law" in the 1821 constitution included English statutes, which would justify the enactment made in 1828, which again, apparently ineffectually, sought to bar English statutes which were transmitted with the colonists and "so transmitted constituted the common law of the colonies ... and by constitutional adoption became the common law of this state" 115

Codification began in 1846 and was originally the work of Field. The Codes he prepared are the basis of New York's successful codification and his Code of Procedure which was the basis of practice for thirty years. He is credited with the success of the codification movement in America. 116

(c) Provision repealing English statutes without completion of statutory revision

The Northwest Territory, known as Ohio, continued the common law in 1784 and in 1795 the Governor and Judges of the Territory in their legislative capacity adopted substantially the provision made for Virginia in 1776, which stated:

"The common law of England, all statutes or acts of the British parliament made in aid of the common law, prior to the fourth year of the reign of King James the first (and which are of a general nature, not local to that Kingdom) and also the several laws in force in this Territory, shall be the rule of decision" 117

In 1779 the General Assembly of the Territory in two acts specifically repealed so much of the 1795 act relating to three English statutes. 118

After Ohio was admitted as a state to the Union, the General Assembly in 1805 passed an Act that repealed the provision made in 1795 and continued by the first state constitution, but 1805 enactment was in substantially the same terms. In 1806 the General Assembly repealed so much of the 1805 Act

"... as declared the common law of England and the statutes or acts of the British Parliament made in aid of the common law, prior to the fourth year of the reign of King James the First, to be in force as the rule of decision in this state" 119

In 1848, the State Supreme Court commented on this repeal,

"... The adoption of the law from Virginia and the two enactments of 1805 and 1806 by implication, necessarily show that the British statutes never had any force in Ohio save that derived from their adoption by the Legislature. In all cases where the British statutes contravene or change the common law and are not so incorporated into it as to have become part and parcel of the system, it is supposed they have no force within this State independent of Legislative enactments adopting them." 120

3. Lists of Statutes

The American colonies had used at least six methods of listing English statutes. As these generally preceded complete codification, they have been dealt with under that heading. The various methods used were:

- (1) legislative adoption of a list of named English statutes, or
- (2) of English statutes in force at a particular date;
- (3) partial reform involving the continuance of the general provision that common law and British statutes were in force, supplemented by a non-statutory list authorized by the legislature, or

- (4) supplemented by a non-statutory list published but not authorized by the legislature;
- (5) provision repealing English statutes upon completion of full statutory revision, or
- (6) without completion of full statutory revision.¹²¹

Listing therefore has been accepted as a suitable method to reduce the statutes to a manageable quantity. Each list has validity for another jurisdiction only if evaluated on the basis of the decisiveness of legislation, if any, giving the list force; the reception date; the date of the revision; and the materials included in the listing made. For example, the list does not always cut-off at the reception date.

(a) Alberta: Institute of Law Research and Reform

Alberta is another Canadian jurisdiction that has a reception statute of general application.¹²² The Institute of Law Research and Reform in Alberta has recently prepared a list of statutes which were in force in England at the reception date, 15 July, 1870. The list was prepared by Côté and an Index is being prepared. The last Report¹²³ of the Institute indicates that the list will be published shortly. Côté has himself anticipated the problem of validity for the Alberta list when he said, concerning reform

"Intermediate or partial schemes have been more common. One frequently adopted has been an official list of what English statutes are believed to be applicable and in force. Such lists usually have no legislative sanction whatever but the distinguished auspices under which they are prepared and the fact they are usually published as an appendix to the local volumes of statutes, have doubtless combined to give them considerable persuasive authority." 124

The Alberta list, when published, will be a contribution to the determination of law for those provinces and territories having the 15 July, 1870 reception date.¹²⁵ It should be noted however, that it will not affect the legislative ambit of the Federal government, and its effect on proprio vigore legislation in force in Alberta will depend on the enacting legislation, if any. There is the need if the list eventually is sanctioned by legislation to examine the terms of such statute carefully in order to avoid the situation which pertained in New York.¹²⁶

(b) Bahamas: Statutes expressly declared in force

The Declaratory Act, 1799,¹²⁷ expressly declared in force a list of statutes for the period from 1225 to 1787. The list has been subsequently increased and certain portions of the common law excepted by the revision of 1957. The enumerated statutes, as revised in 1957, now includes a number of scheduled acts which extend to 56 & 57 Victoria, the year 1893.¹²⁸ Each is reproduced as a Chapter in the Revised edition of the Laws, "and all Acts relating to the prerogative of the Crown and the rights and liberties of the subject" are included.

(c) Gibraltar: Statutes declared in force, with specific provision to alter

In 1962, Gibraltar enacted a list of 136 English statutes, the enactment replacing the previous application of statutes of general application in force in England December 31, 1883 and making provision that the list may be altered by resolution of the Legislative Council.¹²⁹

(d) Ghana (formerly Gold Coast): Statutes specifically excluded

The list in Ghana is the reverse provision: Acts which do not apply are listed. They were first listed in 1893 and since that time, many others have been added. The 1960 Constitution applies common law and customary law (as defined in the Interpretation Act 1960)¹³⁰ and "enactments in force immediately before the coming into operation of the Constitution". These enactments include, statutes of general application, which were in force in England on July 24, 1874, and United Kingdom Acts which applied proprio vigore, and both subject to:

- (1) the provisions of Ghana statutes, and
- (2) the official list of United Kingdom statutes which do not apply, as published in 1893 and as revised in 1951. It should be noted, however, that these lists are not complete, they have been added to by several Ghana statutes which exclude other statutes. 131

(e) Application of English Law Ordinance, Hong Kong

Hong Kong is concerned with a reception date of 5 April 1843. The Ordinance adopted is in the form of a list of English statutes which apply. The law of Hong Kong is complicated by the reception of Chinese law and perhaps for this reason the list is not an extensive one. 132

4. Complete Reform

Few colonies have had the courage to cut off access to the English statutes completely. Many of the listings made by the "old" colonies of North America were designed as preliminary steps to such provision.^{132A} Delimiting English Statutes that may be referred

to may be a sufficient complete reform.

Western Nigeria's reform started with such delimitation, and, has now proceeded to a complete repeal of all applicable English Statutes, save those enacted as Western Nigerian law. Victoria, Australia, has made a complete provision by combining several methods of listing and enactment in one magnificent and succinct reform statute.

(a) Western Nigeria

Nigeria was administered by Britain as the Colony and Protectorate of Nigeria until October 1, 1960, when it became independent. The Nigerian Independence Act, 1960, gave the Nigerian legislatures power to repeal in Nigeria any Imperial enactments.¹³³

Western Nigeria's 1959 statute revision was the work of the Law Revision Commissioner, Sir John Verity, who in 1959, after examining the English statute book from 1267 to 1899, published a collection of revised enactments which he considered to be in force in the Region.¹³⁴

The complete reform was effected in two parts:

1. the legislature enacted twenty-one laws of the Region which were those English statutes which it wished to retain. These were set out in full. Most, but not all, were pre-1900 statutes of general application. 135
2. the legislature enacted, to perfect the complete reform, the Law of England (Application) Law, which declared inter alia that thereafter, "no Imperial Act hitherto in force within the Region, shall have any force or effect herein."¹³⁶ The Statute made the usual provisions of a transitional nature as are found in such legislation.

Although the scheme is apparently complete, it is subject to the Federal jurisdiction of Nigeria, and the whole system embraces provision for customary law. Park has considered the future of the law in Nigeria, and his prediction is most interesting,

"The case law will comprise both common law and equity, and they will be Nigerian, not English, common law and equity. Of course their rules will, as a matter of history, have originated in England, but it may be expected that before too long the courts will cease to be required to apply the common law and equity of England, and will be able to evolve their own developments based firmly on their own as well as English decisions. Statutes will probably provide the most important single source of law, for they will have been the principal means of creating the unified system. It is likely that every statute in force will be an enactment of a Nigerian legislature. Imperial Orders in Council that extend directly to Nigeria will most certainly have been superceded by local enactments, and it is to be hoped that the other legislatures will follow the example of that of the Western Region and eliminate from their law also pre-1900 English statutes of general application. Customary law as such will cease to be a general source of law in its own right, though some of its rules will probably have been enacted in statutory form." 137

Mid-Western Nigeria was carved from Western Nigeria August 9, 1963.¹³⁸

Nigeria became a Republic on October 1, 1963.¹³⁹ In a Postscript to his Book, Park noted that with the coming independence, the Constitutions would probably change, but he apparently saw no reason to amend his prediction as to the future of the statute law.¹⁴⁰

(b) Victoria (Australia)

In Victoria, an exhaustive study undertaken by His Honour Sir Leo Cussen formed the basis for the Imperial Acts Application Act, 1922.¹⁴¹

Cussen had completed a revision and consolidation of the Victorian

Statutes in 1915, which had been accepted by the Legislature in globo.

He continued for seven years to study the reception of English statutes, examining the original English legislation, considering the texts of eminent legal authorities,¹⁴² the text of local legislation, and the interpretative case law.

The State of Victoria has a reception date as at 25 July, 1828, introduced by Imperial legislation. The reception statute was designed to clarify the matter of settlers' law, which was particularly complicated in Victoria as the original colony of New South Wales had been a penal colony with very limited civil rights.¹⁴³ The Statute declared,

"... 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" 144

The matter of applicability caused considerable litigation in Australia and it has been calculated that it was the subject matter of between one-quarter and one-third of the cases decided by the New South Wales Courts between 1825 and 1862.¹⁴⁵

The "Memorandum for the Honourable the Premier" submitted with the draft Bill states,

"The test whether any such Act is in force in Victoria is whether it could reasonably have been applied to the Colony in 1828, the date of the Act 9 Geo. IV c. 83"146

Until 1851, New South Wales had included Victoria in its territory, and the area was known as the Port Phillip District. On separation, the same law continued to be in force. Prior to the 1922 Statute, enacted law in force in Victoria comprised:

- (i) Imperial legislation introduced in 1828 into New South Wales;
- (ii) New South Wales legislation passed between 1828 and 1851;
- (iii) Victorian legislation from 1851 onward;
- (iv) Certain Acts of the Imperial Parliament before and since 1828 in its capacity as the supreme Legislature, which operate by paramount force and which are imposed by express words or necessary intendment and which are not subject to repeal or amendment by the Victorian Parliament; 147 and
- (v) Legislation of the Commonwealth of Australia.

The legislation of group (i) is the subject matter of the 1922 Statute.

Cussen conceptualized the problem in Victoria as to this body of received law,

"Over the operation of this body of law in Victoria the Parliament of Victoria has control, both as to its substance and form. It is not readily available in Victoria, except to those within reach of large libraries, and it is not characterized by any formal marks which readily distinguish it on the one hand from legislation so obviously arising out of purely English conditions as not to be applicable here, or on the other hand from some of the legislation which, being enacted by the Imperial Parliament in its capacity as the supreme Legislature, operates as of paramount force in every part of the Dominions falling within its scope, legislation which the local Legislature can neither repeal or vary...." 148

The general situation is the same as it is in Canada. Upon introduction, such law ceased to be "English Law" and was an enactment which could be repealed or amended by the local legislature, or by the Federal or Commonwealth legislature, each within their allocated powers. The Act divided such legislation into four parts:

Three receptacles for legislation were provided, in addition to the Part III consolidating provisions. These receptacles are:

- (1) Transcribed enactments: Clause 4,

provides that those Imperial enactments mentioned in the

First Schedule, to the extent that they are set out or transcribed in Part II, shall continue to have such force and effect as they now have.

The Report of the Select Committee said with respect to these,

"These enactments, it is believed, are now in force in this State, but for greater caution they are not specifically re-enacted, but are given whatever legal force and effect they had on the 31 December, 1921." 149

Part II of the Act reprints those portions of the Imperial Acts preserved by Clause 4, and listed in the First Schedule. The Explanatory Paper which accompanied the Bill provides the explanation for these,

"With respect to Imperial enactments not thus consolidated which may be held to be in force by virtue of the Act 9 George IV. c. LXXXIII., the Bill enumerates in chronological order in the First Schedule and sets out in alphabetical order in Part II the greater part of such enactments. In many cases these have been judicailly declared to be in force locally, and in the remaining cases it seems possible, applying judicial tests, that they would be held to be in force in Victoria." 150

(2) Repealed enactments: Clause 7,

repeals all Imperial enactments in force in England at the time of 9 Geo. IV c. 83 "so far as they are in force in Victoria and so far as the Victorian Parliament has power to repeal them," but there are excepted:

the transcribed enactments, mentioned in Clauses 5 and 6.

(3) Exceptions to the repealed enactments:

(a) Clause 5 exemption, embraces in three groups those legislative matters in which the State has no jurisdiction,

(i) as to legislation in force proprio vigore; 151

(ii) as to legislation relating to the security or safety of the sovereign "so far as they are in force in England at the passing of this Act"; 152

(iii) as to any "enactment relating to naval or military matters or to naturalization nationality or aliens or to copyrights

patents of inventions or designs or trade marks or to any matter with respect to which the Parliament of the Commonwealth of Australia has made or hereafter makes any law with which a repeal if effected by such section would be inconsistent." 153

- (b) Clause 6 exemption, which excepts those special enactments mentioned in the first column of the Second Schedule of the Act (except as otherwise provided in the Schedule) to the extent that they were in force in England on the 31 December, 1921.¹⁵⁴

Clause 7 is a general repeal for Victoria of all Imperial enactments not enumerated or set out in the Act, apart from the exceptions created by Clause 4, the transcribed enactments, and the exceptions created by Clauses 5 and 6.

Those enactments mentioned in the First Schedule (Clause 4) and the Second Schedule (Clause 6), may not be in operation in Victoria, and their effect is limited to whatsoever effect they had on the 31 December, 1921,¹⁵⁵ but nothing outside these Schedules may be invoked by the Courts of Victoria. The Explanatory Paper elaborates on the placing of an enactment in A or B,

"... generally ... the enactments in the First Schedule are those which are of the greatest practical importance and which at present can be conveniently transcribed. It is with respect to these that the greatest practical difficulty, caused by the inaccessibility of authentic texts, arises. It is not intended by what is just stated to suggest that the enactments enumerated in the Second Schedule are not of importance; it is intended merely to indicate that they do not call for practical consideration so frequently or so urgently as those enumerated in the First Schedule." 156

Provision is made in the Act to transfer Acts from one Schedule to another.

The final group of Statutes are those consolidated:

(4) Consolidated Provisions; Part III.

Clauses 10 to 100, inclusive, are consolidated and consolidating provisions which revise, consolidate, and enact as indigenous law the English Statutes therein as set out. The Explanatory Paper states with respect to this Part, that English legislation after the reception date was considered, and indicates that further reform may be effected.¹⁵⁷ A Table indicating the Repealed Enactments was placed at the end of the Explanatory Paper. The Explanatory Paper and the Table are not a part of the Statute. Six restrictions are placed on the Repealed Enactments Table, severely restricting its value for another jurisdiction, unless these were evaluated.¹⁵⁸

The Act received Royal Assent 25 May, 1923 and was declared to be in force at 1 September, 1923.

Victoria has continued the work of revision and consolidation. The Statute itself has been amended twice and further consolidation has taken place incorporating the transcribed enactments into such statutes as the Evidence Act, Juries Act, Justices Act, Police Offences Act, and the Property Law Act, all enactments being made in 1928.¹⁵⁹

Part III of the Act has been substantially repealed by consolidations and enactments made in 1928, namely,

Administration and Probate Act
 Constitution Act Amendment Act
 Crimes Act
 Employers and Employees Act
 Legal Profession Practice Act
 Marriage Act
 Police Offences Act

Religious Successory and Charitable Trusts Act, and the
 Supreme Court Act.

After this substantial consolidation of 1928, only five sections remain in Part III, which originally comprised ninety-one sections. Sections 42, 43, and 98 to 100 inclusive, which all relate to criminal matters, acts or offences remain.¹⁶¹

Further review of the Victorian Statute was undertaken by Gretchen Kewley. Her review was undertaken in June, 1973,¹⁶² for a period of two years; her mandate was to consider the 130 unrepealed Acts listed in the First and Second Schedules of the Imperial Acts Application Act, 1922, as amended.

Kewley made two Interim Reports, in the twelfth and twentieth month of her tenure. In a Progress Report as at December, 1973, she indicated that in addition to studying all the Victorian materials available, she had studied recent recommendations in connection with reform in England, New South Wales, Papua New Guinea and Hong Kong; the Report on the Imperial Acts in force in the Australian Capital Territory issued by the Law Reform Commission of that Territory in 1973 and the repeals effected in England by the Criminal Law Act, 1967 and the Statute Law (Repeals) Acts of 1969 and 1971. She also considered the Law Commission Reports which led to the passing of these Acts, with a view to determining whether the reason for repeal in England applied in Victoria.¹⁶³

Kewley's final Report was presented 11th June, 1975. The Introduction notes that she has examined the 130 Imperial Acts which comprised her mandate, which dated from 1267, required examination. She discussed these under alphabetically arranged subject heads, and reported

"Each unrepealed Act in the First and Second Schedules has been examined individually to determine its present relevance in the law of Victoria, and a recommendation has been made as to its retention or repeal based on the examination." 164

The Schedules to Kewley's Report are from the 1922 Act and comprise, in effect, a Chronological Index to the Kewley recommendations and a short statement of her recommendations. The Statutes are considered individually in the Report in alphabetical order. However, in some cases groupings have been made.

She states the object of her review is

"to clear away as much as possible of the dead wood recommending for repeal those enactments which appear meaningless, unnecessary or uncertain in their application or adequately covered by present-day Victorian law, and recommending for retention only those English Acts which are undoubtedly in operation in Victoria, or with which the Victorian law is so inextricably bound, that to repeal them would be impossible." 165

Those which are recommended for retention mainly relate to Criminal law.

In addition to the retention of these Statutes, at least, Kewley has dealt with the others on the basis of

- (a) their repeal depends on a Policy Decision;
- (b) they are unrepealable in that Victoria does not have the power to repeal proprio vigore legislation;
- (c) several it is suggested should be replaced in whole or part;
- (d) the balance repealed. 166

Kewley also considered the Part II sections of the 1922 Statute which remain in force. 167

Sections 42 and 43 provide for certain gaps in Part II and Kewley advises that the future of these sections depends on the form a future Act may take.

Sections 98 to 100 inclusive relate to the adoption for Victoria of the English Piracy Act, 1837; this must be preserved to operate in conjunction with the two Piracy Acts of the Second Schedule, until replaced by modern legislation;

Preservation of the death penalty for certain offences (s. 99) 168, and the common law offences of 7 & 8 Vict., c. 24 (1844, Imp.) as to badgering, engrossing, forestalling (s. 100) is a policy decision to be decided by the legislature.

The Victorian material has been developed at length as it is the most exhaustive study that has been made. The resource material has been given greatest consideration and includes what is apparently all the available authorities. If a study were proceeded with in British Columbia, the Victorian material and the material referred to by Kewley would provide a great deal of authoritative scholarship as to individual statutes for the period before 1828, and indeed as to the situation of the law of England at a much later date. The 1922 Statute has formed the basis of study for several of the reports which were considered by Kewley.¹⁶⁹

(c) The legacy of the Victorian legislation

- (i) Report of the Law Reform Commission of New South Wales on the Application of Imperial Acts in New South Wales (L.R.C. 4) November, 1967

The Law Reform Commission made this Report to the Attorney General pursuant to a reference by him to the Commission in the following terms, directing the Commission

"To review all Imperial Acts in force in this State (as a first step towards general Statute Law Revision) and so far as practicable, the preparation of legislation to repeal them as Imperial Acts and re-enact such part of them as should remain part of the law of New South Wales." 170

The Report of the Commission to the Attorney General reviews the mandate, the history of the Colony, the substantive declarations in the reception statute and advises it has confined their study to those Imperial Acts in force, or possibly in force, in New South Wales by virtue of the Imperial Act 9, Geo. IV c. 83 s. 24, save for some incidental matters relating thereto. They excepted consideration of the other two groups of statutes in force in New South Wales:

"(1) ... by express words or necessary Intendment and by virtue of the paramount legislative power of the Imperial Parliament (for example the Merchant Shipping Act, 1894); "

They did however, deal with certain of these in Appendix III and provided for them in section 6.

"(3) ... because they have been adopted by legislation of Real Property Limitation Act, 1833). 171

The Report contains a brief summary of the legal interpretation that has been placed on that Statute, noting that the Report has been prepared on the basis that the following cases correctly state the law:

"for practical purposes it may be taken that Chief Justice Forbes" view "that the section did not introduce any new principle but was merely declaratory of the common law" was correct, as Lord Watson, in delivering the opinion of the Privy Council in *Cooper v. Stuart* (1889) 14 A.C. 286, treated New South Wales as an ordinary settled colony."

... so far as the same can be applied, that is, "can be reasonably applied". The test applicable was restated by the High Court in 1905, in *Quan Yick v. Hinds*, 2 C.L.R. 345, as being whether the particular Imperial Act (or the part of it which was in question) was suitable or unsuitable in its nature to the needs of the Colony, and that the question must be determined by a consideration of the condition of the Colony in 1828 (per Griffith C.J. at p. 356). 172

The resource material of the Commission is referred to,

"Imperial Statutes in force in New South Wales"
prepared by the late Mr. H.B. Bignold of the New
South Wales Bar, ...

the Victorian statute known as the Imperial Acts
Application Act 1922, prepared by Sir Leo Cussen,
a Judge of the Supreme Court of Victoria, as a
result of what has been described as "years of
patient and erudite labour".

Before their time Alexander Oliver, parliamentary
draftsman of New South Wales, had brought out what
he called "The Statute Index" in 1894. This included
a "Chronological Table of Statutes of the Imperial
Legislature (not specifically adopted by local Acts)
which relate to the Colony of New South Wales, or
affect the Colony as part of Her Majesty's Possess-
ions or Dominions; also of those judicially decided
or presumed to be in force in New South Wales.

This table listed 214 statutes up to the time for the
period from 9 Henry III c. 29, the Great Charter
of Henry III of 1225 (a re-issue of Magna Carta of
1217), up to the passing of 9 Geo. IV c. 83 173

Appendix IV of the Report is a draft Bill.

The Imperial Acts Application Act, 1967,^{173A} provides four
receptacles for Acts (as did the Victorian legislation):

(1) substituted enactments: section 5

The provision in Part III is substituted for Acts
as listed in First Schedule.

These are described in Report Appendix I, as

- A. Acts in force which should be continued in force
or substitution, either wholly or in part.
SUBSTITUTED ENACTMENTS are those which contain
provisions the substance of which (so far as they
were enforced in England, 25 July 1828) should
continue to be law. The suggested new provision will
be subject to the provisions of State Acts, which
shall prevail. 174

This section and Part III correspond to the Victorian
Act, Clause 4 and Part II.

(2) preserved Imperial enactments: section 6

Those listed in Part I of the Second Schedule and the portion mentioned in the first column of the Imperial enactment mentioned in the second column of Part II of the Second Schedule which were in force in England on the 28 July, 1928) is declared to have remained in force, to be in force and "shall from the commencement of this Act be in force in New South Wales and not be repealed by s. 8.

These are described in Report Appendix I as

- B. Those which it is impracticable to enact substituted provisions but which it is desirable to continue in force in their ancient form:

Constitutional Enactments and also provisions as to treason, piracy and Imperial Acts before 25 July, 1828, applying irrespective of the reception statute. 175

(3) Enactments not affected by repeal: section 7

- (a) "or any other Imperial enactment which independently of the provisions of the Imperial Act 9 George IV, Chapter 83, is made applicable to New South Wales by the express words or necessary intendment of any Imperial enactment."

This section corresponds to the Victorian Act, Clause 7.

- (b) Those listed in the Third Schedule, which fall within the definition of (a) if the word "other" is removed. 176

The Statutes before 25th July, 1828, applying irrespective of 9 George IV, c. 83, Appendix III, before discussing these, explains,

"Although the Commonwealth by the adoption in 1942 of the Statute of Westminster 1931 has been able to remove for itself the legal limitations of colonial status which occasionally fettered the operations of Colonial or Dominion Legislatures, the States are still subject to some of the legal fetters of the colonial era, although no doubt for practical purposes the Australian States are now autonomous political entities so far as the British Government is concerned (Castles, Limitations on the Autonomy of the Australian States, Public Law, 1962, p. 176). The States are legally still bound by

Imperial Statutes before or after 1865, the year of the passing of the Colonial Laws Validity Act, which apply to them by paramount force -- by express words or necessary intendment"

SUBJECT to recommending the repeal of those listed in the Third Schedule which must be effected by the Imperial Parliament (or by the Commonwealth if within its ambit of jurisdiction.

Schedule III Statutes are as follows:

Sec. 7

Enactments applying irrespective of 9 George IV c. 83

(A) Criminal Law Enactments.					
(1698-9)	11 William III c. 12	..	..	..	Crimes by Governors of Colonies.
(1772)	12 George III c. 24	..	..	..	The Dockyards, &c., Protection Act, 1772.
(1802)	42 George III c. 85, s.1	..	..	..	The Criminal Jurisdiction Act, 1802.
(1812)	52 George III c. 156	..	..	..	The Prisoners of War (Escape) Act, 1812.
(1824)	5 George IV c. 113	..	..	..	The Slave Trade Act, 1824.
(B) Miscellaneous.					
(1813)	54 George III c. 15, s.4.	..	..	..	The New South Wales (Debts) Act, 1813.
(1819)	59 George III c. 60	..	..	..	The Ordinations for Colonies Act, 1819.
(1821)	1 and 2 George IV c.121,ss.27-29				The Commissariat Accounts Act, 1821.

This is a deviation from the Victorian Act, s. 5.

177

(4) Repealed enactments: Section 8

repeals all Imperial Enactments (commencing with the Statute of Merton, 20 Henry III A.D. 1235-6) in force in England at the time of passing 9 Geo. IV c.83 "so far as they are in force in New South Wales", but they are excepted the provisions of sections 6 and 7.

178

This section corresponds to the Victoria Act. No. 3270, Clause 7.

The Report deals with many matters relating only to New South Wales, including,

- (a) the adopted English statutes. A list of these statutes was given in Oliver's Statute Index of 1874, and numbered 214, to 1874. 179
Appendix II, which provides the reasons for repeal of the English statutes in force reads in part,

"We have not included Imperial enactments which have been held not to be in force in New South Wales, nor have we included those which have been repealed expressly or (in all cases) by implication. In some instances repeal by implication results from the same subject matter being dealt with by local legislation. An example is the Imperial Act 14, Geo. III c. 78 (Fires Prevention (Metropolis) Act, 1774) which is discussed in Hazlewood v. Webber, 52 C.L.R. 268 at pp. 275-6..." 180

- (b) the matters involving government policy on which the specific direction of the Attorney General was sought:

- "(a) The repeal of the residue of section 4 of 29 Car. II c.3. (The Statute of Frauds, 1677).
(b) Laws relating to privileges of Parliament.
(c) The repeal of 1 Geo. I St.2. c.5. (The Riot Act, 1714).
(d) Laws relating to Habeas Corpus.
(e) Laws relating to lotteries and gaming.
(f) Laws relating to the Sheriff.
(g) Laws relating to disturbance of religious worship and Sunday observance." 181

- (c) the effect on present legislation in New South Wales is then considered.

The following matters are of particular interest for other jurisdictions:

- (d) section 9, the savings clause which is drawn in conformity with the savings clause of s. 38 of the Interpretation Act, 1889 (Imp.) and not the "Westbury savings", is explained,

"A similar saving clause was adopted in the three Statute Law Revision Acts passed in New South Wales in 1898, 1924 and 1937. The Commissioner for

the Consolidation and Revision of the Statute Law, His Honour, Judge Heydon, in his memorandum to the Bill of 1898 said "Revision Acts of this character have been periodically prepared and passed in England for now a number of years back. To prevent the possibility of any injury being done by these repeals, a saving clause very carefully drawn has been inserted in every Revision Act, and has been found, under the test of actual use, to be quite sufficient for its purpose. It has, therefore, been placed in this Bill." This clause was also adopted in section 7 of the Imperial Acts Application Act 1922 of Victoria. (See Sir Leo Cussen's evidence. Victorian Statutes, 1922, p. 106.)

The clause embodying the "Westbury savings" apparently has come to be considered to go too far, it having been argued that the savings may operate to nullify the effect of a particular repeal. (Cf. Woodfall's Landlord and Tenant 24th Edition (1939), p.453.) The Westbury savings were discussed by Mr. C.H. Chorley, Parliamentary Counsel, in his evidence before the Joint Select Committee of the House of Lords and the House of Commons in May, 1958. (See 7th Report of the Joint Committee on Consolidation and Statute Law Revision Bills for the Session 1957-58: H.L. Papers 1957-58, Nos 5-VI, 108-I and H.C. Papers 1957-58, No. 209-I, cited Hals, op.cit., p.474.) It was then decided to dispense with the Westbury savings and to rely on the general provisions in the Interpretation Act, 1889, section 38, and accordingly in the Statute Law Revision Act of 1958 and later Statute Law Revision Acts, there is no special saving clause.

In justice to the memory of Lord Westbury it might be mentioned that a note to the Bill for the Statute Law Revision Act, 1863, contains the following: "The early statutes stand in a peculiar position with relation to modern law. Many of their provisions remain, in some sense, embodied in the existing law, notwithstanding that their immediate subject matter may no longer exist. (To mention one instance: 6 Ed.1 Stat. Gloucester, c.5, respecting the Writ of Waste, forms part of the existing law as to waste, although the Writ of Waste has been abolished.) This peculiarity has always been borne in mind in the compilation of the schedule and the very special terms of the saving in the repealing clause of the Bill have been adopted in order to preclude any apprehension of a substantive alteration of the law being produced by the repeal of any of these early statutes."

Section 8 of our Interpretation Act of 1897

resembles section 38 of the English Interpretation Act of 1889 except that it does not contain paragraph (a) of section 38 of the English Act, which provides that unless the contrary intention appears the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect. Such a provision is essential in a Bill such as this. Accordingly the provisions of section 38 of the Act of 1889 have been adopted in the Draft Bill.

The "Westbury clauses" are, we think, inappropriate in the Bill for the following reasons -

- (1) The Bill is intended to make substantial alteration in the law (for example, by the repeal of the remaining provisions of the Statute Law Revision Act is intended, in general, merely to cut away statutory material which has ceased to have a present effect.
- (2) The wider the saving clauses, the greater the problems will be of ascertaining the extent of the repeal.
- (3) The wider the saving clauses, the more need there will be to refer to the repealed Imperial Acts. The utility of the Bill will be measured by the extent to which it makes such reference unnecessary.
- (4) If, despite the attention which we have given to the problems, the repeals turn out to have gone too far, the position can be restored by proclamation under clause 11. This is better than reliance on the necessarily vague words of a saving clause.

Clause 9 (2) (c) will preserve the case law which may be originally based wholly or partly on any of the repealed Imperial enactments.

- (e) Following the example of Sir Leo Cussen, we have included in clause 11 of the draft Bill a provision to empower the Governor in Council to revive any Imperial enactment which the draft Bill would repeal. The purpose is to enable any accidental omission from the First or Second Schedules to be cured without further legislation being required.

182

The statute was passed in 1969 and was used extensively in the Australian Capital Territory Report.

- (ii) Report of the Law Reform Commission of the Australian Capital Territory and Supplementary Report, 1973;

This report was made to the Attorney-General of the

Commonwealth is dated the 25th day of August, 1972. The referral here was made on 17th September, 1971.

"A review of the Imperial Acts that still apply in the Australian Capital Territory with a view to recommending --

- (a) which of those Acts in their application to the Australian Capital Territory should be repealed;
- (b) which should continue to apply in the Territory; and
- (c) which should be replaced by legislation in more modern form."

183

The following statements of the Commission, which consisted of the Honourable Mr. Justice Blackburn as Chairman, and N.M. Macphillamy and Professor P.S. Atiyah as Members, are material to appraising this Report,¹⁸⁴

- (a) concerning the resource material used;
 - (1) the work of Sir Leo Cussen in Victoria
 - (2) the report of the Law Reform Commission of New South Wales

"We have relied greatly on these two works, particularly the latter. We are satisfied that the list of Imperial Acts which were treated by the New South Wales Commission as in force in New South Wales when that Commission reported, can be accepted as a substantially exhaustive list of such Acts passed before the Australian Courts Act 1828. We have found very few Acts indeed which that Commission did not mention, and we do not believe that there are any ... of any importance."

- (3) some uncompleted work done in this field by officers of your Department before the establishment of the Law Reform Commission of the Australian Capital Territory

- (b) as to the objects of the reference,

"We have assumed that the simplification of statute law, and the reduction of the places where such law is to be found, are desirable ends in themselves, and that all applicable Imperial Acts for the

retention of which no sufficient reason can be shown should therefore be repealed. The legislative schemes of both the I.A.A. Act of 1922 (Vic.) and the I.A.A. Act of 1969 (N.S.W.) are based upon this principle; they provide for the repeal (with the necessary saving clauses of all applicable Imperial Acts with certain express exceptions. We recommend the adoption of the same principle This obviates the necessity for absolute precision We do not claim such a degree of precision, but we are confident that none of any significance has been overlooked. We also believe that we are not recommending the repeal of any Act the effect of which there is any substantial reason to preserve"

(c) summarizing the law in force in the Capital Territory,

(i) enactments in force by virtue of their own express

provisions or by necessary intendment, and of the paramount

power of the successive Imperial Parliaments. The

list at present includes, for example,

the Herbalists Act 1542,

the Dockyards Protection Act 1772

the Commonwealth of Australia Constitution Act 1900, and the Statute of Westminster 1931.

The Law Reform Commission of New South Wales mentioned some

of these Acts incidentally, pointing out that they were

unrepealable by the Parliament of New South Wales, but

"... ignored, for some reason, all such Acts passed after the Australian Courts Act of 1828. But they are repealable by the Commonwealth Parliament, and may thus, by virtue of an Ordinance be rendered inapplicable to the Australian Capital Territory We have therefore tried to find and consider all such Acts passed before 3 September 1939. This date is that on which s. 4 of the Statute of Westminster 1931 came into force in regard to Australian law; see s. 10 of the Statute, and s. 3 of the Statute of Westminster Adoption Act 1942 (Commonwealth)...." 184

(ii) After 3 September 1939, the United Kingdom Parliament

is competent to legislate for the Commonwealth, provided the Commonwealth requests and consents to the enactment of the legislation in question. The Commission said,

"If any such legislation has been so passed, it would obviously not be fit for repeal in the Australian Capital Territory. We therefore recommend that the provision effecting a 'residuary repeal' should be so expressed as not to apply to Acts passed on or after 3 September 1939"; 185

(iii) which came into force upon the foundation of the

Colony, or which came into force by virtue of s. 24 of the Australian Courts Act, 1928 and

1. having come into force in the United Kingdom on or before 25 July 1828 and
2. were still so in force immediately before 1 January 1911, and came into force in the Australian Capital territory by virtue of s. 6 of the Seat of Government acceptance Act, 1909 and
3. have not since 1 January 1911, by legislation, been made inapplicable to the Australian Capital Territory.

(d) as to statutory interpretation,

(i) the doctrine of implied repeal:

This doctrine as exemplified in Hazelwood v. Webber¹⁸⁶

and expressed as follows:

"The repetition of this section by the colonial legislation operated as an implied repeal of the British enactment so far as it applied to New South Wales...."

The Report notes that it may be confined to the repetition in colonial legislation of the words of an Imperial enactment which

is in force by virtue of the common law rule or the Act of 1828. They said,

"Moreover, the principle is a curious one. The idea of earlier legislation being repealed by later inconsistent legislation is well understood; this is the opposite -- repeal by later consistent legislation. Whether, in any given case, the principle applies may depend on whether the words of the earlier Act are 'transcribed', 'repeated without alteration' or 'exactly reproduced' in the later Act. The expressions quoted are all used in the principal judgment in Hazelwood v. Webber. But in Reid v. Fitzgerald (1926) 48 W.N. (N.S.W.) 25, Harvey, C. J. in Eq. applied the same principle where there was 'an exact reproduction ... save for the accidental and immaterial omission of three words'. This judgment was referred to with approval by the High Court in Hazelwood v. Webber. If, therefore, the principle is not confined to the case of absolutely identical wording, it may be sometimes arguable whether or not a repeal has taken place. But the point is probably not of importance in view of the course we recommend, that of the repeal of all Imperial enactments, with express exceptions." 187

(ii) the practical problems of one compendium statute

The two options of one compendium statute, as opposed to amending each relevant Ordinance is discussed. They considered the statute in the form provided in New South Wales, which contains all replacement provisions; and in the form of lists and reference to the compendium statute in tables and indices. The matter was left for the draftsman to decide, although some suggestions as to the form of statute are set out in Appendix 3 to the Report.¹⁸⁸

(e) as to classification of statutes

The Report has three Appendices, of which the first two are repositories for statutes. They are,

Appendix 1 Part A, Acts to be preserved

These Acts are left as they are and are not restated in modern terms.

(1) some are Acts of major constitutional significance and of

historical significance, which are rarely cited but should nevertheless remain in force, such as Magna Carta and the Commonwealth of Australia Constitution Act, 1900;

- (ii) some are preserved to avoid a difference in law between the Australian Capital Territory and that of the States in a field of law which applies to all States and Territories. In such cases, if appeal is thought expedient, it would be appropriate to do so throughout Australia. Such an Act is the Merchant Shipping Act, 1894;
- (iii) some are preserved as they relate to topics on which new legislation is under consideration (the example given is criminal law) or is badly needed and the old law is of some complexity (the example given is limitation of actions).

Appendix 1 Part B, Acts to be repealed and replaced

These Acts are to be repealed and replaced by provisions in modern terms. The list is similar, but not identical, to the Appendix 1(A) list of the New South Wales Report.¹⁸⁹

Appendix 2, Acts to be repealed

This Appendix is a complete list of all Imperial Acts which are or may be in force and which are recommended for repeal. These should cease to be applicable.¹⁹⁰

(f) recommendations for legislation

- (i) the savings clauses of the new South Wales Report are adopted.
- (ii) 19 Substituted Provisions are listed for attention.

The Commission confined itself to the task of removing what it deemed obsolete, while retaining the law in its present sense. It refrained from recommending reforms which touched upon policy but considered anticipated changes in the law in the Capital Territory. As a result of its work, it isolated areas which require consideration by the Commission, including the law of limitation of actions and of real property conveyancing, concerning which separate submissions will be made. In one or two cases repeal or other amendment having an effect wider than merely in the Australian Capital Territory is recommended.

A further Report of 24 January 1973 dealt with three Acts which had been omitted in the first Report.

- (iii) An unpublished report on English Statutes in Papua New Guinea by Professor R. O'Regan, Professor of Law, Queensland University, formerly of the Monash Law Faculty
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This Report is apparently based on the Victorian legislation. In addition to the many problems occasioned by the complicated legislative history of Papua New Guinea which was first attached to Queensland and later to the Australian Federation, and is now an independent State within the federation, Papua New Guinea has the matter of traditional law of the aborigines to accommodate.¹⁹¹

FOOTNOTES (Part III)

1. Reynolds v. Vaughan, supra, n.72, p. 98.
2. Joseph Chitty, Collection of Statutes, with notes thereon, intended as a Circuit and Court Companion, First edition: London, 1829, Second and Third editions, W. N. Welsby and Edward Beavan, ed. London, S. Sweet, both editions 4 vols. 1854 and 1865. Further editions by other editors, known as "Chitty's Statutes".
3. Supra, n. 12, p. 20.
4. Maurice Eugen Lang, Codification In the British Empire and America, (Amsterdam, H.J. Paris, 1924,) p. 28.
5. Courtenay Ilbert, The Mechanics of Law Making, New York, Columbia University Press, 1914, p. 25
6. Loc. cit. Sir Nicholas is the Father of Sir Francis Bacon.
7. Ibid., p. 26.
8. Loc. cit., C.T. Carr, "Revised Statutes", (1929) 45 Law Quarterly Review, p. 168; Donald Veall, The Popular Movement for Law Reform 1640 - 1660, Oxford, Clarendon Press, 1970, p. 70ff.
9. Ilbert, loc. cit.
10. Veall, op. cit., p. 79; Ilbert, op. cit., p. 27;
 Edward Foss, Biographica Juridica, a Biographical Dictionary of the Judges of England, 1066-1870 (London: John Murray, 1870) (Photostatic reprint Germany Meisenheim 1971):
 Sir Matthew Hale was C.J.K.B. 1671-1676. His Analysis of Law is said to be the basis of Blackstone's Commentaries:
 Ashley Cooper, Lord Shaftesbury, was originally a Royalist but later one of Cromwell's Chancery Judges. King Charles is said to have described him as "a chancellor that was master of more law than all his judges ... and more divinity than all Bishops".
11. Joseph H. Beale, "The Early English Statutes", (1921-2) 35 Harvard Law Review, p. 519ff.
 Laws prior to Magna Carta have been printed by command of King William IV, Ancient Laws and Institutes of England, in 2 volumes, prepared under the direction of The Commissioners on the Public Records of the Kingdom, 1840.

12. Ilbert, op. cit., p. 28; Carr, op. cit., p. 169-170.
13. Ilbert, loc. cit.
14. Ibid. O. Ruffhead was formerly associated as editor with J. Cay of the Statutes at large from Magna Carta to 13 Geo. III inc., in 9 volumes published 1758-73 of which Ruffhead did v. 7-9. Serjeant Runnington who edited Hale's Common Law, also edited the Ruffhead edition 1786.
15. Chronological Table and Index of Statutes, Fourth Edition 1235 - 1877, Preface.(1878) London, Eyre and Spottiswoode Her Majesty's Printers, 1878. 1st ed. , 1870, various editors. The Preface to the various editions are most valuable resources as to work done to improve the Index., p. vii(4th ed.)
16. Acts and Ordinances of the Interregnum 1642 - 1660, 3 volumes. Collected and edited by C.H. Firth & R. S. Rait for the Statute Law Commissioners, London, His Majesty's Stationary Office, 1911; (photoreproduced Florida, Wm. W. Gaunt & Sons, Inc.,1969.)
17. Ilbert, op. cit., p. 42; Cecil T. Carr, "The Statutes Revised, 1950", (1951) 67 Law Quarterly Review, p. 486.
18. Carr (1951), loc. cit.; Carr (1929), supra n.8, pp.176, 1777.
19. Loc. cit.
20. Carr (1951), loc. cit.
21. J.E. Côté, "The Introduction of English Law into Alberta", (1964), 3 Alberta Law Review, 262 @ p. 266, n. 27, re first Index.
22. Supra, n. 15.
23. The List of Statutes prepared by Côté is to be published by the Alberta Institute of Law Research and Reform. Alberta, Institute of Law Research and Reform, 1975-6 Report. July, 1976,p.26.
24. Ilbert, op. cit., p. 32.
25. 26 & 27 Vict. c. 125, (Imp.) 28 July, 1863. This is the origin of the "Westbury savings" clause. This clause is discussed in terms of modern reform. Cecil T. Carr, "The Statutes Revised, 1950" (1951), 67 Law Quarterly Review, 485, n. 4 and New South Wales Report, supra, p.168.

- 26 The Schedule referred to in section 1 provides;
 "This Schedule is to be read as referring to the Edition prepared under the Direction of the Record Commission, intituled "The Statutes of the Realm; printed by Command of his Majesty King George the Third, "in pursuance of an Address of the House of Commons of Great Britain. "From original Records and authentic Manuscripts". The Dates and Titles of the Statutes and Acts are taken from that Edition; the Chapters (before the Division into separate Acts) are described by the marginal Abstracts, and the Enactments cited in terms are cited from the Translation into English, or the original English, given in that Edition.
- The Repeal by the present Act of a part of a Statute or Act set out or referred to in the Terms of the Translation given in that Edition is to operate on the original Latin or Norman-French of which the Translation is set out or referred to, as if the Original itself were in like manner set out or referred to.
- A Description or Citation of a portion of a Statute or Act is inclusive of the Words, Section, or other part first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end, of the portion comprised in the Description or Citation.
- The Edition of Ruffhead referred to is that by Serjeant Runnington, 1786. "
- 27 Carr, op. loc. cit.
- 28 Ilbert, op. cit., p. 39. A summary of the work of consolidation is given, p. 36-40.
- 29 Lang, op. cit., p. 58.
- 30 Bills of Exchange Act, 1882; 45 & 46 Vict. c. 61 (Imp.)
Partnership Act, 1890, 53 & 54 Vict. c. 39 (Imp.)
Sale of Goods Act, 1893, 56 & 57 Vict. c. 71 (Imp.)
Company Law Consolidation Act, 1908, 8 Ed. 7, c. 69;
 Now repealed (1948, 11 & 12 Geo. 6 c. 38 & 1929, c. 23.)
- 31 Lang, op. cit., p. 31, 62.
 Jeremy Bentham (1748 - 1832), parliamentarian, referred to by Sir Courtenay Ilbert as "perhaps the greatest of law reformers".
- 32 René David and John E. C. Brierley, Major Legal Systems in the World Today (An Introduction to the Comparative Study of Law), London, Stevens and Sons, 1968, English Edition, p. 50. (First Edition, René David, published in France, 1964.) They refer to the failure of Prussian codification in 1794 as to the

former and to the Austrian Code of 1811 as having limited expansion. Britain falls in the first grouping, not being "unhampered by the past and willing - even at the expense of the privileges of an older order to establish the new principles of justice, liberty and dignity of the individual which, politically, the Natural Law School maintained must be the basis for society".

- 33 2 Wm. IV, c. 45
- 34 As given by Ilbert, op. cit., p. 29.
- 35 Lang, op. cit., pp. 21-2, Lord Brougham addressing the House of Lords on law-making.
- 36 Ibid., pp. 47-52, 88. Lang explains the extension of the Criminal Code to other jurisdictions by colonial legislation.
- 37 Ibid., p. 55, and at p. 66 & 67 as to influence in Canada in respect of the Criminal Code.
- 38 Ibid., p. 57, quoting from Hansard, vol. CCXLV, p. 327.
- 39 12 & 13 Geo.VI c. 33, Consolidation of Enactments (Procedure Act, 1949 (Imp.))
- 40 The Law Commission Act, 1965
- 41 First Programme of the Law Commission, London, H.M. Stationery office, 1965, p. 3-4.
- 42 The Law Commission (Law. Comm. No. 71) Tenth Annual Report 1974-5, p. 3.
- 43 Supra, n. 44, p. 95
- 44 Paul Gérin-Lajoie, Constitutional Amendment in Canada, Toronto, University of Toronto Press, 1950, p. 129ff.
- 45 F.R. Scott, "Forgotten Amendments to the Canadian Constitution, 1942, Canadian Bar Review, vol. 20, p.339ff.
- 46 Infra VI, 3, (b), p. 154.
- 47 Infra VI, 2, (b), p.151.
- 48 Infra VI, 2, (c), p.153.
- 49 Infra VI, 2, (c), p.151.

- 50 Brown, supra (n.9 p.93) passim; Côté 1977, supra (n. 5 p. 19), p. 85.
North Carolina infra VI, 2 (a), p. 142.
New York infra VI, 2 (b), p. 144.
- 51 Infra, VI, 1 (b), p. 132
Cote, op. cit., pp 88-9.
W.R. Jackett, "Foundations of Canadian Law in History and Theory,". Lectures delivered to Faculty of Law, Queens University, Kingston, Ontario, March 26, 27, 1962 and published in O.E. Lang (ed.), Contemporary Problems of Public Law in Canada (Toronto: University of Toronto Press, 1968, p. 1)
- 52 Seven jurisdictions in Canada have a reception statute of general application: British Columbia, Ontario, Manitoba, the North-West Territories and the Yukon Territory, Saskatchewan and Alberta.
- 53 Supra p. 9.
- 54 Report of Theodore Davie to His Honour Edgar Dewdney, Lieutenant Governor of British Columbia, supra (n.115, p. 101).
- 55 Ibid., p. 4.
- 56 The Revised Statutes of British Columbia, 1911
Published by Authority; Arranged chronologically by the Commissioners for the Revised Statutes, 1911 (Victoria, B.C.: William H. Cullin, Printer to the King's Most Excellent Majesty, 1913).
- 57 Ibid., p. 3.
- 58 Ibid., p. 317.
- 59 As enactments of British Columbia.
- 60 The quotation is from the explanation infra n. 57.
- 61 Supra n. 58.
- 62 13 Geo. V. c.71 (1922, B.C.).
- 63 v. Appendix A.I., infra p. 209.
- 64 S.B.C. 1969 c. 14 (B.C.) July 1, 1969.

65. K.B. Farquhar, "The Law Reform Commission of British Columbia, A Perspective" (May, 1976) 3 The Dalhousie Law Journal, 275 @ p. 280. Mr.
 Arthur Close, Counsel to the Law Commission is the person presently concerned. The matter is dealt with in the 1972 Report of the Commission, recommending the revision-repeal
66. Jackett, op. cit. (method. (Probably the method they
 (would adopt would eventually be
67. R.S.O. 1970, c. 367. (in the form of the Victoria Act.)
68. 32 Geo. III, c. 1 (U.C.)
69. 2 Edw. VII, c. 13 (Ont.), 17 March 1902, The Revised Statutes of Ontario, 1897, volume III (Toronto: Printed by L. K. Cameron, Law Printer to the King's Most Excellent Majesty, 1902), pp.vi. ff.
70. Ibid., p. iii, Proclamation, 29 May, 1902.
71. Ibid., Schedule A, p. 3899; Schedule B, p. 3903.
72. Loc. cit., p. 3899.
73. Ibid., p. 3903.
74. 2 Edw. VII, c.13 (Ont.) s. 12, p. ix.
75. Ibid., p. vii.
76. Supra n. 69, p. 3915.
77. Ibid., Part III, Appendix, p. v.
78. Ibid., p. v.
79. Ibid., Part IV, Appendix p. xliii. The proviso is printed immediately following the title of the Part.
80. "Consolidation of Imperial Statutes in force in Ontario" (1902) 22 Canadian Law Times 62, and "Revised Statutes of Ontario, vol. III," (1902) 38 Canadian Law Journal, 65 @ 66.
81. Lang, supra n. 4, p. 67ff as to the codification of the Criminal Law in Canada.

- 82 Richard F. Gosse, Q.C. LLB. D.Phil., formerly Counsel to the Ontario Law Reform Commission and later a Commissioner of the Law Reform Commission of British Columbia, is presently a Professor of Law, University of British Columbia.
- 83 Ontario Law Reform Commission Act, 1964, c. 78 (Ont.) assented to May 8, 1964.
- 84 Gosse, Memorandum to the Commissioners, Ontario Law Reform Commission (unpublished) dated June 12, 1969, p.3, which refers to a Gosse draft material "The Reception of English Property Law in Ontario" prepared 1966 (undated). Publication rights are reserved in respect of this draft material, as yet unpublished.
- 85 Loc. cit.
- 86 Loc. cit.
- 87 Gosse Memorandum, op. cit., p. 2.
- 88 Supra n. 81
- 89 Lang, loc. cit., and also at p. 82ff., as to Indian codification.
- 90 Gibraltar was a ceded colony. v. Jephson v. Riera 12 E.R. 598, @ 606. English Law is in force 31 Dec. 1883, if not in conflict with overriding provisions, such as the Code.
- 91 Originally acquired from Turkey, Cyprus was annexed in 1914.
- 92 Brown, supra (n.9, p. 93), p. 25.
- 93 Ibid., pp 42-3.
- 94 Op. cit., p. 32ff.; Lang, op. cit., p. 99ff.
- 95 Brown, op. cit., pp. 31, 40 n. 62, as to Order in Council disapproving, which was dated Apr 8, 1754. The text of the Act is given at p.360ff.
- 96 Ibid., p. 31, pp. 145-6.
- 97 Ibid., p. 33 n. 26: Carolina Law Repository, 549-555 (1814), 4 North Carolina Reports, Part II, p.294-303.

98. Brown, Ibid. p. 32.
99. Brown, op. cit., p. 373ff.
100. Loc. cit.
101. Ibid., pp. 18, 31.
102. Ibid., p. 18-19, n. 34.
103. Supra n. 101.
104. Ibid., p. 69 ff., the quotation is at p. 70; Lang, supra (n.4, p. 176), p. 114ff. as to New York Codification Movement.
105. Feb. 20, 1787, 2 Jones & Varick 67;
Jan. 30, 1787, 2 Jones & Varick 7;
Feb. 7, 1788, 2 Jones & Varick, 214; and
2 Jones & Varick, 67, 7, 214, 88 and 20, respectively,
Brown. op.cit., p. 71, n. 5-9.
106. Loc. cit. Feb. 20, 1787, 2 Jones & Varick, 68;
Feb. 20, 1788, 2 Jones & Varick.
107. Ibid., p. 34ff.
108. Ibid., p. 71ff.
109. Loc. cit.
110. Dec. 10, 1828, Laws of the State of New York, McKinney's
Consolidated Laws of New York (St. Paul, Minn.: West
Publishing Co., 1971), Bk. 1 vii., "Report of the Board
of Statutory Consolidation" traces the history of the
various consolidations up to codification: 1786 revision
(Jones & Varick); Kent & Radcliff Revision, published 1902;
Van Ness & Woodworth Revision, published 1803; the revised
statutes of 1821 and the new constitution infra, n. 109),
culminating in the special session of the legislature
which resulted in the 3 volume Revised Statutes of 1829,
later edited by various editors in 9 editions.
- This Report also deals with the Field Codes, infra n. 116.
The special legislative session in New York held 1827-1828
is discussed in Carr 67 L.Q.R. (1951) 482; Again Carr
emphasizes its influence was not felt in England as condi-
tions were not comparable, he said
- "The New York Commissioners, as they gratefully recorded
were sustained and cheered by the ready cooperation of
the Legislature; the legislators did not grudge their time
and were not distracted by the controversies of party
politics; moreover New York judges were sympathetic and
liberal in their acceptance and construction of the new law...."

- 111 4 Paige 178, 198-199 (1833)
- 112 Loc. cit.
- 113 (1859) 19 N.Y. 68; (Quia Emptores, 18 Ed. I, (v. Brown, op. cit. p. 71 n. 71)
- 114 (1859) 19 N.Y. 68, at pp. 73-5.
- 115 Brown, op. cit., p. 75.
- 116 Report, McKinney's Statutes, loc. cit., n. 110; Lang, op. cit. pp. 114ff., as to Field's contribution to American codification.
- 117 Brown, op. cit. pp. 25, 43, 45, 158.
- 118 Ibid., p. 158-9, as to English Statutes;
37 Hen. VII c. 9 (usury)
13 Eliz. c.8 (usury)
43 Eliz. c.6 (re prevention)
- 119 Loc. cit., gives quotations.
- 120 Loc. cit., Crawford v. Chapman, 17 O.S. 585, 590 (1885).
These territories had been one of the areas of contention between the American colonists and England before the Revolution. The western expansion of the seaboard colonies, even before the Treaty of Peace of 1784, was in conflict with the British colonial policy of utilizing the lands for the benefit of the fur traders from Canada. State interests were ceded to the United States between 1781 to 1786.
If these lands were not "settled" by the British Traders, they were "settled" as colonies of the American states of New York, Virginia, and Connecticut, which states all at the time of expansion had some English statutes in force. Should not the English statutes in force in each of the colonies followed them as they became colonists? Côté, op. cit., p. 47 re Voortrekkers of South Africa" extension of the territory of the colonies in which they live".
- 121 Ibid., p. 42-3, 45.
- 122 4&5 Ed. VII, c.3., 3 16 (Can.); v. Côté, supra (n. 5, p. 19), p. 91.

- 123 Op. cit., n. 23, p. 177.
- 124 Côté, op. cit., pp. 84-5.
- 125 Alberta, Saskatchewan, Manitoba, North West Territories and Yukon, v. Côté, op. cit. p. 89ff.
- 126 Supra n. 112, as to common law statutes.
- 127 Daniels, supra (n. 7 p. 92), p. 329,
"An Act to declare how much of the laws of England are practicable within the Bahama Islands, and ought to be in force within the same ...", v. Appendix B, infra p. 229.
- 128 Revised in 1957, c. 2. Appendix B, VIII (ii), infra p. 231.
- 129 Roberts-Wray, op. cit. (n. 4 p. 92), pp. 87, 306.
Gibraltar was ceded to Britain by Treaty of Utrecht in 1713.
Application of English Law Ordinance, 1962, (Ordinance No. 17 of 1962).
Sarawak has such a list with power of General Counsel to alter Application of Laws Ordinance, Rev. Laws 1958, c. 2.
- 130 Roberts-Wray, op. cit. p. 791.
- 131 A list of English statutes which did not apply,
Statute Law Revision Ordinance (Rev. Laws, 1951, c.3)
Interpretation Act, (Rev. Laws, 1951, c. 4.)
Park, op. cit. (n. 75 p. 98), p. 4.
- 132 Roberts-Wray, op. cit., 698; Application of English Law Ordinance, Revised Edition, 1970, c. 88.
- 132A Brown, op. cit. pp. 43, 45, 157ff.
- 133 8 & 9 Eliz. II c. 55 (Imp.)
- 134 Law of England (Application) Law, 1959, Revised Laws, 1959, Cap. 60, infra Appendix B, VII.
The draftsman was Sir John Verity, formerly Chief Justice of Nigeria.
Park, op. cit., p. 45, gives Verity's accomplishment in collecting the law of the region of Western Nigeria. In 1959 he prepared, in 7 volumes, the collected revised edition of all statutes in force in Western Nigeria, (including provision as to those in force before the federal system was introduced).

Park also explains:

- (1) an Exclusive Legislative list
- (2) a concurrent legislative List, published as Schedules to the Constitution of the Federation of Nigeria, which Constitution is the second schedule to Nigeria (Constitution) Order in Council, 1960 (S.I. 1960/1962; L.N. 159 of 1960).

- 135 Op. cit., p. 41, 51-2 gives two interesting examples of laws since the reception date of 1900 which were included: Law Reform (Frustrated Contracts) Act, 1943 was enacted as part of the Contracts Law, Cap. 25, as an example of incorporating also certain post-1900 Acts which had reformed and improved the previous law.
- Customary law as provided for in many instances, eg. Married Women's Property Act, 1882, was enacted as part of the Married Women's Property Law, cap. 76, with the additional provision excluding its operation from marriages in accordance with customary law (Note: Marriage is a federal head, except under customary law).
- 136 Allott, supra (n. 75 p. 98) p. 53-4.
- 137 Park, op. cit., p. 142-3.
- 138 Roberts-Wray, op. cit., 794.
Mid-Western Region Act, 1962 (No. 6 of 1962).
- 139 Nigeria Independence Act, 1960 (8 & 9 Eliz. II c. 55 (Imp.))
Nigeria (Constitution) Order in Council, 1960, v. 134.
- 140 Park, op. cit., Postscript to Preface, p. v.
- 141 13 Geo. V. No. 3270, 1922 (Victoria) Proclaimed 25 May 1923; Amended 5722/1970, 8137/1971.
- 142 Ink & Pencil annotations on Cussen's specially bound copy of the Imperial Acts Application Act, 1922, transcribed for Mr. Arthur Close, list the following authors:

Hale	Sir Matthew Hale. <u>The History of the Common Law of England</u> (1739)
Hawkins	<u>Pleas of the Crown Vol. I</u> (8th ed. 1824)
Holdsworth	<u>A History of English Law Vol. I</u>
Jenks Digest)	<u>Jenks' Digest of English Civil Law</u>
Jenks Civil Law)	(2nd ed., 1921)

- P. & M. Pollock and Maitland. A History of English Law (1st ed.)
- Plucknett Theodore F. T. Plucknett. Statutes and their Interpretation in the First Half of the Fourteenth Century (1922)
- In Evidence he also referred to,
- Bignold Bignold's Imperial Statutes in force in New South Wales

- 143 This history is given by Castles, supra (n.24 p.94) passim.
- 144 The Australian Courts Act, 1828 (9 Geo. IV. c. 83 (Imp.) the foundation of law for New South Wales, Tasmania, Van Diemen's Land, Victoria, Queensland, Northern Territory, Australian Capital Territory, Papua New Guinea. Castles, op. cit., p. 3, n. 12-15 incl.:
 South Australia, originally part of New South Wales, but date used is December 28, 1836, on basis Ordinance No. 2 of 1843 and judicial decisions given n. 13;
 Western Australia was provided with June 1, 1829 as the date that State "shall be deemed to have been established" Interpretation Act, 9 Geo. V No. xx, section 43. "The Reprinted Acts of the Parliament of Western Australia", volume 6 (1954).
- 145 W. Harrison Moore, K.B.E., C.M.G., LL.D., "A Century of Victorian Law, 16 Journal of Comparative Legislation and International Law (3rd series) 174 at 178, n. 4.
- 146 "Memorandum for the Honourable The Premier #1597", p. 3 - 4 (Photocopy (undated) in the Collection of the Law Reform Commission of British Columbia).
- 147 Victoria: Report from the Joint Select Committee of the Legislative Council and Legislative Assembly on the Imperial Acts Application Bill, 23 November 1922 (Ordered printed by the Legislative Assembly, 28 November, 1922.) (hereafter called Victorian Report) p. 3.
- 148 Ibid., p. 7, Statement of His Honour Sir Leo Cussen to the Committee on the Draft Bill, p. 11, 11 August 1922.
- 149 Ibid., p. 4 (Committee Report).
- 150 Explanatory Paper, p. 75, This paper, including the Table of some of the repealed enactments (subject to the reference description in the bill) accompanied the Bill of 1922 as printed with the Consolidated statute 5722/70.

- 151 The states do not have the power to repeal proprio vigore legislation, Kewley Report, p. 9 (Victoria: Report on The Imperial Acts Application Act, 1922, by Gretchen Kewley (11 June 1975) Ordered printed by the Legislative Assembly c. 3, 7082/75) (hereafter, Kewley Report) p. 9. discussing New South Wales Report (infra p. 190 n. 174) and the effect of Imperial repeals effected by Statute Law (Repeals) Act, 1973—limited to England, on Victoria
 "... we are left with obsolete Imperial Acts, no longer on the Statute Books at Westminster, but which are nevertheless unrepealable in this state."
 Examples are given n. (a) p. 3 of Consolidated Act 5722/70.
- 152 Federal heads of jurisdiction would be included
Note: these are as of date of passing the Act — the State cannot legislate to change and they must be as at that date.
- 153 Ibid., n. (b) p. 3, The English Chronological Table and Index of the Statutes, supra n.15, p. 177.
 is referred to by footnote.
- 154 Ibid., n. (a) p. 4, explains the Imperial Copyright Act of 1911, 1 & 2 Geo. V, c. 46 repeals the Acts of 1734 and 1888 and International Copyright Acts (exc. ss. 7, 8 of 25 & 26 Vict. c. 68) in Dominions from coming into operation in such part. The Commonwealth Act No. 20 of 1912 brought it in force in Australia 1 July 1912.
- 155 Clause 6: The date, presumably, at which their force was determined cf. date of coming in force of Act elsewhere provided.
cf. Clause 5 (2) the date here is the date of the passing of the Act.
- 156 Explanatory Paper, op. cit. p. 79.
- 157 Loc. cit.
- 158 Ibid. p. 81 ff.; The Table begins on p. 83; v. Cussen, Evidence in Victorian Report, op. cit. p. 16.
 "... while the provisions set out in the Bill are of importance — of course I consider that its effect in providing for the repeal of so many, together with the repeal of the sections, is the most important part of the Bill — in a sense it may be said that the most important part of the Bill is what is not there. That is to say the exclusion of all those enactments, many of which — the more important of which — are set out in the table at the end of the Explanatory Paper, which is the great thing that the Bill has accomplished."

- 159 No. 3270 was amended 5722/70 and 8137/71. Other consolidation and repeal was effected in the various 1928 Statutes listed. This was contemplated in the Victorian Report, op. cit., p. 4 - 5.
- 160 Loc. cit. contemplated these consolidations effected in groupings.
- 161 Gretchen Kewley, Report on The Imperial Acts Application Act 1922 (c. 3, 7082/75) dated 11 June 1975, p. 117, explains why these sections have survived.
- 162 Loc. cit., Introduction, p. 7 ff.
- 163 Ibid.
- 164 Ibid, p. 8.
- 165 Ibid, p. 7
- 166 The schedules to the report are an index of recommendations, relating back to the page where the authorities are discussed. The Table of Contents is arranged on the basis of groupings of statutes in alphabetical order, by subject matter.
- 167 Kewley Report, op. cit. 117.
- 168 Op. cit. This information is taken from p. 117 and the Schedules p. 121, 122.
- 169 Op. cit., list p. 9.
- 170 Report of the Law Reform Commission of New South Wales on the Application of Imperial Acts in New South Wales (L.R.C. 4) November, 1967; p. 25.
- 171 Loc. cit.
- 172 Op. cit., p. 28, cf. Mitchell v. Scales 5 C.L.R. 405, "the view was expressed that in considering whether an Imperial Act was introduced into New South Wales by 9 Geo. IV. c. 83, regard must be had to suitability of the Imperial Act as a whole to local conditions."
- 173 Loc. cit.

- 173A. Appendix IV New South Wales Report of 1967, was enacted as Imperial Acts Application Act 1969 (N.S.W.).
174. Report of the Law Reform Commission on the Application of Imperial Acts (L.R.C. 4) November, 1967 (hereafter NSW Report), Appendix I (A) p. 39ff; Appendix IV, draft Bill, Part III, s. 5(3), Part III s. 12-42, p. 147ff., as listed in the First Schedule p. 163.
175. NSW Report, Appendix I B, enactments to be continued, p. 59ff; Appendix IV, draft Bill, s. 6.
176. NSW Report, Appendix IV, draft Bill, s. 7 some of which are listed in the Third Schedule, set out infra, p. 166. as explained in Appendix III, p. 136 (from which page the explanation is taken), a similar explanation is given in the Report pp. 30, 31.
177. Op. cit., Appendix IV, draft Bill, p. 166. These are outside the jurisdiction of the State and are not dealt with in this way by the Victorian Statute.
178. Op. cit., Appendix IV draft Bill, p. 145. Imperial Acts proposed for repeal are explained in Appendix II, p. 70.
179. Op. cit., p. 28. Alexander Oliver, parliamentary draftsman of New South Wales, "The Statute Index" prepared by him in 1874.
180. Ibid., p. 31.
181. Ibid., p. 32.
182. Ibid., pp. 33, 34. The Westbury Savings have been previously mentioned in respect of Imperial Statute Law Revision, supra p. 121. As to Clause 11, this provision in the Victorian Legislation has not been used.
183. Law Reform Commission of the Australian Capital Territory; Report on Imperial Acts in force in the Australian Capital Territory and Supplementary Report (Canberra: Australian Government Publishing Service, 1973), p. 1 and quotations on p. 1-2. (A.C.T. Report dated 25 August 1972, A.C.T. Supplementary Report dated 24 January 1973).

184. Op. cit., p. 2.
The following authority is given as to the powers of the Commonwealth Parliament (the words omitted in the quotation)
"...Co-operative Committee on Japanese Canadians v. A.-G. for Canada [1947] A.C. 87 at pp. 106-107, and has been treated as the law by the Governor-General in Council as the legislative authority for the Australian Capital Territory (e.g. Lotteries Ordinance 1964, s. 3(2))"
185. Loc. cit. Canada would need a similar provision, assuming the present constitutional arrangements remain.
186. (1934) 52 C.L.R. 268; the quotation is given in A.C.T. Report, op. cit., p. 3.
187. Loc. cit. This is an interesting comparison with the British Columbia enactment of substantially the Divorce and Matrimonial Causes Act of 1857 as amended 1858, discussed supra, p.78.
188. Ibid., p. 57. These are an appraisal of the effectiveness of the N.S.W. legislation upon which the A.C.T. Report relies greatly and a list of suggested "Substituted Provisions".
189.

	Page
	<u>A.C.T.</u>
	<u>Report</u>
Appendix 1 Part A, Acts to be Preserved	3, 7 Second Schedule p. 60
Part B, Acts to be repealed and replaced	4, 12,
	58ff "Substituted Provisions"
	First Schedule p. 60
	Supplementary Report
	p. 75-6
190. Appendix 2 Acts to be repealed 4, 24.
191. Referred to by Kewley in her report reviewing the Victorian legislation. The area has a complicated history, v. infra n. 35, p. 95 As to traditional law, v. Michelle Potter, Traditional Law in Papua New Guinea. An Annotated and Selected Bibliography. (Canberra: Department of Law Research, School of Social Sciences, Australian National University, 1973).

Conclusion

VII CAN THE IMPACT OF ENGLISH LAW BE ASSESSED?

What law is in force in British Columbia today?

Although everyone is not presumed to know what the law is, it is a well established principle of law that ignorance of the law will not excuse its breach.

The law in force in British Columbia today includes,

- (i) the law in the Revised Statutes of British Columbia, including much adopted and copied from English Law;
- (ii) federal legislation which came on Union, under the heads of jurisdiction assigned to the federal authority by the British North America Act, 1867, and that enacted since Union;
- (iii) so far as it is not inconsistent with (i) and (ii),
 "The Civil and Criminal Laws of England, as the same existed on the nineteenth day of November, 1858, and so far as the same are not from local circumstances inapplicable, are in force in all parts of the Province; but the said laws shall be held to be modified and altered by all legislation having the force of law in the Province, or in any former Colony comprised within the said geographical limits thereof."
- (iv) the law of the former colonies of Vancouver Island and British Columbia, including both
 - (a) statutes enacted by each jurisdiction as to that part, and
 - (b) the common law which came with the settlers, including English statutes in force as part of the common law;
- (v) legislation in force proprio vigore in British Columbia and Canada, and not modified by either legislative authority, within its appropriate jurisdiction, since the Statute of Westminster, 1931.

This thesis has examined, primarily, the meaning of (iii), the seemingly simple statement of the English Law Act. This enactment provided a foundation for the growth of colonial law in British Columbia, but has not provided a finiteness as to what the law of British Columbia is. Such a provision is in keeping with the great tradition of flexibility in the common law, but is not necessarily a satisfactory provision.

It is important to realize that determining what English law was received is a modern legal problem, affecting the rights of the various levels of government in Canada and their powers, and the rights of Canadian citizens and residents who are subject to the law.

The review of legislative history and of the history and judicial interpretation of legislation which forms the basis for judicial decisions relative to reception, raises the suggestion that this question is of interest only to historians. Such is not the case.

Surely it is the duty of the legislature to provide a more definitive and workable statement as to what the law is.

Legislative revision is a substantial matter in cost and in effect. The English have been actively pursuing reform of the statutes for over a century in a period that is almost identical with the existence of the Province of British Columbia. Their efforts began with the revision of the statute book in 1865, and the associated indexing, consolidation of Acts and the erasure of "sleeping statutes", from the statute book. Colonial juris-

dictions have undertaken great reform. It is the conclusion of this thesis that legislative reform is the appropriate course for British Columbia.

All of these matters have been described as they relate to the identification of the body of applicable law.

Lord Cranworth said in 1858,

"Nothing is more difficult than to know which of our laws is to be regarded as imported into our colonies Who is to decide whether they are adapted or not?"

This statement leads us to three principal issues of reception:

1. Which English Laws were imported?
2. Are they to be adapted to the colonial situation?
3. Who is to decide?

Superimposed on the many complexities of these questions, there is the further problem of mountains of legislation enacted in both British Columbia and Canada, complicating the law in force.

1. Which English Laws were imported?

This thesis has not attempted to list every case or every reform accomplished in other jurisdictions. Those referred to have been chosen, first, to illustrate problems in the definition and ascertainment of which English statutes and law are in force and, second, to illustrate, from the work of other jurisdictions, the methods or combinations of methods, which are

available. Primarily the emphasis is on statute law. This does not mean what was omitted was not important, but only that what was selected seemed more relevant.

2. Are they to be adapted to the colonial situation?

Preliminary to reform, it would be necessary to determine:

- (a) Which statutes are in force in England; and
- (b) Which Ordinances were in force in Vancouver Island

as at the reception date,
19 November, 1858;

To facilitate such a determination, statements must be made as to established parameters, to provide a frame of reference. Decisions must also be made on the issues which have been isolated, but are not decided. Such statements will be in the form of the New South Wales statement as to the "Westbury Savings" and that of Australian Capital Territory statement as to the doctrine of implied repeal. These should relate to a decision as to the relevance of settler's law; and

a similar decision as to the date at which local circumstances will be considered. This should be related to the numerous changes made in the English Law Act, and the effect of judicial interpretation thereon.

This material would yield a list to be coordinated with the many lists available to provide an annotated list.

The annotated list would then be considered in terms of,

- (i) statutes passed in British Columbia after 1858, and before Union, and
- (ii) statutes passed in Vancouver Island before Union, with British Columbia, and
- (iii) with judicial decisions,

to establish the law as at Union with Canada from which time the Federal legislative heads must be considered separately in that they limit pro tanto the legislative powers of British Columbia.

The 1911 Revision of the British Columbia Statutes must be next considered. First, the consolidated lists provided in R.S.B.C. 1897 and 1911 must be checked with the statute book for accuracy. These then should be co-ordinated with the annotated list and the Federal material, and the consolidated material removed.

A list of proprio vigore statutes should be made up to 1931, and any subsequent repeals noted.

These lists would provide a basis for reform. They are presumably what the Alberta list will be and can be cross-referenced to the Alberta materials and to listings in other jurisdictions.

What areas would reform include?

At least these possibilities can be considered:

- (a) a review of the 1911 legislation and of the consolidation effected with an appraisal of the work done at that time;

(b) a preliminary determination as to what statutes are in force in England in 1858, and may be in force in British Columbia, without considering subsequent local legislation or perhaps considering it only up to 1911.

(c) an investigation of legislation in force proprio vigore in British Columbia, perhaps including those in force and relating to federal heads of jurisdiction;

(d) a full reform.

3. Who is to decide?

Is there justification for legislative revision?

In British Columbia the many problems which stimulate legislative interest have not been present. Native and customary law have not intruded to create a need to provide pluralism in the law. The native population was tribal, without written laws. British Columbia, like other similar jurisdictions, arrived at a solution for the protection of the native peoples by legislative provision without making great concessions. Nationalism, which has provided the impetus for resolution of the problem in Africa, has not done so here. Probably, most decisively, we have never had a Boothby, J. who took a position so strongly that he created a reform movement that culminated in the Colonial Laws Validity Act, 1865. Our Judiciary have taken a most progressive approach to the problem, giving care in considering the issue to be

decided and often providing the research for this aspect of the law.

The problem is neither new nor unique to British Columbia. Considering repatriation of the constitution is not new. Reception reform would seem to be a practical preliminary matter. The courts handle the ~~issues~~ on an ad hoc basis. However, if the law is to be regarded as always speaking, it does so at the cost of finality being established on an issue, even after judicial decision. Although the legal tradition may be merely regarded as a mosaic of isolated events, with judicial ingenuity making the whole function, it must be remembered that judicial ingenuity is called into operation only when the issue arises, and in the early colonial period often was related only to adapting English Law to the colonial situation.

What form would reform in British Columbia take?

First, a listing. Thereafter, the various reforms effected in other jurisdictions could be considered. This sort of reform is not politically expedient, and unless attention is paid to the various aspects of the reception matter, it is generally regarded as a particularly academic field of law. It is however an important and worthwhile field of research. Is it a problem that can be conveniently forgotten, but exploring its ramifications certainly indicates that the repeal of the English Law Act

simpliciter is not a satisfactory solution.

If legislative reform is not undertaken it may be practical to at least formulate rules to determine what English law is actually in force in British Columbia,

- (1) in the absence of statutory provision, English judicial decisions will be looked at to ascertain the common law. It would appear that the reception date is not necessarily a cut-off date;
- (2) English Statutes in force would be determined at 19 November 1858;
- (3) subsequent legislation in force would be determined whether enacted by British Columbia, Canada or the Imperial Parliament, provided the jurisdiction is appropriate;
- (4) relevant judicial decisions would be considered, and
- (5) local conditions at the date the issue arose.

Such rules yield an answer of no certainty but merely a "best opinion".

Judicial decisions are the end product of such a best opinion, fitted into the overall fabric of legal rules but always based on a malfunction and not providing an all inclusive statement. Judicial decision is based on Parliamentary law. Parliament has not a similar obligation to integrate legislation into the existing legislation and the volume of enacted

legislation grows. Cussen said that what was achieved in his legislation was what was left out. Reduction in the volume of law which may be applicable is in itself an accomplishment had nothing else been done. Law Reform Commissions have joined academics in stressing the need for reform. The subject is included in the First Programme of the Law Reform Commission of British Columbia. The Commission in its Second Report has expressed the opinion that remedial legislation should be enacted.

Martin, J.A., said in In re Gillespie in 1920, "... every citizen has the right to know exactly what the law of the public weal is, so that he may not jeopardize his person or his property by unwittingly infringing it...."

If one is to bear the consequence of the law, it is surely the duty of the legislature to provide a statement as to what the law is.

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APPENDIX A

I The evolution of the English Law Act, R. S. B. C. 1960, c. 129, s. 2. p. 1*

- (i) PROCLAMATION having the Force of Law to declare that English Law is in force in British Columbia, 19 November, 1858, British Columbia Ordinances 1858-1866, p. 13

"... that the Civil and Criminal Laws of England, as the same existed at the date of the said Proclamation of the said Act, and so far as they are not, from local circumstances, inapplicable to the Colony of British Columbia, ARE AND WILL REMAIN IN FULL FORCE within the said Colony, till such times as they shall be altered by Her said Majesty in Her Privy Council, or by me, the said Governor, or by such other Legislative Authority as may hereafter be legally constituted in the said Colony; and that such Laws shall be administered and enforced by all proper authorities against all persons claiming protection of the same Laws."

- (ii) 30 Vict.: English Law Ordinance, 1867, 6 March, 1867. No. 7 (1867); printed No. 70 The Laws of British Columbia, 1871; C.S.B.C. 1877, c. 103, p. 384 (Consecutive No. 266)

"Whereas it is expedient to assimilate the Law establishing the date of the application of English Law to all parts of the Colony of British Columbia:
...

2. From and after the passing of this Ordinance, the civil and criminal laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, ARE AND SHALL BE IN FORCE in all parts of the Colony of British Columbia:
Provided, however, that in applying this Ordinance to that part of the Colony previous to the union known as British Columbia, the said civil and criminal laws as the same existed at the date aforesaid shall

*The Block capitals in the verb form of the statutes of this section have been added for convenience and do not appear in the text.

be held to be modified and altered by all past legislation (of the said Colony of British Columbia before the Union, and of the Colony of British Columbia since the Union) affecting the said Colony of British Columbia as it existed before the Union.

- (iii) An Act respecting the Revised Statutes of Canada, 49 Vict. c. 4 (Can.) Assented to 2 June 1886,

s. 5(2) repeals enactments in Schedule A

Schedule A, p. 19 "Acts and Parts of Acts Repealed, from the coming into force of the Revised Statutes of Canada, so far as the said Acts and parts of Acts relate to matters within the legislative authority of the Parliament of Canada ...

Laws of the separate colony of British Columbia ...

70 An Ordinance to assimilate the general application of English Law"

Extent of Repeal "s. 2 so far as it relates to the Criminal Law and sections 1 & 3."

s. 6 provides: "The repeal of the said Acts and parts of Acts shall not revive any Act or provision of law repealed by them; nor shall the said repeal prevent the effect of any saving clause in the said Acts and parts of Acts, or the application of any of the said Acts or parts of Acts, or of any Act or provision of law formerly in force, to any transaction, matter or thing anterior to the said repeal, to which they would otherwise apply."

- (iv) English Law Act, Consolidated Acts, 1888, c. 69 s. 2; R.S.B.C. 1897 c. 115 s. 2:

"The Civil Laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, SHALL BE IN FORCE in all parts of British Columbia: Provided, however, that the said Laws shall be held to be modified and altered by all legislation still having the force of law, of the

Province of British Columbia or of any former Colony comprised within the geographical limits thereof. "

- (v) English Law Act, R.S.B.C. 1911, c. 75, s. 2:

"The Civil and Criminal Laws of England, as the same existed on the nineteenth day of November, 1858, and so far as the same are not from local circumstances inapplicable, SHALL BE IN FORCE in all parts of the Province of British Columbia: Provided, however, that the said laws shall be held to be modified and altered by all legislation having the force of law in the Province of British Columbia, or in any former Colony comprised within the said geographical limits thereof. "

- this verb form is repeated in the 1924, 1936 and 1948 Revision of the Statutes.

- (vi) English Law Act, R.S.B.C. 1960, c. 129, s. 2:

"The Civil and Criminal Laws of England, as the same existed on the nineteenth day of November, 1858, and so far as the same are not from local circumstances inapplicable, ARE IN FORCE in all parts of the Province; but the said laws shall be held to be modified and altered by all legislation having the force of law in the Province, or in any former Colony comprised within the said geographical limits thereof. "

- (vii) As to the Stickeen territories see provision for English Law: 25 Vict.: Order in Council 19 July 1862 (Imp.) Printed R.S.B.C. 1911, vol. IV (1913), p. 254ff and at p. 189 of Appendix, 1871 Statutes:

"... And it is further ordered that the law in force in the said territories shall be the law of England as it existed on the 1st day of January, 1862, so far as the same is applicable to the circumstances of those territories. "

II The boundaries of the Province of British Columbia

(a) Vancouver Island (formerly Vancouver's Island)

- (i) 12 Vict.: Letters Patent, Vancouver Island, 1849. (13 January 1849). Printed R.S.B.C. 1911, vol. IV (1913), p. 107ff.

"And whereas by a treaty between Ourselves and the United States of America, for the settlement of the Oregon Boundary, . . . it was agreed upon and concluded . . . That from the point of the forty-ninth parallel of north latitude where the boundary laid down in existing treaties . . . terminated, the line of boundary between Our territories and those of the United States should be continued westward along the said parallel of north latitude to the middle of the channel which separates the continent from Vancouver Island, and thence southerly through the middle of the said channel and of De Fuca's Straits to the Pacific Ocean: Provided, however, that the navigation of the whole of the said channel and straits south of the forty-ninth parallel of north latitude should remain free and open to both parties:

...

... We . . . do by these presents, . . . give, grant, and confirm unto the said Governor and Company of Adventurers of England trading into Hudson's Bay, and their successors, all that the said Island called Vancouver Island, together with all royalties of the seas upon these coasts within the limits aforesaid, and all mines royal thereto belonging . . ."

- (ii) An Act to provide for the Administration of Justice in Vancouver's Island, 12 & 13 Vict. c. 48. (28 July 1849). Printed R.S.B.C. 1911, vol. IV (1913), p. 115ff.

" 4. And be it enacted, That all such Islands adjacent to Vancouver's Island or to the Western Coast of North America, and forming Part of the Dominions of Her Majesty, as are to the Southward of the Fifty-second Degree of North Latitude, shall be deemed Part of Vancouver's Island for the

Purposes of this Act."

(b) British Columbia (the original mainland colony)

(iii) An Act to provide for the Government of British Columbia, 21 & 22 Vict. c. 99. (2 August 1858).
Printed R.S.B.C. 1911, vol. IV (1913), p. 245ff.

" 1. British Columbia shall, for the Purposes of this Act, be held to comprise all such Territories within the Dominions of Her Majesty as are bounded to the South by the Frontier of the United States of America, to the East by the main Chain of the Rocky Mountains, to the North by Simpson's River and the Finlay Branch of the Peace River, and to the West by the Pacific Ocean, and shall include Queen Charlotte's Island, and all other Islands adjacent to the said Territories, except as hereinafter excepted.

6. No Part of the Colony of Vancouver's Island, as at present established, shall be comprised within British Columbia for the Purpose of this Act; "

Section 6 continues with provision "... to annex the said Island to British Columbia, subject to such Conditions "

British Columbia boundaries redefined in 1863:

(iv) An Act to define the Boundaries of the Colony of British Columbia, and to continue an Act to provide for the Government of the said Colony, 26 & 27 Vict. c. 83 (28th July, 1863). Printed R.S.B.C. 1911, vol. IV (1913), p. 266-267.

" 3. British Columbia shall ... be held to comprise all such Territories within the Dominions of Her Majesty as are bounded to the South by the Territories of the United States of America, to the West by the Pacific Ocean and the Frontier of the Russian Territories in North America, to the North by the Sixtieth Parallel of North Latitude,

and to the East, from the Boundary of the United States Northwards, by the Rocky Mountains and the One hundred and twentieth Meridian of West Longitude, and shall include Queen Charlotte's Island and all other Islands adjacent to the said Territories, except Vancouver's Island and the Islands adjacent thereto. "

(c) Stickeen territories had been defined in 1862:

(v) 25 Vict.: Order in Council, 19th July 1862. Supra Appendix A I (vii)

"...And whereas it is necessary to provide for the government of certain territories adjacent to our colony of British Columbia, but not being within the jurisdiction of the Legislative authority of any of Her Majesty's possessions abroad, hereinafter called the Stickeen territories.

Her Majesty, ... is pleased to order, ... and it is hereby ordered accordingly, that the said Stickeen territories shall comprise so much of the dominions of Her Majesty as are bounded to the west and south-west by the frontier of Russian America, to the south and south-east by the boundary of British Columbia, to the east by the 125th meridian of west longitude, and to the north by the 62nd parallel of north latitude"

(d) The United Colony of British Columbia was provided for:

(vi) The British Columbia Act, 1866, 29 & 30 Vict. c. 67. (6 August 1866). Printed R.S.B.C. 1911, vol. IV (1913), p. 271-273.

" 7. Until the Union British Columbia shall comprise all such Territories within the Dominions of Her Majesty as are bounded to the South by the Territories of the United States of America, to the West by the Pacific Ocean and the Frontier of the Russian Territories in North America, to the North by the Sixtieth Parallel of North Latitude, and to the East from the Boundary of the United

States Northwards by the Rocky Mountains and the One hundred and twentieth Meridian of West Longitude; and shall include Queen Charlotte's Island and all other Islands adjacent to the said Territories, except Vancouver Island and the Islands adjacent thereto.

8. After the Union British Columbia shall comprise all the Territories and Islands aforesaid and Vancouver Island and the Islands adjacent thereto"

III Provision for the administration of Justice

(a) Vancouver Island (formerly Vancouver's Island)

(i) An Act for extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada to the Trial and Punishment of Persons guilty of Crimes and Offences within certain Parts of North America adjoining to the said Provinces, 43 Geo. III, c. 138. (Imp.) 1803, and

(ii) An Act for the regulating the Fur Trade, and establishing a Criminal and Civil Jurisdiction, within certain Parts of North America, 1 & 2 George IV, c. 66 (Imp.) 1821,

provided inter alia that the jurisdiction of the Courts of Upper and Lower Canada should extend over British fur territories.

(iii) An Act to provide for the Administration of Justice in Vancouver's Island, 12 & 13 Vict. c. 48 (Imp.) 28 July 1849, Supra Appendix A, II (ii)

"... Be it therefore enacted ... That from and after the Proclamation of this Act in Vancouver's Island the said Act of the Forty-third Year of King George the Third, and the said recited Provisions of the Second Year of King George the Fourth ... shall cease to have Force in and to be applicable to Vancouver's Island aforesaid; and

it shall be lawful for Her Majesty from Time to Time ... to make Provision for the Administration of Justice in the said Island, and for that Purpose to constitute such Court or Courts of Record and other Courts, with such Jurisdiction in Matters Civil and Criminal, and such equitable and ecclesiastical Jurisdiction, subject to such Limitations and Restrictions, and to appoint and remove, or provide for the Appointment and Removal of such Judges ...

2. Provided always, ... That when ... a local Legislature has been established in Vancouver's Island it shall be lawful for such Legislature, ... by any Law or Ordinance ... to make such Alterations as to such Legislature may seem meet in the Constitution or Jurisdiction of the Courts which may be established ... and ... for and concerning the Administration of Justice in the said Island.

3. Provided ... That all Judgments given in any Civil Suit in the said Island shall be subject to Appeal to Her Majesty in Council"

- (iv) Supreme Court of Civil Justice created December 2, 1853, Minutes of the Council of Vancouver Island, 1851-1861, is referred to by Farr, op. cit. (n.21 p. 21), p. 3 n. 9a: Archives of British Columbia, Memoir No. 11, 18 (1918).

(b) British Columbia

Pursuant to the Authority of 21 & 22 Victoria, c. 99 (Imp.), supra, Appendix A II (iii)

- (v) Governor Douglas Proclaimed on 8 June, 1859, Printed 1877 C.S.B.C. c. 51 (Consecutive No. 141, R.S. 1871, No. 28):

"...And whereas it is expedient to declare the constitution of the Court of Justice of British

Columbia, and to make provisions with regard thereto:

Now, therefore, I, the said James Douglas, Governor of British Columbia, do hereby, by virtue of the aforesaid authority and of every other authority enabling me in its behalf, enact and proclaim as follows, viz: -

1. The Court held before the said Matthew Baillie Begbie, and his successors in office, shall be called and known as "The Supreme Court of Civil Justice of British Columbia."

2. The said Matthew Baillie Begbie, shall be the Judge therein during Her Majesty's pleasure.

3. The said Court shall be a Court of Record by the name or style of "The Supreme Court of Civil Justice of British Columbia."

5. The said Supreme Court of Civil Justice of British Columbia shall have complete cognizance of all pleas, whatsoever, and shall have jurisdiction in all cases, civil as well as criminal, arising within the said Colony of British Columbia."

(c) Stickeen territories

(vi) 25 Vict.: Order in Council, 19th July 1862. Supra, Appendix A I (vii)

"... And it is ordered that the supreme court of civil justice in British Columbia shall and may take cognizance of all or any suits, ... which may arise in respect of any act or matter occurring within the said territories, and ...

And it is further ordered that the judge of the said supreme court may make general rules of court to regulate the proceedings of any justice of the peace or officer of court appointed under authority of this Order in Council"

(d) The United Colony of British Columbia

- (vii) Courts Declaratory Ordinance, 1868, 1 May 1868.
 Printed 1877 C.S.B.C. c. 52 (Consecutive No. 301,
 R.S. 1871, No. 99):

" 1. All the jurisdiction, powers, and authorities which before the passing of the "British Columbia Act, 1866," were by law vested in and had and exercisable by the Supreme Court of Civil Justice of the Colony of Vancouver Island, and in and by the Chief Justice thereof, both in civil and criminal matters and proceedings, shall be deemed and taken to have continued so vested in, and to have been had and exercisable by, the said Court and the said Chief Justice thereof, as if the said Act had not been passed.

2. Whenever, in any of the Ordinances made and passed in the last Session of the Legislature of this Colony, the words "The Supreme Court," "The Supreme Court of Civil Justice," "The Supreme Court of Civil Justice of British Columbia," "or other superior Courts" shall occur, the same shall henceforward and unless repugnant to the plain sense of the context, be and be deemed to have been, from the date of the passing of such Ordinances respectively, for the Mainland "The Supreme Court of Civil Justice of British Columbia," for Vancouver Island and its Dependencies "The Supreme Court of Civil Justice of the Colony of Vancouver Island."

- (viii) Supreme Courts Ordinance, 1869, 1 March, 1869.
 Printed 1877 C.S.B.C. c. 53 (Consecutive No. 318,
 R.S. 1871, No. 112):

" 4. The Supreme Court established under the name of "The Supreme Court of Civil Justice of the Colony of Vancouver Island" shall, from and after the coming into operation of this Ordinance, be called "The Supreme Court of Vancouver Island," and the present Chief Justice thereof shall be called and known by the name and style of "The Chief Justice of Vancouver Island."

5. The Supreme Court established under the name of "The Supreme Court of Civil Justice of British Columbia" shall, from and after the coming into operation of this Ordinance, be called "The Supreme Court of the Mainland of British Columbia," and the present Judge thereof shall be called and known by the name and style of the "Chief Justice of the Mainland of British Columbia."

10. Provided, always, that upon the Mainland of British Columbia the Chief Justice of the Mainland of British Columbia, and upon Vancouver Island the Chief Justice of Vancouver Island, shall have rank and precedence over the other Chief Justice.

11. Upon a vacancy being created by the death, resignation, or otherwise, of either of the present two Chief Justices, the said Supreme Courts of the Mainland of British Columbia and of Vancouver Island shall be merged into one Supreme Court, to be called "The Supreme Court of British Columbia," and the surviving or remaining Chief Justice shall preside over the said Courts, and shall be called "The Chief Justice of British Columbia", "

(ix) Courts Merger Ordinance, 1870, 22 April, 1870.
Printed 1877 C.S.B.C. c. 54 (Consecutive No. 346,
R.S. 1871, No. 135):

" 1. The merger of the Supreme Court of the Mainland of British Columbia, and of the Supreme Court of Vancouver Island, into the Supreme Court of British Columbia, under the "Supreme Courts Ordinance, 1869," shall be deemed and taken for all purposes whatsoever to have taken place as from the twenty-ninth day of March, A.D. 1870, and shall be so recognized in judicature, and thereout, in all proceedings, matters, and things by all persons and for all purposes whatsoever. "

(x) Supreme Court Fees Ordinance, 1870, 26 April, 1870.
Printed 1877 C.S.B.C. c. 55 (Consecutive No. 236,
350, 435; R.S. 1871, Nos. 60, 139, respectively, and
15 (1873)

(e) Union with Canada

- (xi) Puisne Judges Appointment Act, 1872, 11 April 1872.
Printed 1877 C.S.B.C. c. 56 (Consecutive No. 404,
No. 24 (1872)).
- (xii) Circuit Courts Act, 1872, 11 April, 1872. Printed 1877
C.S.B.C. c. 57 (Consecutive No. 398, No. 18 (1872)).
- (xiii) Act for enabling the Judges of the Supreme Court to make
rules and orders, 1877, 18 April, 1877. Printed 1877
C.S.B.C. c. 58 (Consecutive No. 257, No. 21 (1877)).

IV British North America Act, 1867, 30 & 31 Vict. c. 3 (Imp.)
 [29 March, 1867] Provides inter alia:

s. 91 It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that ... the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of subjects next hereinafter enumerated; that is to say

1. Added by British North America (No. 2) Act, 1949,
 13 Geo. VI, c. 81 (U.K.)

"The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects of this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House."

s. 92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated

s. 101. "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the

Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada. "

s. 129 Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.

s. 146 It shall be lawful for the Queen, ... on Addresses from the Houses of Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, ... into the Union, ... on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

V The Interpretation Act, British Columbia

- (xiv) The Interpretation Act, 1872, S.B.C. 1877, ch. 2, s. 6, reads in part:

"In construing this or any Act of the Legislature of British Columbia, unless it be otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning, or calling for a different construction:

(1) The Law is to be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its its spirit, true intent, and meaning:

(2) The word "shall" is to be construed as imperative, and the word "may" as permissive;"

Note: by s. 2, this Act is applicable to those statutes passed after 1872, i. e. after 35 Victoria (British Columbia); and

by s. 9, the effect of 13 & 14 Victoria c. 2., "An Act for shortening the language used in Acts of Parliament" is preserved.

- (xv) Interpretation Act, R.S.B.C. 1960, c. 199, s. 23 (in part):

"In construing this or any Act of the Legislature, unless it is otherwise provided, or there is something in the context or other provisions thereof indicating a different meaning, or calling for a different construction,

(a) the word "shall" is to be construed as imperative, and the word "may"

(d) the law is to be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same is to be applied to the circumstances as they arise,

so that effect may be given to each Act, and every part thereof, according to its spirit, true intent, and meaning;"

- (f) "every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything that the Legislature deems to be for the public good, or to prevent or punish the doing of anything that it deems contrary to the public good; and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning, and spirit;"

s.22 The repeal of any Act or part of an Act shall not revive any Act or provision of law repealed by such Act or part of an Act, or prevent the effect of any saving clause therein.

(xvi) Interpretation Act, S.B.C. 1974, c. 42 (proclaimed effective July 1, 1974) 22-23 Eliz.IIC.42.

s.7(1) Every enactment shall be construed as always speaking.

- (2) Where a provision in an enactment is expressed in the present tense, the provision applies to the circumstances as they arise.

s.8 Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

s.30 provides, in part,

Where an enactment is repealed in whole or in part, the repeal does not (a) revive an enactment or thing not in force or existing immediately before the time when the repeal takes effect; or....

s.31 sets out elaborate provisions as to repeal and replacement.

VI Imperial Legislation enlarging or defining the sphere of Colonial legislation generally

1. Colonial Laws Validity Act, 1865,
[29 June, 1865] 28 & 29 Vict. c. 63 (Imp.) provides inter alia:

"An Act of Parliament, or any Provision thereof, shall, in construing this Act, be said to extend to any Colony when it is made applicable to such Colony by the express Words or necessary Intendment of any Act of Parliament: ...

2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under the Authority of such Act of Parliament, or having in the Colony the Force and Effect of Such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

3. No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of England, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order or Regulation as aforesaid;"

2. Statute of Westminster, 1931, 22 Geo. V, c. 4 (Imp.)
[11 December, 1931] provides inter alia:

"2(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or

regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3 It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4 No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that the Dominion has requested, and consented to the enactment thereof.

5 Without prejudice to the generality of the foregoing provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British Possession did not include reference to the Parliament of a Dominion. "
(Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60 (Imp.))

6 excludes s. 4 & part of s. 7 of Colonial Courts of Admiralty Act, 1890, from effect in any Dominion.
(Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict. c. 27 (Imp.))

"7(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1876 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any

of the legislatures of the Provinces respectively.

11 Notwithstanding anything in the Interpretation Act, 1889, the expression "Colony" shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion. "

Note: Interpretation Act, 1889, 52 & 53 Vict. c. 63 (Imp.)

APPENDIX BVII The Law of England (Application) Law, Cap. 60, 1959
(Western Nigeria):

" 3. From and after the commencement of this Law and subject to the provisions of any written law, the common law of England and the doctrines of equity observed by Her Majesty's High Court of Justice in England shall be in force throughout the Region.

4. Subject to the provisions of this Law no Imperial Act hitherto in force within the Region shall have any force or effect therein:

Provided that, subject to the express provisions of any written law, this section shall not --

- (a) revive anything not in force or existing at the commencement of this Law; or
- (b) affect the previous operation of any Imperial Act to which this section applies or anything duly done or suffered under any such Act; or
- (c) affect any right, privilege, obligation or liability accrued or incurred under any such Act; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any such Act; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Law had not been passed:

Provided that where the penalty, forfeiture or punishment imposed by any such written law in force upon or after the commencement of this Law is heavier than that imposed by any such Act as aforesaid, the provisions of such Act whereby the lighter penalty, forfeiture or punishment is imposed shall, unless such written law as aforesaid otherwise provides, be applied if the court decides to inflict any punishment."

VIII BAHAMAS

- (i) Declaratory Act of the Bahama Islands (1799) 40 Geo. 3 c. 2 (Bahamas)

"An Act to declare how much of the laws of England are practicable within the Bahama Islands and ought to be in force within the same."

Preamble:

The common law of England in all cases, where the same hath not been altered by any of the Acts or Statutes hereinafter enumerated, or by any Act or Acts of the Assembly of these islands, (except so much thereof as hath relation to the ancient feudal tenures, to outlawries in civil suits, to the wager of law or of batall, appeals of felony, writs of attain, and ecclesiastical matters) is and of right ought to be, in full force within these islands, as the same now is in that part of Great Britain called England."

s. 2 "The several statutes and Acts of Parliament hereinafter particularly enumerated and mentioned, are, and of right ought to be, in full force and virtue within and throughout this Colony, as the same would be if the Bahama Islands were therein expressly named, or as if the aforesaid Acts and Statutes had been made and enacted by the General Assembly of these Islands."

The list extends from 1225 to 1787.

s. 3 "All and every of the Acts, Statutes, and parts of Acts and Statutes of the Parliament of England or Great Britain, which relate to the prerogative of the Crown, or to the allegiance of the people, also such as require certain oaths

(commonly called the state oaths) and tests to be taken or subscribed by the people of Great Britain, also such as declare the rights, liberties, and privileges of the subject are, and of right ought to be, of full force and virtue within this Colony, as the same would be if the Bahama Islands were therein expressly named, or as if the aforesaid Acts and Statutes had been made and enacted by the General Assembly of these Islands.

s. 7 declared,

"That the several Acts and Statutes hereby declared to be in force shall be taken, construed and executed liberally and according to the substantial effect and meaning of the same and provided also, that nothing herein contained shall extend, or abridge, alter or repeal any Act or Acts of the General Assembly of these Islands, or any article, clause, matter or thing herein contained."

(ii) Declaratory Act, 1957, c. 2 (Bahamas)

Schedule, Part I lists

ACTS AND STATUTES OF THE PARLIAMENT OF ENGLAND AND
OF THE PARLIAMENT OF GREAT BRITAIN EXTENDED TO THE
COLONY BY 2 of 1799

Acts and Statutes	Subject	Chapter in this Edition
27 Henry VIII. Ch. 10	Statute of Uses	200
13 Elizabeth I. Ch. 5	Fraudulent Gifts	201
27 Elizabeth I. Ch. 4	Fraudulent Conveyances	202
43 Elizabeth I. Ch. 8	Fraudulent Administration	226
21 James I. Ch. 16	Limitation of Actions	97
19 Charles II. Ch. 6	Presumption of Death	98
22 & 23 Charles II. Ch. 10	Statute of Distributions	227
29 Charles II. Ch. 3	Statute of Frauds	203
31 Charles II. Ch. 2	Habeas Corpus	99
3 William & Mary. Ch. 14	Fraudulent Devises	228
4 William & Mary. Ch. 16	Clandestine Mortgages	204
8 & 9 William III. Ch. 11	Frivolous and Vexatious Suits	100
10 & 11 William III. Ch. 16	Posthumous Children	229
8 Anne. Ch. 14	Landlord and Tenant	206
9 Anne. Ch. 14	Gaming	101
4 George II. Ch. 10	Lunatics' Estates	237
4 George II. Ch. 28	Landlord and Tenant (No. 2)	207
7 George II. Ch. 20	Mortgages	205
11 George II. Ch. 19	Distress for Rent (No. 2)	209
15 George II. Ch. 30	Lunatics' Marriage	238

NOTE.--This Act declared 207 Acts and Statutes in force in the Colony. Subsequent legislation has reduced this number to 20. Each of these Acts and Statutes is inserted in its appropriate title and numbered as a chapter of this Edition as indicated above.

Schedule, Part II lists

ACTS AND STATUTES OF THE PARLIAMENT OF ENGLAND AND
OF THE PARLIAMENT OF GREAT BRITAIN AND OF THE PAR-
LIAMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND
IRELAND EXTENDED TO THE COLONY SINCE THE ENACTMENT
OF THE DECLARATORY ACT (2 of 1799) and STILL IN FORCE.

Acts and Statutes Extended	Subject	Extending in this Act Edition	Chapter in this Edition
2 William & Mary Sess. 1. Ch. 5	Distress for Rent	10 of 1872	208
57 George III. Ch. 52	Deserted Tenements	10 of 1872	210
6 George IV. Ch. 129	Combination of Workmen	1 of 1839	293
1 William IV. Ch. 40	Executors	23 of 1860	232
2 & 3 William IV. Ch. 71	Prescription	9 of 1846	213
3 & 4 William IV. Ch. 27	Real Property Limitation	9 of 1846	214
3 & 4 William IV. Ch. 42	Civil Procedure	33 of 1840	102
3 & 4 William IV. Ch. 106	Inheritance	15 of 1844	233
4 & 5 William IV. Ch. 22	Rent	10 of 1872	211
1 Victoria Ch. 26	Wills	23 of 1841	230
1 Victoria Ch. 28	Real Property Limitation	9 of 1846	215
6 & 7 Victoria Ch. 96	Libel	8 of 1847	103
8 & 9 Victoria Ch. 106	Real Property	9 of 1846	217
9 & 10 Victoria Ch. 93	Fatal Accidents	7 of 1847	104
13 & 14 Victoria Ch. 28	Trustees Appointment	14 of 1903	105
15 & 16 Victoria Ch. 24	Wills	21 of 1854	231
18 & 19 Victoria Ch. 43	Infants' Settlements	23 of 1860	107
18 & 19 Victoria Ch. 111	Bills of Lading	23 of 1860	151
19 & 20 Victoria Ch. 97	Mercantile Law Am'dm't	23 of 1860	152
22 & 23 Victoria Ch. 35	Property and Trustees	23 of 1860	218
25 & 26 Victoria Ch. 89(Part iv)	Companies	4 of 1868	124
33 & 34 Victoria Ch. 23	Criminal Forfeitures	7 of 1875	108
33 & 34 Victoria Ch. 35	Apportionment	10 of 1872	212
34 & 35 Victoria Ch. 79	Lodgers' Goods	10 of 1872	109
37 & 38 Victoria Ch. 57	Real Property Limitation	2 of 1877	216
45 & 46 Victoria Ch. 61	Bills of Exchange	5 of 1892	150
52 & 53 Victoria Ch. 49	Arbitration	20 of 1899	110
53 & 54 Victoria Ch. 19	Trustees Appointment	14 of 1903	106
56 & 57 Victoria Ch. 53	Trustees	20 of 1899	111

NOTE. --Each of these Acts and Statutes is inserted in its appropriate title and numbered as a chapter of this Edition as indicated above.

There are in addition certain Acts of the United Kingdom Parliament that apply in the Colony by virtue of their own provisions. These are not printed in this Edition, but a reference is made to them at the end of the Table of Statutes.