

**THE INTER - COLONIAL ELEMENT IN
COLONIAL STATUTE LAW :**
**AN ENQUIRY INTO ASPECTS OF THE
LEGISLATION OF THE BRITISH
SETTLEMENT COLONIES 1790 - 1900 .**

A thesis submitted in partial fulfilment of the
requirements of the degree of Doctor of Philosophy
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Jeremy Nigel Finn

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University of Canterbury

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ABSTRACT

The thesis considers various of the factors which shaped the development of the statute law of the British settlement colonies in the nineteenth century. The principal argument is that the conventional analysis which largely ascribes legal development in each colony to either British precedents or indigenous innovations and regards the influence of other colonies as of only occasional importance is inadequate and must be modified. The thesis proposes instead an analysis which recognises borrowing from other colonies as a standard means of legal development and reform. Archival, parliamentary and other sources are used to assess the factors influencing legal developments found in several colonies. The thesis examines some of the elements which influenced the choices made by colonial legislators or legislatures in the selection of colonial or English statutes as the basis for further colonial legislation. The discussion is illustrated by examination of particular areas of law and by a reference to the degree to which statute law was the product of the influence of certain individuals and institutions. In particular there is discussion of the role of the members of the judiciary and of other colonial officials, particularly the Parliamentary Draftsmen employed in some colonies in the latter part of the period, as well as consideration of the nature and impact of legislation put forward by private members of the legislative bodies. The role and effect of the Colonial Office in monitoring and developing colonial law is also discussed. The thesis also seeks to explore the formal and informal channels by which legal ideas and innovations passed from colony to colony, particularly the developments which were generated by the migration of individuals between colonies or which relied, in whole or in part, on unofficial links between government officials, lawyers, politicians or other individuals in the different colonies.

Statement as to prior publications

Except as stated below, the text of this thesis has not been published in any form prior to its submission for examination:

- (a) Part of Chapter 3, pp.60-61, dealing with the reception of English law in the settlement colonies is derived from the prior publication cited: Finn, Jeremy "The Imperial Laws Application Act 1988" (1989) 4 Canterbury LR 93.
- (b) Parts of Chapter 7 dealing with the office of Parliamentary Draftsman in Victoria, New South Wales and Queensland were presented as a paper at the Australasian Law Teachers Conference, Hobart, October 1994.

Except for materials quoted, which quotations are indicated by the use of quotation marks and are attributed in footnotes, this thesis is entirely my own work.

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¹ NOTE that some statutes which did not include short titles are here listed under what would have been an appropriate short title had one been enacted. See below, p.41, n.51.

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Table of Abbreviations as used in Footnotes

ADB	<i>Australian Dictionary of Biography</i>
AOT	Archives Office of Tasmania
APCNSW	Archives of the Parliamentary Counsel for New South Wales
CALH	Castles, Alex <i>An Australian Legal History</i> (Sydney, Law Book Co., 1982)
Castles & Harris	Castles, Alex C. and Harris, Michael C. <i>Law-makers and Wayward Whigs; Government and Law in South Australia 1836-1986</i> (Wakefield Press, Adelaide, 1987).
DL	Dixson Library, Sydney
GANSW	Government Archives of New South Wales
Hague	Hague, R.M. <i>"History of the Law in South Australia"</i> (typescript, 1937), Mortlock Library.
HRA	<i>Historical Records of Australia</i>
LaTL	La Trobe Library, Melbourne
ML	Mitchell Library, Sydney
NSWPD	New South Wales Parliamentary Debates
NZDB	<i>New Zealand Dictionary of Biography</i>
NZNA(W)	New Zealand National Archives, Wellington
NZPD	New Zealand Parliamentary Debates

Parsons	Parsons, Robin <i>"Lawyers in the New South Wales Parliament 1870-1890: A study in the Legislative Role of Private Members"</i> (PhD. Thesis, Macquarie University, March 1972).
PRO	Public Record Office of the United Kingdom
QPD	Queensland Parliamentary Debates
QSA	Queensland State Archives
Russell	Russell, E. <i>A History of the Law in Western Australia</i> (UWA Press 1980)
SAPD	South Australian Parliamentary Debates
SAPP	South Australian Parliamentary Papers
SAPRO	South Australian Public Record Office
SASL	South Australian State Library
Swinfen	Swinfen, D.B. <i>Imperial Control of Colonial Legislation 1813-1865 : A Study of British Policy toward Colonial Legislative Powers</i> (Clarendon Press, Oxford, 1970)
VH	Victorian Hansard
VPD	Victorian Parliamentary Debates
VPP	Victorian Parliamentary Papers
VPRO	Public Record Office of Victoria
WAPD	Western Australian Parliamentary Debates

Chapter 1:

Introduction

This thesis examines aspects of the development of the statute law of some of the British colonies in the nineteenth century. The selection of this time period admittedly involves an attempt to isolate and consider something which is a part of a continuing process, but the choice is not entirely arbitrary. The late eighteenth century had seen the creation of a new settlement colony¹ in both Upper Canada, a separate entity from 1791, and the commencement of British settlement in Australia in 1788. Although it was not until 1814 that Britain acquired sovereignty over the Cape of Good Hope, it had had de facto control there from 1795 to 1802 and from 1804 on. The North American colonies in the early years of the period of this study period were heavily influenced by the aftermath of the American War of Independence, an event which shaped the character of the remaining North American colonial population and politics for fifty years or more. Nor were its effects limited to North America - the "loss" of the American colonies profoundly influenced British political thought upon the subject of colonies and their government for most of the nineteenth century. The close of the nineteenth century is also to an extent arbitrary, but the federation of the Australian colonies represents a significant alteration in the pattern of development of the Australasian colonies, and is therefore a convenient closing point for the current study. The same period saw a transformation of British interest in South Africa with the acquisition of de facto, then de jure, control over the Boer republics.

The principal focus of the thesis is on Australasian law, but there is also a less detailed discussion of aspects of the law in the British North American colonies, and, to a minor

¹ The term "settlement colony" will be used frequently throughout this thesis. It is intended to cover those colonies where the policy of the British Government was to encourage or tolerate European settlement with a view to a European population which would predominate either numerically or politically, or both, over any indigenous inhabitants. The term therefore is used to comprehend the separate colonies of British North America, (later to form the Dominion of Canada, but including Newfoundland), the colonies later making up the Commonwealth of Australia; New Zealand and the colonies of Natal and Cape of Good Hope. A table showing the dates of creation or acquisition of these various colonies is in Table A below p.313.

extent, those in South Africa. The quantity of material involved prevents an exhaustive treatment of the field. Instead the thesis aims to examine various of the factors which went to shape the development of the law. The principal thrust of the thesis is to attempt to isolate and describe matters which encouraged, or militated against, development of a body of colonial law distinctively different from that of England, especially those factors which encouraged colonies to look to developments in other colonies as a source of inspiration or precedent for legislation. Certain of these influencing factors are illustrated by examination of particular areas of law, individuals or institutions. The thesis also seeks to explore the formal and informal channels by which legal ideas and innovations passed from colony to colony.

A. An historiographical introduction

The extension of the British Empire in the eighteenth and nineteenth centuries is a remarkably unevenly documented phenomenon. The course of the expansion of British power and control has been thoroughly charted and the political events in at least most of the colonies acquired during the period have been analysed in greater or lesser depth. However in almost all cases historians have approached their work in an intellectual framework which focuses on the British (or, in some cases, only the English) connections to the colony. This approach naturally leads historians into a consideration of colonial history as being the creation of antithetical strains of British influence and the development of the colony or colonies in question. The resulting mindset results in a neglect of a probably more sound appreciation of the British Empire as a dynamic system with multiple centres of development.²

The development of, and transmission of, English³ law to the colonies and legal developments within the colonies have occasionally been included within the descriptive histories of the colonies, but have more commonly been the subject of serious discussion only outside the mainstream of historical writing. Most commonly legal histories are found in legal periodicals or in specialist lawyer's histories. These writings are, if anything, more markedly Anglocentric than are most general histories. Nor is there any more consideration of developments across a number of colonies. Even the comparatively well researched histories of the settlement colonies are usually limited in scope and lack any significant comparative element.⁴ Many only describe

² As to this see the very illuminating introductory essay in Bailyn, Bernard and Morgan, Philip D. (eds) *Strangers Within the Realm: Cultural Margins of the First British Empire* (University of North Carolina Press, Chapel Hill N.C., 1991), especially pp. 1-10.

³ As to the use of English, rather than British, law, see Jamieson, N.J. "English Law but British Justice" (1980) 4 Otago LR 488.

⁴ The plea for comparative history made by G.K. Raudzens (Raudzens, G.K. "Upper Canada and New South Wales to 1855: The Feasibility of Comparative Colonial History" JRAHS, 1981, vol.67 p.1) has apparently borne little fruit.

events in one colony;⁵ others select a group of colonies which were later amalgamated in some fashion.⁶ More commonly, legal historians of any part of the colonial period have tended to select an institution⁷ or an individual (or individuals).⁸ There has been scant consideration of the interaction between Britain and the colonies in the development of the law - D.B. Swinfen's seminal work on the review of colonial legislation by the Colonial Office being an honourable exception.⁹ Even less attention has been paid to the question of the influence of legal developments in one colony upon the development of the law in another colony, except occasionally and in regard to specialist areas of law. The spread of the Torrens system has been well documented.¹⁰ Some other historians of particular aspects of law have considered developments in different areas - Ellinger and McKay have written of chattel securities in an Australasian context;¹¹ White has considered a chain of legislation relating to probation¹² and John Seymour has noted various attempts to deal with juvenile offenders.¹³

⁵ Castles, Alex C. and, Michael C. *Law-makers and Wayward Whigs; Government and Law in South Australia 1836-1986* (Wakefield Press, Adelaide, 1987); Robson, J.L. (ed.) *New Zealand; The Development of its Laws and Constitution* (2nd ed., 1967, London, Stevens & Sons); Russell, E. *A History of the Law in Western Australia* (Perth, U.W.A. Press, 1980); Waite, P., Oxner, S. and Barnes, T. (eds.) *Law in a Colonial Society: The Nova Scotia Experience* (Toronto, Carswell, 1984). A more limited treatment of statute law alone in a single colony is Parsons, Angus and Campbell A.L. "The South Australian Centenary of Legislation" (1936) 17 JCL & IL (3rd series) 21.

⁶ Castles, A.C. *An Australian Legal History* (Sydney, Law Book Co., 1982); Flaherty, D. (ed.). *Essays in the History of Canadian Law* (vols.1 & 2, Osgoode Society, Toronto, 1981 and 1983); Paton, G.W.(ed.) *The Commonwealth of Australia: The Development of its Laws and Constitution* (London, Stevens and Sons, 1952).

⁷ Bennett, J.M. (ed), *A History of the New South Wales Bar* (NSW Bar Association, Sydney, 1969); McPherson, B.H. *The Supreme Court of Queensland 1859-1960* (Butterworths of Australia 1989); Brode, P. *Sir John Beverly Robinson* (U of Toronto Press, Toronto, 1984); Currey, C.H. *Sir Frances Forbes* (Sydney, Angus and Robertson, 1968)

⁸ e.g. Spiller's extensive treatment of the Chapman family (See Spiller, Peter *The Chapman Legal Family* (VUP, 1992); Spiller, Peter, *Two Judges - Father and Son: An analysis of the careers of Henry Samuel Chapman and Frederick Revans Chapman.* (Thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy, University of Canterbury 1991); Spiller, Peter "Henry Chapman: Pioneer Law Lecturer at the University of Melbourne" (1989) 17 MULR 275; Spiller, Peter, "The Career of Henry Chapman in Dunedin" (1990) 7 Otago LR 305; Spiller, P., "Chapman J. and the *Symonds* Case" (1990) 4 Canterbury LR 257.

⁹ Swinfen, D.B. *Imperial Control of Colonial Legislation 1813-1865 : A study of British Policy toward Colonial Legislative Powers* (Clarendon Press, Oxford, 1970).

¹⁰ See below, pp.273-78.

¹¹ Ellinger, E.P. and McKay, L. "Chattel Securities in New Zealand 1843-47" (1974) 3 Otago LR 153.

¹² White, J. "The Pitfalls of Imitation: The New South Wales First Offenders Probation Act of 1894" (1985) 13 VUWLR 137.

¹³ Seymour, J.A. *Dealing with Young Offenders in New Zealand: the system in evolution* (Legal Research Foundation Monograph, Auckland, 1976).

There have been few attempts to consider both a wide range of aspects of law and events in more than one colony - perhaps the best, notable both for its quality and its pioneering nature, is Paul Finn's *Law and Government in Colonial Australia*¹⁴ - and even then Finn considers events and attitudes in only three of the six Australian colonies. A similarly limited but shallower account of some aspects of Australian developments is given by Bennett and Forbes in considering the relative importance of tradition and British inheritance on the one hand and local innovation on the other!¹⁵

One obvious cause of this tendency to concentration on isolated elements of law in the British Empire is the sheer size of the task involved in any significant comparative exercise. Such a comparative study is also contrary to the tendency of legal historians to accord prominence to case law, rather than statute law, in most historical accounts. Why such a preference should exist is not clear. One probable cause is the influence of English legal historians who have traditionally framed their analyses around documented cases - a cultural habit applied without great thought as to the validity of the approach by their later, and non-English, followers. A second possibility is the attraction of the human element - even where the focus of research is statute law, it may be that consideration of the statute's effect in decided cases will be perceived to involve more intellectual satisfaction than consideration of the same statute in terms of statutory parallels in other colonies. Resource constraints are also relevant - it is generally far more difficult to find adequate editions of old statutes of other colonies, let alone parliamentary records relating to them, than to gain access to volumes of early law reports of those colonies.

The result has been a literature which carries the deficiencies of a limited conceptual framework. Where the development of the law in one colony is seen in isolation, the tendency is to magnify the contribution made by individuals within that colony. Where

¹⁴ Finn, Paul D. *Law and Government in Colonial Australia* (OUP, Australia, 1987).

¹⁵ Bennett, J.M. and Forbes, J.R. "Tradition and Experiment: Some Australian Legal Attitudes in The Nineteenth Century" (1971) 7 U Qld LJ 172.

an author has had regard to British developments as well as local ones, the resultant analysis is usually comes to be framed in bi-polar terms - that which is not a "British" development must arise from a local initiative, and vice versa. In such an analysis it is usually assumed that legal development paralleled political and constitutional development, and therefore that the British influence was restrictive of a general colonial desire for progress and reform. In some cases historians have contended that "technical" or "lawyer's" law in the colonies was derived from Britain, though laws enshrining more progressive social attitudes and political reforms might be the product of colonial efforts.¹⁶ Some historians, such as Brode¹⁷ have gone at least some distance further and considered the divergent aims of different factions in colonial society, some of which sought to buttress claims to political or social power by the adherence to traditional forms of the English law.¹⁸ Any subsequent debate is frequently distorted by the constraints of such a simplistic model into an even more simplistic, and even less accurate, controversy over the extent to which the colony had escaped from the shackles of British at any particular time, and the influence of various individuals over the timing, or the extent, of such hypothetical cultural 'liberation'.¹⁹

The intercolonial aspect has thus been largely neglected. Many writers on the legal history of parts of the British Empire neglect it entirely. Not all are unaware of the effect that developments in one colony could have on another. A recent Canadian writer, John McLaren has commented that

What is often forgotten, however, is that within the British Imperial system the transference of legal ideology and institutions was not invariably from Britain to the colonies and dominions. There is increasing evidence being unearthed by legal historians of borrowing between the colonies and dominions, assisted by the peregrinations of governors, bureaucrats and judges, immigration and emigration of

¹⁶ E.g. see Moore, Sir Harrison "A Century of Victorian Law" (1934) 16 J Comp Legn 175.

¹⁷ Brode, P. *Sir John Beverly Robinson* (U Toronto Press, Toronto, 1984).

¹⁸ Baker, G Blaine "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 Law and History Review 219.

¹⁹ A paradigm example of writings of this type is provided by Mack, K. "*Development of an Australian Legal System*" in Elinghaus M.P., Bradbrook, A.J. and Duggan, A.J. *The Emergence of Australian Law* (Butterworths of Australia, Sydney 1989).

private members and individuals and groups and improved modes of communication".²⁰

McLaren cites as examples the Australian influence on British Columbian goldfields law²¹ and the colonial interaction on legislation limiting Asian migration to the self-governing colonies.²² In both cases, as will be shown later, the position was more complex than McLaren's surface analysis indicates. More importantly, the quoted statement indicates a viewpoint that colonial interconnection and influence was a relatively minor matter, the exceptions to the "not invariable" rule that migration of ideas went from Britain to the colonies.

A brief inspection of the writing on New Zealand's early legal history indicates the limitations of much of the current literature. Much of what has been written about the development of the law in the first decade of British rule²³ has focussed on the establishment of English courts and law in New Zealand. Even so, there is little agreement among the commentators as to the key influences on early New Zealand law.

One writer, Cameron, has stated:

"The policy of the founders of our legal system seems to have been to depart as little as possible in principle or detail from the law then existing in England. Alterations seems for the most part to have been imposed by compelling circumstances rather than by desire".²⁴

Two other writers, Foden²⁵ and Cornford,²⁶ have paid attention to the importance of New South Wales precedents for the ordinances enacted in the first two sessions of the New Zealand Legislative Council. Foden, however, does not discuss the period after

²⁰ McLaren, John "The Legal Historian, Masochist or Missionary? A Canadian Reflects" (1994) 5 *Legal Education Review* 67, 76. This article provides a most useful commentary on several aspects of modern legal historical writing.

²¹ As to which see below, pp.29-30.

²² As to which see below, pp.78ff.

²³ i.e. 1841-1850 ; a period largely ignored by the recent explosion in writings about the Treaty of Waitangi

²⁴ Cameron, B.J. "Law Reform in New Zealand" (1956) 33 *NZLJ* 88, 89.

²⁵ Foden, N.A. *New Zealand Legal History (1642-1842)* (Sweet & Maxwell Wellington, 1965) Chapters 17-20

²⁶ Cornford, P.A. "The Administration of Justice in New Zealand 1841-1846 (A Legislative Chronicle) [Part I] The Fisher Period" (1970) 4 *NZULR* 18 and "The Administration of Justice in New Zealand" 1841-1846 (A Legislative Chronicle) [Part II] The Swainson Period" (1970) 4 *NZULR* 120.

1842, and Cornford restricts his coverage of the post-1842 period to discussion of the court system.

A fourth view has been put forward which perhaps best expresses the received tradition of New Zealand's legal development. This view claims that there was a high degree of innovation in the early period of New Zealand law, and gives the praise for this to William Martin (the first Chief Justice of New Zealand), Thomas Outhwaite (an English solicitor who became the Registrar of the Supreme Court) and, in particular, to William Swainson, the Attorney-General of New Zealand from 1842 to the end of the Crown Colony period in New Zealand.²⁷

None of these different analyses accurately reflect the reality of New Zealand's early legal history;²⁸ in their inaccuracy they provide a microcosm of the defects in the historiography of legal development in the British Empire as a whole.

²⁷ Mason, H.G.R. "One Hundred Years of Legislative Development in New Zealand" (1941) 23 *JCompLeg&IL* (Series I) 1, 3 and Cornford "The Administration of Justice in New Zealand" 1841-1846 (*A Legislative Chronicle*) [Part II] The Swainson Period" (1970) 4 *NZULR* 120

²⁸ See also pp.122-124 below.

B. Historical overview of the British settlement colonies and their governance.

In the early years of the nineteenth century, British colonies with a predominant European population were only to be found in North America and Australia. The diverse North American colonies reflected their heterogeneous origins and developments. The oldest remaining British colonial possessions were on the Atlantic coast - Newfoundland and Nova Scotia.²⁹ These colonies were later joined by other small enclaves - the short lived separate colony of Cape Breton Island and Prince Edward Island. Nova Scotia was divided with the splitting off of New Brunswick in 1784 as part of the aftermath of the American War of Independence. A vast extension of British sovereignty occurred with the acquisition of the remaining French possessions in mainland North America in 1763. The settled area spreading along the St. Lawrence River was styled as "Canada" until the separation of the districts along the Great Lakes in 1791, when the inland district was styled as Upper Canada; the original area of French settlement then became Lower Canada. In 1841, the two Canadas were united as the new colony of Canada; then became separate provinces in the Confederation of Canada in 1867,³⁰ in which they were joined by Nova Scotia and New Brunswick. To these were added the formerly separate colonies of British Columbia in 1871 and Prince Edward Island³¹ two years later. British colonisation of the Pacific Coast region had begun in 1849 when the Hudson's Bay Company acquired control over Vancouver Island. In the late 1850s, the extension of the Californian gold rushes to the Fraser River led to the establishment of a colony on the mainland, originally styled as New Caledonia. At the same time, the Crown took back Vancouver Island from the Hudson's Bay Company, and in 1866 New Caledonia and Vancouver Island were merged into the new entity of British Columbia.³² In 1869, the new Dominion had

²⁹ Both were the scene of British settlement prior to their final acquisition by Britain under the Treaty of Utrecht in 1713 : Calder, Angus *Revolutionary Empire* (Jonathan Cape, London, 1981) p. 426.

³⁰ British North America Act 1867(Imp).

³¹ The remaining Atlantic coast colony, Newfoundland, did not join the Dominion of Canada until 1950.

³² See Knaplund, Paul, *The British Empire 1815-1939* (Harpers, New York, 1941), p 223.

gained the vast western lands of the Hudson's Bay Company; this was to be divided into the new province of Manitoba (established in 1870) and the North Western Territories. This latter entity was later diminished by the creation of the new provinces of Alberta and Saskatchewan in 1905.

The development of the Canadian colonies cannot be assessed solely by reference to their geographical expansion. An understanding of the nature of political and legal developments can only be gained by considering the population of the colonies, its growth and the sources of migration. The most influential factor in Canadian affairs in the late eighteenth and early nineteenth centuries was the mass migration into the Maritimes and Upper Canada of the "United Empire Loyalists" - those supporters of the British Crown during the American War of Independence who chose, for one reason or another, to depart from, or not to return to, the new Republic. While many went to Britain or to the West Indian colonies, a very substantial number went north. Estimates vary, but it appears that the population of the Maritimes must have at least doubled between 1776 and 1785,³³ rising from perhaps 35,000 to 70,000 over the period. The population had slowly risen to perhaps 150,000 by 1815, and continued to rise slowly over the remainder of the nineteenth century. By contrast, the new area of Upper Canada, later Ontario, grew fast. The initial impetus again came from United Empire Loyalists, with perhaps 6,000 to 10,000 of them settling in Upper Canada³⁴ the population was later to be swelled by many migrants from America who came not out of political conviction but in search of cheap land - a body of persons who contributed substantially to the difficulties of the British Government in the War of 1812, and even more so to the unrest of the 1830s. One of the enduring legacies of the United Empire Loyalist migration was the creation of a politically dominant elite which was intensely conservative and resistant to any political or legal change which in any way seemed tainted with republicanism: another was a strong core of persons with legal experience

³³ Ibid, p 65 ; cf Calder, Angus *Revolutionary Empire* (Jonathan Cape, London, 1981) p.803.

³⁴ Calder, Angus, op. cit. n.33 p. 426.

and education drawn from a range of different legal systems of the former colonies. The nature of the Loyalist influence may be demonstrated by the fact that every New Brunswick judge until the 1820s was a Loyalist emigre ; many of their successors came from Loyalist families.³⁵ In Upper Canada, the leaders of the Loyalists formed what was to be come known as the "Family Compact", a conservative oligarchy which dominated the colony until somewhat weakened by the reforms of the 1830s.³⁶ The nature of Canadian development was also heavily influenced by the character of Lower Canada. This colony was controlled by the British, but the major part of the population was of French descent, French speaking and Roman Catholic in religion. The rights of these British subjects to be bound by their own body of laws, derived from the Coutume de Paris of 1661, was guaranteed by the Treaty of Paris of 1763. Lower Canada represented in an acute form a difficulty to be found in other colonies as well - the need to find ways to deal with subjects of a different culture from that of Britain. By and large a *modus vivendi* was established between the Francophone and Anglophone communities of Canada but the interests, and prejudices, of the former frequently affected proposals for legal or constitutional reform. The Maritime colonies, and parts of the western territories, also had Francophone minorities, but these were generally small enough that they had little effect on political or legal developments³⁷

Canada was not the only region where the British ruled European subjects with a culture and law of their own. In the Caribbean, there were European minorities of various backgrounds - Spanish in Trinidad; French in St Lucia; Dutch in British Guiana. However, there was only one settlement colony outside North America where there was any serious problem of assimilation of an established settler populace to British rule. In

³⁵ Stockton, A.A. *The Judges of New Brunswick and their Times*, (Acadiensis Magazine, St. John, New Brunswick, 1907), *passim*.

³⁶ Brode, P. *Sir John Beverly Robinson* (U Toronto Press, Toronto, 1984), ch. 1 provides a useful introduction to this body.

³⁷ There were risings of the Metis (a rural population descended from both French traders and the indigenous Indian population) in frontier areas later organised as the provinces of Manitoba in (Red River rising, 1870) and Saskatchewan (Northwestern Rebellion, 1885) but these were quickly suppressed. In any case the risings, as they are sometimes called, were sparked more by issues affecting Indians than by any grievance specific to a separate Francophone minority.

1814, Holland ceded to Great Britain its colony at the Cape of Good Hope. The European settlers there, mostly of Dutch descent, were perhaps one third of the total population - the remainder being slaves, half-castes and natives.³⁸ Despite the later arrival of British migrants, the proportion of Europeans in the colony's population fell over the nineteenth century - the greatest growth in population was fuelled by Bantu migrants from the north. Although the Romano-Dutch law of the existing settlers (or Afrikaners as they usually referred to themselves) was retained for Afrikaners, English law, both statutory and common, also came to be applied in the colony in appropriate cases. With the later expansion of British control to the north-east, there came the creation in 1843 of the new province of Natal, which was treated as inheriting English law, at least for settlers of European descent. However, the influence of Romano-Dutch law in Southern Africa was preserved in the new Afrikaner republics created by Afrikaner migrants from the Cape Colony from 1837 on.³⁹

Antedating the South African colonies was the commencement, albeit initially only on a tiny scale, of British settlement in Australasia. British interests in the Australian land-mass commenced with the initial convict settlements⁴⁰ at Sydney (or Botany Bay) in 1788, and Van Diemen's Land fifteen years later. The first free settlement colony was Swan River, (later Western Australia) in 1829. This was followed by South Australia in 1836, and by the creation of new colonies by fission from New South Wales - Victoria in 1850 and Queensland in 1859. In the interim, Britain had acquired sovereignty, at least to British satisfaction, over New Zealand in 1840. The growth of these colonies, initially regulated far more by the numbers of convicts sent out from Britain than by any other factor, was steady, but not spectacular for some decades. However, with the discovery of gold in Victoria and New South Wales in the early 1850s, the situation was

³⁸ Knaplund, *op. cit.* n. 32, p.109.

³⁹ The causes of the Afrikaner exodus, of which the first and most famous manifestation was the 'Great Trek' of 1837 are still a matter of controversy, but one factor had been dissatisfaction with the abolition of slavery, and the fixing of compensation at what was seen as too low a price, by British statutes.

⁴⁰ The establishment of these colonies was prompted by a number of factors - strategic, economic and social: Blainey, G, *The Tyranny of Distance* (Sun Books, Melbourne, 1966), pp.18-32.

transformed. The population of Australia, soared from around 150,000 in 1837 to over 1,650,000 in 1871. The growth was greatest in Victoria and New South Wales, where the population more than doubled between 1850 and 1855.⁴¹ However, the other Australian colonies were to experience periods of significant economic growth later in the century, with concomitant growth in population. A similar pattern of significant regional growth followed by later more general development recorded in New Zealand in the 1860s, again following the discovery of gold.

The evolution of government of the settlement colonies, particularly the achievement of responsible government following the Durham Report of 1839, has been well documented.⁴² For present purposes it is sufficient to note the evolution of government in the various colonies followed a broadly similar pattern. In almost all, there was a period (which may be called "Crown Colony" government) where both executive government and legislative functions were in the hands of a Governor and appointed Councils. The next step or "representative government" was generally the creation of a form of representative institution to undertake legislative functions. Finally there was a handing over of executive government on internal matters to representatives of the majority in the legislative body - "responsible government" as it was termed. The first colony to achieve this status was Nova Scotia in 1848, with most of the other settlement colonies achieving responsible government within the next twenty years. There were variations on this prototype of constitutional development - the Canadian maritime colonies generally had representative bodies from their inception though with a restrictive franchise which minimised friction with the Governor. Queensland, on separation from New South Wales in 1859, acquired responsible government immediately and thus never experienced as a separate colony either Crown Colony government or representative government. The pace of constitutional development varied greatly. Some, such as Queensland and Victoria, experienced rapid

⁴¹ Knaplund, *op. cit.* n.32, p. 277.

⁴² Macintyre, W.D. *Colonies into Commonwealth* (2nd ed) (Blandford, London, 1968) provides a convenient brief treatment.

development; in the case of some perhaps unreasonably so. New Zealand achieved responsible government in 1856, thus compressing into only 16 years what took much longer in other colonies and found the demands of the new system outrunning somewhat the capacity of the then colonists. Development could however be much slower - the Cape of Good Hope secured representative government in 1859 but responsible government was delayed until 1872. Even slower was Western Australia, with responsible government coming in 1890, some 61 years from the inception of the colony. Natal took almost as long.

These political and constitutional developments had profound influences on the processes of legislation. These are considered in more detail later, but for current purposes, four significant consequences should be noted. With the inception of legislation by a representative body, the capacity of the Executive to ensure the passage of legislation - either at all, or in its original form - was notably weakened. This also curtailed the influence of the Colonial Office over colonial legislation.⁴³ Secondly, and perhaps more importantly, representative government meant the end of the Executive's effective monopoly on the introduction of legislation. Many initiatives could, and did, now come from opposition or independent members of the legislature.⁴⁴ Responsible government brought with it the potential for, and often the actuality of, friction with Britain over the scope of colonial legislative competence. Lastly, but by no means least importantly, responsible government transformed the position of the Government's principal legal officers and advisers. One manifestation of this was the greater frequency of officeholding by successful colonial lawyers - a matter which in itself significantly affected both the quality of legislation and the sources from which such legislation was drawn.⁴⁵

⁴³ As to this see chapter 4.

⁴⁴ See chapter 8.

⁴⁵ The contribution of the legal officers of the colonial Governments to legislation is considered in Chapter 6.

C. Of colonial attitudes and philosophies.

In any analysis of any aspect of the history of the British settlement colonies it must be remembered that although they were "British" there were a number of important differences between the attitudes of the British governing sects and those who had or acquired political power in the colonies. Firstly it is pertinent to note that to some extent at least in the settlement colonies there was a collective colonial identity which was "British" in a way that was not actually found in Britain, since colonial societies created an amalgam of the varied and disparate and often antagonistic Anglo-Celtic cultures which in the United Kingdom tended to exist separately.⁴⁶

Secondly there is the very important fact that, until quite late in the century, those migrating to the colonies could be divided into those who intended to settle permanently and those who went as temporary sojourners,⁴⁷ intending to stay in the colony only for the term of some official appointment or until some social or financial goal had been achieved before returning to Britain. The distinction may well have been more important in the Australasian colonies than in the North American colonies, since trans-Atlantic travel demanded less in money and time than did a venture to Australasia or New Zealand, but it is always of some significance. Persons who saw themselves as sojourners rather than permanent colonists did not have as a goal the creation of a new society or a new country, but personal advancement. It is those classes to whom emigration was an irrevocable step who were first to acquire a nationalist temper. As a result, the relative young colonial democracies had, at least at first, relatively few leaders of comparable social standing and financial position to the leading men of British politics. This was something that some British politicians were slow to realise.

As Francis puts it:

"As H.T. Manning pointed out there was always a tendency to assume that the colonies were all alike, and that their political life resembled

⁴⁶ See Akenson, Donald Harvey *Half the World From Home: Perspectives on the Irish in New Zealand 1860-1950*. (VUP, 1990) pp. 192-4.

⁴⁷ cf Nadel, George *Australia's Colonial Culture: Ideas, Men and Institutions in Mid-Nineteenth Century Eastern Australia* (F W Cheshire, Melbourne, 1957), pp.30-31

eighteenth-century Virginia. Whig Secretaries of State took it for granted there must be country gentlemen".⁴⁸

These factors, and the relative egalitarianism of colonial societies meant that control of the domestic political agenda was in the hands of the colonial elite which was both more pragmatic and utilitarian in its outlook than its British counterparts, and less inclined to see social reform as a demonstration of paternalistic concern by those who dominated government by inheritance and wealth⁴⁹.

Thirdly colonial politicians and leaders were distinguished from their counterparts in Britain by the lack of doctrinaire beliefs and by the degree to which even members of conservative political factions in the colonies could be proponents of social reform. Perhaps the paradigm case of this, as Francis has pointed out, is the career of John Beverley Robinson in Upper Canada. Robinson, despite being an archetypal Tory in politics, put forward a number of very liberal minded proposals for reform of the law, including the removal of the death penalty for concealment of the death of a bastard child.⁵⁰

There were however other cases where lawyers found that pragmatic attitudes translated into a reluctance to depart from English precedents. In 1853, the Chief Justice of South Australia, Charles Cooper, was prepared to recommend the adoption in the colony of the Common Law Procedure Act 1852(Imp), even though Cooper had not seen an complete version of the British Act. In Cooper's view, the 1852 Act promised to simplify legal proceedings and render them much less expensive. Nor was this all. To Cooper, the colony benefited from keeping in step with English law and copying the British statutes, since they were, to his mind, better drafted than colonial measures, and moreover imitation enabled the colonies to obtain the full benefit of English decisions

⁴⁸ Francis, Mark *Governors and Settlers: Images of Authority in the British Colonies 1820-60* (Macmillan, London, 1992) p.128.

⁴⁹ For the importance of paternalist attitudes in the British social reforms of the first half of the nineteenth century, see Roberts, David *Paternalism in Early Victorian England* (Croom Helm, London, 1979), esp. pp. 205ff. For colonial attitudes, see Nadel, op. cit, n.47, p.31

⁵⁰ See Francis, Mark, op. cit n. 48, p.117, and see Brode, P. *Sir John Beverley Robinson* (Osgoode Society, Toronto, 1984) pp.183-4.

on the statutes.⁵¹ This is a view far from unique to Cooper - in many another debate the advantages of following on Britain's coattails were expounded, though not perhaps with marked success.

Overall colonial political debate was less concerned with theory than with practical effect. One New Zealand historian summed up the basis for the land legislation of the 1890s thus:

"Land reformers such as Ballance and McKenzie were not doctrinaire theorists. They sought to fit theory to political reality, rather than vice versa, and the intellectual support provided by George and Mill was utilised only so far as it was applicable to New Zealand conditions".⁵²

The absence of doctrinaire views is reflected in the willingness of colonial leaders to alternately claim that the colony should follow English customs or precedents and to assert a need for a proud independence. Nadel refers to Australian proponents of reform of education in the 1840s who used the English Conservatives support for reform to defuse criticism by colonial conservatives.

"This was part of the eclectic debating technique of Colonial reforms. Sometimes the more backward aspects of English society were cited as the *exemplum horridum* to prevent the new country from burdening itself with old mistakes. At other times, the English example was favourably held up to the colonial conservatives - who were usually very consciously English - to beat them on their own ground".⁵³

Even so, it is clear that many colonial politicians, even those of a sojourner character, were very conscious of the importance of the institutions and traditions they were creating. One indication of this is a reported comment of Sir George Grey, then

recently returned to Britain from his first governorship of new Zealand that
" he was very much struck in coming to England by the way in which we *lived for the present*. In the colony whatever you do or plan is calculated with a view to what it will or ought to be in twenty or fifty or a hundred years hence. Here nobody looks a year before them".⁵⁴

⁵¹ Cooper to Chief Secretary, 11th June 1853, file GRG24/6, SAPRO

⁵² McIvor, Tim *The Rainmaker: A Biography of John Ballance, Journalist and Politician 1839-1893* (Heinemann Reed, Auckland 1989), pp. 112-3.

⁵³ Nadel, op. cit. n.47, p.162

⁵⁴ Blachford to Rev. R.W. Church, 25 May 1854, printed in Marindin, G. E., ed. *Letters of Frederic Lord Blachford, Undersecretary of State for the Colonies 1860-71* (John Murray, London, 1896), pp.156-7. Emphasis in original.

It seems probable that in general colonial politicians were much more open to change and reform than were their British counterparts. This may have been at least a matter of pragmatism - one New Zealand journalist and politician took the view that expediency was the key factor:

"They would have no more compunction in some of the Colonies about changing the entire constitution than the people at home would have about a simple extension of the franchise. Nations that have neither history nor tradition, are governed by expediency - the convenience of the greatest number, and are always subject to sudden changes and fluctuations of popular opinion."⁵⁵

This receptivity to new ideas and willingness to experiment should not be seen as totally antithetical to British political thought at the time. As Nadel, the author of perhaps the most penetrating study of colonial political attitudes, points out, there was, in all English-speaking communities, a general belief that society was progressing toward some new plane. The debates were more about the rate at which changes should be made, and what exact form they should take, than about whether or not there should be change at all.⁵⁶

Undoubtedly late in the century there was some move toward a more doctrinaire approach to politics, but even this must be seen in the context of attitudes which were generally more progressive than was the case in England. Certainly reforms often went much further in the colonies than in Britain, or the colonies succeeded in introducing progressive legislation where similar proposals fell foul of the conservative elements in the British legislature. In part this reflects the fact that many colonials of a conservative but not ultra-conservative cast were prepared to see a much more interventionist role for government, in part because it might assist some of their projects and interests but perhaps principally because they recognised that the electoral appeal of the labour movement could only be challenged by active measures to remedy perceived social evils.⁵⁷

⁵⁵ John Ballance, in an 1867 editorial, quoted by McIvor, Tim, *op. cit.* n.52, p.26

⁵⁶ Nadel, George *op. cit.* n.47, p.63.

⁵⁷ cf Ward, J.M. "Colonial Liberalism and its Aftermath: New South Wales 1867-1917" *JRAHS*, 1981, vol.67, p.81

There was a significant move toward a cultivation of habits and attitudes British, more especially things English, in the third quarter of the nineteenth century. In part this was simply a result of the immense increase in population consequent on the gold rushes, an increase predominantly drawn from the British Isles. Many of these voluntary migrants came seeking opportunities in their chosen trades and professions, opportunities denied them in England by economic circumstances, unlike earlier generations of colonists who had either come out involuntarily, or had sought to exploit the lands and natural resources of the colonies in fashions which had no real counterpart in the British economy. The process is perhaps most clearly seen in Australia. In the first part of the century migrants (at least voluntary migrants and some at least released prisoners) were pioneers in a colonial society, with the relative openness to new ideas that a self-image of the colonist as pioneer might engender. Later migrants were more likely to see a colony as being on its way to adulthood, a process measured by the rapidity with which the colony reproduced the more desirable features of England, a mindset which tended to make similarity with England a touchstone of maturity and set it in opposition to outmoded or "colonial" attitudes. The development of colonial nationalism, as had been found in New South Wales in the 1840s and early 1850s, was hindered because nationalist aspirations became more difficult to separate from Anglocentric cultural perceptions.

It may therefore be contended that one significant side-effect of the gold-rushes was to dilute, though perhaps never to extinguish, the colonial nationalist aspirations of some writers and politicians. As one Australian writer has put it:

"there was a `radical-nationalist-tempered' policy in Sydney in the 1840s' in the face of economic decline, some felt that the colony's best interest would be served if control lay in local hands rather than being dictated from Britain. The time seemed ripe for independent nationalism. But then the gold-rushes arrived, solving the economic malaise, but swamping the colonists with an influx of new immigrants for whom Australianism was not important."⁵⁸

⁵⁸ Walter, James (ed) *Australian Studies: A Survey* (OUP, 1989), p.5.

In all the colonies there was, to greater or lesser extent, some growth of a nationalist spirit. In South Africa's case, it was hindered by the persistent rivalry between the Boer republics and the British colonies. In Canada there is formal nationalism with Confederation in 1867, though some historians would argue that the creation of a single federal state long preceded a sense of genuine nationalism which was not found until some decades later. New Zealand nationalism follows a similar, if perhaps less marked pattern, to that of its trans-Tasman neighbours. It is in those colonies, in the later decades of the century, that a resurgent Australian (and, on occasion, Australasian⁵⁹) nationalist spirit again extolled the virtues of the colonial elements in its national life and compared them favourably to features of British society. Whatever may have been the fate of the inchoate nationalism of the Australian colonies before the gold-rushes, there can be no doubt of the strong nationalist sentiments that developed in the latter years of the century. More significantly, in the later period the nationalists were not the disgruntled and relatively powerless figures of the earlier time. Instead the nationalists were some of the most powerful political figures in the colonies, and their views did not incline them to consider colonial initiatives as less sound or desirable than imitations of English developments. Consider the sentiments of S.W. Griffith, in a speech favouring federation:

".... I confess, Sir, that for my part I feel rather tired of being called a 'colonist' or a 'colonial'. Although no doubt the good people of England treat us with the greatest respect, and give the greatest consideration to our view, and are animated by the best intentions toward us, nevertheless we are thought only dependencies of the Crown. There is no question that the idea prevails, not intentionally expressed, but still latent, that after all the 'colonists' or 'colonials' are an inferior sort of people".⁶⁰

As Griffith's correspondence showed, he was far from alone in his views.⁶¹

The intertwined pattern of the respective influences of English and Imperial attitudes, colonial nationalism and, on occasion, intercolonial ties, was in part a product of a

⁵⁹ It is interesting that Andrew Inglis Clark, a prominent Tasmanian lawyer-politician in the 1890s, could prepare a speech in which he invariably referred to "Australasia", never to "Australia"; see draft Speech on the death of George Higinbotham, in Clark family papers, University of Tasmania Archives.

⁶⁰ See off-print of 1890 QPD, undated but for 9 July 1890, in Griffith papers, file MSQ.187, ML.

⁶¹ E.g. see William Windeyer to Griffith, 17 August 1890, in Griffith papers, file MSQ.187, ML.

number of diverse channels by which information about events and ideas in Britain and in other colonies were carried to receptive audiences in each of the colonies. Colonists were aware, to a degree which in retrospect seems astounding, of developments in Britain and in the other colonies.

In part this is because the nineteenth century was, par excellence, the era of the printed word. The newspapers of nineteenth century tended to carry a substantially higher proportion of material from other countries than is now the case. In some cases this extended to the giving of extensive publicity to disputes between one another colony and the Imperial authorities. In 1850 William Fox, the New Zealand settler and politician, wrote to a friend that

"Our politics have been at a standstill since we sent our "resolutions" in reply to Grey's despatches on the Constitution. We are, however, going to have a meeting to express our sympathy with the Cape Colonists, who are making the best stand against the Home Government since the Bostonians made tea in the harbour. The Cape papers have been backing us up on the Constitution question, and it is only fair to reciprocate"⁶²

As that excerpt makes clear, colonial newspapers were very quick to give space to material from the other colonies. That is not to say that there was not an equal willingness to print material from British papers, but in the first half of the century Australasian colonial newspapers were handicapped by the relative infrequency with which British material came to hand. One of the factors which may well have done much to decrease colonial nationalism and increase interest in British affairs, and British precedents for legislation, was the increase in the regularity and frequency of shipping between Australia and Britain. This is suggested by J.B. Hirst, an Australian writer, in his comments on the New South Wales newspapers of the 1850s:

"...the newspapers did not present merely digests or summaries of British news. They reprinted whole articles from the British newspapers - editorials, reports of Parliamentary Debates, speeches by major political figures outside Parliament, the proceedings of reform meetings and church assemblies, significant letters to the editor the British news may have taken two or three weeks to reach the colony, but it was not regarded as stale with ships arriving every week, it became much easier to follow British events as they unfolded. We usually measure the improvement in communication between Britain and Australia by the shortening of the voyage between them. But for the

⁶² William Fox to Constantine Dillon, 8 February 1850, printed in Sharp, C.A.(ed) *The Letters of the Hon. Constantine Dillon 1842-53* (A.H. and A.W. Reed, Wellington, 1954) p. 105.

ease with which British news could be followed, the significant factor is the frequency of the voyages".⁶³

This increase in British material did not close off coverage of other colonies in the newspapers or journals of the day. Any New Zealand or Australian colony would include, as a matter of course, material bearing on events in other colonies. Indeed, as is discussed later,⁶⁴ rivalry over the use of news communicated by telegraph could only be resolved by legislation.

The spread of information by newspapers was, of course, far from the only way in which colonists were influenced by developments in other colonies. In many cases there were direct and important influences on colonial law arising from the movement of individuals from one colony to another. In some cases this was by way of migration, in others by relatively brief occasions of travel. Each such move by a colonist had the potential to act as a conduit for further information transmitted in later visits or, probably as importantly, through the network of private mail which linked the widespread circles of acquaintances that many influential (and not so influential) colonists possessed.

New Zealand is in some ways a paradigm case of the mobility of colonists and the ways in which their personal experiences and contacts influenced the law. As is discussed below,⁶⁵ in the 1840s there were strong correlations between the laws of South Australia and the ordinances put forward in New Zealand; in other cases it is New South Wales law that appears to have been imitated. Both reflect the background of influential figures in New Zealand affairs. However a decade or two later the position is different. Through the 1860s and 1870s the dominant colonial influence in New Zealand law is that of Victoria - indeed it is arguable that Victoria had almost as great an influence on New Zealand legislation in the nineteenth century as did Britain itself.

⁶³ Hirst, J.B. *"The Strange Birth of Colonial Democracy: New South Wales 1848-1884"* (Allen & Unwin, Sydney 1988), pp.48-49.

⁶⁴ See below, pp.239-41.

⁶⁵ See below, pp.122-124.

This is principally because many of the migrants attracted to the goldfields of the South Island in the 1860s were former residents of Victoria. A number of them rose to prominence in New Zealand. Moses Wilson Gray, briefly the District Court Judge for the Otago Goldfields and an authority on mining law, was an Irish barrister who migrated to Victoria in 1856 and then to Otago in the 1860s.⁶⁶ Sir Julius Vogel, who left England as a youth for the Victorian diggings only to abandon his journalistic ventures there for hopes of greater success in New Zealand, put forward various proposals which owed much to his Victorian experience.⁶⁷ Other colonists had extensive personal or business connection with that colony. Lawyers, and judges, who had practised in Victoria brought to New Zealand their knowledge of Victorian law and not infrequently cited it in the courts. Reliance on Victorian cases was also encouraged by the extensive use of Victorian statutes as precedents for local legislation, and by the comparative ease of procuring volumes of Victorian law reports.⁶⁸ So close were the links between Victoria and New Zealand that when Irish miners and a Roman Catholic priest were charged with sedition in Hokitika in 1867, their supporters arranged to bring a leading Melbourne barrister, R. W. Ireland, to New Zealand to defend them.⁶⁹ It is therefore by no means surprising to find that a supporter of the Public Trustee Bill 1870 had been involved in plans for a similar proposal in Victoria in the 1860s.⁷⁰ Personal experience was supplemented still by newspaper coverage - and again the leading position of Melbourne in the Australian economy ensured extensive coverage of Victorian affairs. The Victorian influence on particular New Zealand statutes is apparent in many areas of law, as will be shown later, but it must be borne in mind that knowledge of Victorian precedents did not ensure their adoption. The Victorian Bills of

⁶⁶ Cullen, M. *Lawfully Occupied: The Centennial History of the Otago District Law Society* (ODLS, Dunedin, 1979) p. 21. For details of Wilson Gray see *Dictionary of New Zealand Biography* (Department of Internal Affairs, Wellington, 1940), vol. 1, p. pp.318-9.

⁶⁷ See Dalziel, Raewyn *Julius Vogel: Business Politician* (1986), passim.

⁶⁸ Spiller, Peter "Two Judges - Father and Son: An analysis of the careers of Henry Samuel Chapman and Frederick Revans Chapman". (Ph.D. thesis, University of Canterbury 1991), p. 226.

⁶⁹ See Scholefield, G.H. (ed) *The Richmond-Atkinson Papers*, (Government Printer, Wellington, 1960), vol 2 p.271.

⁷⁰ G. Webster, MHR for Wallace, (1870) 9 NZPD 110. The bill was unsuccessful in that year but passed two years later: Public Trustee Office Act 1872(NZ).

Sale Act 1876(Vic) was reprinted in its entirety in the New Zealand Jurist,⁷¹ yet the Chattels Securities Act 1880(NZ) owes little or nothing to the Victorian statute. Victoria was not the only colony later represented in New Zealand public life - the mover of the Deceased Wife's Sister Marriage Bill 1871, G.M. Waterhouse, modelled his bill on bills that had been introduced in the South Australian legislature when he was a member of it.⁷²

It is clear that on many occasions members of colonial legislatures were very well acquainted with the law extant in other colonies on the subject of a bill under debate. Some idea of the extent to which legislators made reference to other colonies, and on occasion to legal developments in yet other jurisdictions, can be gained from looking at some New Zealand debates in the 1860s and 1870s.

In 1864 the House of Representatives debated a Masters and Servants Bill introduced some time earlier by Cracroft Wilson, who acceded to the wishes of the Government not to proceed with the Bill. However during the debate Thomas Bannatyne Gillies, a Dunedin lawyer and future cabinet minister and Supreme Court judge, drew to the attention of the Government the recent consolidation of Victorian statute law, which included master and servant legislation which Gillies thought a suitable precedent for adoption in New Zealand. Gillies went so far as to offer his copy of the consolidated statutes to the Government for the use of Ministers, an offer apparently not taken up by the cabinet.⁷³

In the following year the House of Representatives had before it the Parliamentary Privileges Bill introduced by Henry Sewell. Hugh Carleton, the Chairman of

Committees, objected to the terms of the bill. he is reported as saying that :
 "He had before him four Privilege Acts passed in adjoining colonies. The Attorney-General had his choice of models from which to draft the Bill before the House, and had chosen the worst. Three colonies - Queensland, South Australia and Tasmania - defined the privileges of

⁷¹ (1877) 2 NZ Jurist(NS) 178

⁷² See (1871) 10 NZPD 156. See also pp.195-97 below.

⁷³ See 1864 NZPD 169.

their legislatures; they knew precisely what they wanted, stated it and took it. The fourth, Victoria, fell back on a vague assumption of the privileges of the House of Commons. The Attorney-General had done the same ...".⁷⁴

Carleton's protest was, however, unavailing, and the Parliamentary Privileges Act 1865(NZ) followed Victoria in simply claiming the undefined privileges of the House of Commons.

The process of migration was, of course, not solely in the direction of New Zealand. Richard Hanson, an English solicitor left England for Wellington in 1840, to act as a land purchase officer for the New Zealand Company did not remain long in New Zealand, leaving in 1846 for South Australia, where he became successively Attorney-General, Prime Minister and Chief Justice⁷⁵.

One consequence of the combined influences of migration and of the accidents of mutual acquaintanceship that occasional travellers between the colonies created is a remarkable, and far from adequately documented, network of private correspondence between influential figures in the different colonies. The scope and nature of it will be illustrated by a number of the documents cited in this study, but for the present two instances may suffice. There was a voluminous correspondence between Parkes in New South Wales and Boucaut in South Australia over several decades, during which time the two politicians exchanged copies of statutes, bills and speeches as well as comments on events in their own and other colonies.⁷⁶ Some correspondence was more widespread - S.W. Griffith in 1877 sent to a number of friends copies of the Judicature Act 1877(Qld) and Rules he had drafted for Queensland, and which had been passed as drafted. Copies went, inter alia, to Alfred Stephen in New South Wales; Ayers, Way and Boucaut in Adelaide and Robert Ramsay in Victoria. Way had received an earlier

⁷⁴ 1865 NZPD 318

⁷⁵ Cooke, R.B.(ed) *Portrait of a Profession : the Centennial Book of the New Zealand Law Society* (A.H. and A.W. Reed, Wellington, 1969), pp 24-5.

⁷⁶ See Boucaut to Parkes, 12 August 1875, Parkes Correspondence, Vol.3, CYA 873, p.62; Boucaut to Parkes, 30 August 1876, Vol.3, CYA 873, p.79 and Boucaut to Parkes, 20 Nov. 1879, Vol.3, CYA 873, p.70, ML.

draft and reciprocated to some extent by sending Griffith a copy of the recent Judicature Act 1876(SA), about which Boucaut was somewhat critical.⁷⁷

During the latter half of the century personal contact and observation increasingly supplemented the effect of newspapers and letters was added as travel between colonies (and between a colony and Britain) became more practical, and frequent. Regular and speedy transport promoted both visits by colonials to other colonies and the frequent interchange of letters and newspapers. In the 1830s and 1840s, Sydney and Melbourne could be as much as three weeks apart by sailing ship; this was reduced by steamships to a week or less later in the 1840s. By the late 1850s a regular triangular service linked Sydney, Launceston and Melbourne on a four to seven day schedule, and by the 1870s, well before any railway linked the two, there was a regular steamship service taking only 48 hours between Melbourne and Sydney.⁷⁸ Other colonies too benefited from the improved transportation - one New Zealand historian has gone so far as to suggest that the growth of distinctive New Zealand national identity was consequent on the improvement in internal communications.⁷⁹

Not least among the effects of improved travel was the greater opportunity for concerted colonial action following meetings of colonial leaders. Examples of legislation proceeding from such conferences appear later, but an early example of common Australian activity following a Premier's conference is that consequent on the agreement at the 1873 intercolonial conference that all colonies should legislate to prevent the introduction of livestock from overseas for a period of two years, to prevent the transmission of rinderpest or foot-and-mouth disease, such legislation to be modelled on the recent Victorian Diseases in Stock Prevention Act.⁸⁰

⁷⁷ Stephen to Griffith 12 March 1877; Ayers to Griffith 2 June 1877; Way to Griffith 5 June 1879; Boucaut to Griffith, 20 June 1877; Ramsay to Griffith 19 March 1877; Griffith papers, File MS.Q185, DL.

⁷⁸ See Gurner, John Augustus *Life's Panorama* (Lothian Publishing Co, Melbourne, 1930) pp.37-39.

⁷⁹ Sinclair, Keith in Eddy, John and Schreuder, Deryck (eds) *The Rise of Colonial Nationalism* (Allen & Unwin, Sydney, 1988), pp.120ff.

⁸⁰ Minutes of the Intercolonial Conference 1873, p. 27; printed in SAPP No.31.

Not least among the effects of the improvement in communications was the need it created for legal measures to provide remedies in cases where one party had decamped from one colony to another. The Victorian Government in 1858 decided to promote legislation to allow persons in other colonies better remedies against debtors removing to Victoria - the recovery of debts owed by such persons was a problem in each colony. The Victorian government not only legislated to ease the difficulties, but deliberately chose to copy a recent Tasmanian statute, in part in the hope that the other colonies would be impelled to follow the same precedent.⁸¹ In other cases a combination of knowledge of events in another colony and a recognition of the benefits of uniformity could impel one colony to move into line with others. Thus the fact that the issue of enforcing maintenance obligations on absconding parents was on the agenda for a Premier's conference prompted the Victorian premier to suggest that as desertion of a wife and children was not an offence in Victoria although it was in other colonies, Victoria should criminalise desertion, along the lines of the New South Wales law⁸²

These changes and developments in colonial society and colonial government must always be borne in mind, for they did much to shape the nature of colonial law and its development. One of the simplest ways in which a colonial government or a colonial legislator could take advantage of the flows of information from other jurisdictions was to use legislation from those other colonies as models on which to draft measures for the local legislature to consider. It is to that phenomenon that attention must now be turned.

⁸¹ Barkly to Labouchere 10 March 1858, Despatches of Governor of Victoria to Secretary of State for the Colonies, File A2346, ML.

⁸² File VPRS 10265/27, VPRO.

Chapter 2

On the concept of the borrowing of legislation

Legal change and reform in any jurisdiction often involves a consideration of the legislation of other states. If the ideas embodied in such legislation are then adopted, the result is derivative legislation - a statute may be considered derivative if it expresses a policy or procedure which is essentially similar to that adopted by a different or foreign legislative body at some earlier time. This thesis contends that the transmission of legal ideas requires an analysis which goes further than considering whether the ideas underlying a statute are derived from legislation by some other body, and considers whether the form, as well as the underlying intellectual framework, of a statute has been adopted. In the context of this thesis, a statute will be described as being the result of 'borrowing' from another colony if it is clear that significant elements of the statute are in whole, or in substantial part, taken in form and substance from the legislation of another colony.

It must be borne in mind, as is discussed in more detail later, that derivative legislation had some significant advantages for the governments of many colonies. It produced statutes which could be presumed to be effective (whether or not they always were is open to question) at a low cost in terms of scarce legal resources. Less experience and ability was needed to adapt another statute than to draft an original piece of legislation; and less time to scrutinise it. Since legal resources were in short supply in many colonies almost throughout the nineteenth century, and their lack a source of difficulty in the early years of every colony,¹ any expedient which eased the burdens on administrators and governmental legal advisers was welcome. Further, reliance on what had been accepted in other colonies provided convenient arguments in favour of

¹ See below, pp.126-30.

the proposed law for use both in political disputes² within the colony and in correspondence with British authorities.³

Evidence that legislative borrowing has taken place comes in many forms, any one or more of which may be relevant to a particular colony and piece of legislation. Some indication of the variety and scope of relevant evidence can be gained from a consideration of the colonial statutes concerning the regulation of goldfields. Both New South Wales and Victoria passed statutes to regulate mining and miners in proclaimed gold-fields, using as a principal device the office of an administrator and adjudicator called the "Warden".⁴ Similar statutes are to be found in New Zealand, South Australia and even in British Columbia.⁵ Evidence that these later statutes were derived from the Victorian and New South Wales legislation is to be found in a number of places. In the case of South Australia and New Zealand, the parliamentary record contains statements made by responsible ministers in the course of introducing the legislation.⁶ In the case of British Columbia, there survive relevant pieces of the official correspondence of the governors of both British Columbia and Victoria. The Governor of Victoria forwarded to British Columbia, via the Colonial Office, copies of the Victorian statute "in reply to an application for copies of recent enactments in this colony in relation to Goldmining".⁷ The British Columbian documents reveal, however, that the Victorian statute was not the working model for the British Columbian legislation, but rather that the draftsman, Begbie CJ, worked from a copy of the New Zealand Goldfields Act of 1858.⁸ It may be mentioned that the New Zealand statute, as with other enactments of

² For the use of colonial parallels as an argument in politics, see pp.17-18 and pp.24-6, above.

³ The procedure for the review of colonial legislation by the British authorities is discussed in chapter 4.

⁴ The early law is chronicled in Veatch "Mining Laws of Australia and New Zealand" (1912) 505 U.S. Geological Survey Bulletin.

⁵ Goldfields Act 1858(NZ); Mining Amendment Act 1870-71(SA) and Gold Fields Act 1859(BC).

⁶ See the speeches of Stafford at 1858 NZPD 41-2 and 78 and of Blyth at 1871 SAPD 1783.

⁷ Barkly to Lytton, May 5 1859; File A2346 ML.

⁸ Douglas to Barkly, n.d. quoted in Williams, David R. *"The Man for a New Country": Sir Matthew Baillie Begbie* (Gray's Publishing Co, Sidney British Columbia, 1977), p. 151.

the period, was first adopted by one of the provincial legislatures before being enacted by the central parliament.⁹

As the goldfields legislation would indicate, one of the most frequent, and most helpful indications of the origins of legislation are statements in the parliamentary record. It is, of course, necessary to ensure that the source of any such comment is in a position to give an authoritative attribution - there may be cases where the parliamentary record will lead one to error.¹⁰ For example, in the debate on the New Zealand Patents Bill 1860, William Fox, then a private member, stated that the Bill was based on a Victorian precedent, whereas the Bill was in fact an amalgam of provisions from various Australian statutes, and included a provision regarding the forging of patent marks on goods which was only to be found elsewhere in Australasia as section 30 of the Patents Act 1858(Tas).

Other external indications can be found in, and assistance derived from, the reports of colonial Attorneys-General on local legislation which were forwarded by the colonial governors to the Colonial Office. For instance, W.H. Giblin, then Attorney-General, commented on the Tasmanian statutes of 1874 thus:

"(i) the Intestate's Real Estate Act 1874 (no.1) was based on a similar law in force in New South Wales for some years, which had recently been adopted in Victoria.

"(ii) the Merchant Ships Officers Examination Act 1874 (no.4) was similar to a New Zealand statute:

"(iii) the Life Assurance Companies Act 1874 (no.6) was an adaptation of a Victorian Act, which itself largely followed the Kingdom Life Assurance Companies Act 1870 (33 & 34 Vic., c.61)(UK)..."¹¹

In other cases, again as illustrated by the goldfields laws, the most useful source in the official correspondence is that of the colonial governor.¹² In the period prior to responsible government, many governors preferred, or were forced, to write their own

⁹ See Goldfields Ordinance 1858(Nelson Province).

¹⁰ 1860 NZPD 435.

¹¹ Enclosure with Du Cane to Carnarvon, 25 September 1874, CO 280/383.

¹² e.g. Barkly to Lytton, May 5 1859, forwarding a despatch addressed to the Governor of British Columbia, "in reply to an application for Copies of recent enactments in this colony in relation to Goldmining" and requesting Colonial Office to forward the Acts, File A2346, ML.

account of the legislation passed by their Legislative Councils. Thus Sir George Grey could report from New Zealand, during his first period in office, on the Constabulary Force Ordinance 1846 and say

"The provisions contained in the enclosed ordinance are for the most part such as are usual in similar Colonial enactments, with such modifications as are rendered necessary by the peculiar circumstances of this country".¹³

Many other such comments by the various colonial governors can be discovered in the voluminous correspondence maintained between colonial administrators and the British Government.

There are also a few cases where the archival record is full enough to reveal the materials referred to by the draftsman of a particular enactment. Where these can be ascertained, they form an invaluable guide to the sources of legislation. An example, drawn from the later years of the period under study, comes from the New South Wales reform of the law governing the administration of the estates of persons dying intestate. The Deceased Estates Administration Bill 1885 was prepared by Frederick Chapman, then Prothonotary of the Supreme Court of New South Wales, and a former Curator of Intestate Estates. The draft Bill he supplied indicates a heavy reliance on the Intestacy Act 1878(Qld) as 9 of the first 17 clauses bear the annotation "see s... of Queensland Act". Chapman's file of materials also included the Victorian Intestates Real Estate Act 1864. However, it is clear that Chapman had in fact cast his net even wider than these documents would indicate - in a letter seeking payment for drawing the bill (on the basis that it had been compiled outside his normal hours of employment), he justified his claim to have laboured long over the Bill by the statement that

"I corresponded with the Curators of all the neighbouring Australasian colonies and collated the various Acts, which I obtained from them, such material as I thought could be beneficially introduced into the Bill which I was preparing".¹⁴

There are other, much less common, cases where the relevant documents provide physical evidence of the copying of legislation. In 1895 the Victorian Parliamentary

¹³ Grey to Gladstone, 6 November 1846, CO 209/46.

¹⁴ Frederick Chapman to Minister of Justice, 18 August 1885, file 5/7709.2, GANSW.

Draftsman sent as the first page of the draft Victorian Sale of Goods Bill 1895¹⁵ a copy of the South Australian statute, the Sale of Goods Act 1894(SA), with a slip of paper bearing the word "Victoria" glued appropriately over the words "South Australia" in the enacting clause. Such a document must, without anything further, be considered conclusive evidence of a borrowing by Victoria of material from South Australia!¹⁶

Less reliable are the comments of judges or legal writers. Not a few biographers are inclined to ascribe undue importance to the activities of the subject of their researches, including frequently an over-inflated assessment of the originality of any contributions made by that subject to the legislation of the period. For instance, the one substantial biography of Sir James Martin, at various times both Premier and Chief Justice of New South Wales,¹⁷ suggests that Martin was a dominant force behind the legislation of 1866 for industrial schools and the relief of destitute children whereas it is clear that developments in New South Wales were heavily influenced by Victorian precedents.¹⁸ By contrast, the more scholarly biography of Sir Matthew Begbie Baillie, first Chief Justice of British Columbia,¹⁹ makes clear that much of his legislative draftsmanship involved the adaptation of legislation already in force elsewhere in the Empire.²⁰ In other cases secondary sources contain errors which appear to have arisen from a misconstruction of the documentary record. Larcombe, a normally authoritative historian of local government in New South Wales has stated

"As a model for his revised plan for the municipal government of Sydney, Gipps relied more upon Canadian practice than the English Municipal Corporations Act 1835".²¹

¹⁵ Later enacted as the Sale of Goods Act 1895-6(Vic).

¹⁶ See the file of documents in VPRS.10265/152, VPRO.

¹⁷ Grainger, Elena *Martin of Martin Place* (Alpha Books, Sydney 1970).

¹⁸ *Ibid.*, p.60, compare discussion at p.34, below.

¹⁹ Williams, David R. *"The Man for a New Country" : Sir Matthew Baillie Begbie* (Gray's Publishing Co, Sidney British Columbia, 1977).

²⁰ *Ibid.*, pp.160-161, and cf discussion of goldfields legislation, pp.29-30 above.

²¹ Larcombe, F.A. *The Origins of Local Government in New South Wales 1831-58* (Sydney UP 1973) p.79.

Larcombe cites as his authority for this view a despatch from Gipps to Bathurst in 1841.²² However, in a later despatch²³ accompanying the Acts passed for the incorporation of Sydney and Melbourne, Gipps says that he had decided it would be expedient to use separate bills for each town, "as had been done in Canada for Montreal and Quebec", rather than a general incorporation statute. The statutes themselves, Gipps says, were "very closely modelled on the English Corporation Act", except as to the provisions governing the franchise for elections. Thus it appears that Larcombe has misconstrued the meaning of Gipps's statements, and attributed to him a use of substantive law from Canada, where Gipps was in fact only referring to the procedure adopted. In most cases, of course, provided the possibility of such errors is borne in mind, secondary sources can be most useful.

In a substantial number of cases, however, there are no external materials of value at all. In such cases, reliance must be placed on inferences drawn from the text of the statute itself. It is not at all uncommon to find that statutes in different colonies have lengthy sections which are identically worded; or have only the changes necessitated by references to places or officials. It is central to this thesis that where such identity of statutory language is found on any substantial scale the fact of borrowing can be assumed without further proof. This assumption is based on the inherent improbability that different draftsmen would have achieved essentially identical results without reference to each other's work. The assumption may be tested by consideration of the instances where there is both a strong textual similarity between the statutes of two or more colonies and an authoritative external source of information as to provenance. In no case where there is a definite textual similarity has an assertion of independent drafting been discovered; in a very large number of cases, the external source has confirmed the internal evidence and established that there was indeed a derivation of one statute from the other. Many of these instances are discussed in the text of this thesis.

²² HRA ser. 1, vol. 21, p. 596.

²³ Gipps to Stanley, 17 November 1842, HRA, ser. 1, vol. 22, p.365.

This thesis therefore proceeds on the basis that where there is no external evidence as to provenance of a statute passed by one colonial legislature which bears a striking similarity to an earlier statute of some other colonial legislature, a derivative relationship can be taken as established.

It is acknowledged that there is a risk of misattribution by such a method. This will be true in two cases. Firstly there are those statutes where the earlier in time of enactment is not in fact the earlier in conception. If one colony adopts and enacts a bill drafted or suggested in another colony, it may do so before that bill's enactment in the colony of origin. It may even be the case that the bill succeeds in the colony of adoption, but not in the colony of inception, in which case a false picture of its origins might be gained. There are a small number of instances where external evidence indicates that something of this nature has occurred - as with legislation to provide for the institutional care and correction of certain juvenile offenders passed in all the Australasian colonies during the 1860s and 1870s.²⁴ The first enactment in point of time was the Tasmanian Industrial Schools Act 1863, but Tasmania was not the originator of the legislation. The first bill introduced, from which almost all the other legislation was derived, was the Victorian Reformatory and Industrial Schools Bill 1863. That bill had a chequered career - Government support for the bill was removed when the Legislative Council effectively barred any state financial aid to Roman Catholic reformatory schools. The opposition then proceeded to sponsor the amended bill through its various stages, but the Governor refused his assent to the Bill in that form.²⁵ A non-sectarian version was passed the following year as the Neglected and Criminal Children Act 1864(Vic), and was adopted, with minor local variations, in South Australia, Queensland and Western Australia as well as in New Zealand,²⁶ although in that latter colony, the national Act followed on

²⁴ See generally Seymour, J.A. *"Dealing with Young Offenders in New Zealand; the System in Evolution"* (Legal Research Foundation monograph, Auckland, 1976), although on the earliest Australian statutes Seymour's history is not entirely reliable.

²⁵ *Melbourne Argus* 9 February 1864.

²⁶ See Industrial and Reformatory Schools Act 1865(Qld); Industrial Schools Act 1874(WA), Destitute Persons Relief Act 1867(SA) and Neglected and Criminal Children Act 1867(NZ).

the adoption of the Victorian Act by the Provincial Council of Otago.²⁷ Only in the New South Wales Industrial Schools Act 1866 is there a clear indication of different drafting. There may have been a number of occasions where a similar pattern of first enactment in a colony other than that of origin occurred. Given that there are few instances of it among the large number of statutes where there is some external evidence as to sources, the frequency of it in the comparatively few cases of similarity where there is no external evidence to give assistance can be expected to be very low, indeed so minimal as not to undermine the general validity of the technique.

Secondly, there is the possibility that similarly worded provisions may arise from genuinely independent drafting. The probability of this happening in cases where there is no external evidence may be assumed to be negligible, since no instances of such independent drafting have been discovered where there is external evidence. The nearest to a claim of separate drafting of similar provisions which appears in the literature is that of Rosalind Atherton that the operative provisions of the Testator's Family Maintenance Bill 1898 were not derived from a provision in the Native Land Court Act 1894(NZ), although both gave the court a power to make discretionary orders in favour of relatives not properly provided for by a testator. It may be noted however that the actual wording of the provisions is quite different. It is also possible that while McNab independently drafted the text of his bill, he had found in the Native Land Court Act provision a curial discretion which was essential to the political acceptance of interference with testamentary provisions.²⁸

The technique of textual comparison, if admitted to be a valid procedure, can also be useful in determining the course of transmission of a particular statute from one colony to another, since the presence or absence of amendments to the statute as first passed in any particular colony can give indications as to which version of the statute was under review at the time of enactment at later stages in other colonies.

²⁷ Neglected and Criminal Children Ordinance 1867(Otago Province).

²⁸ As to the Testator's Family Maintenance legislation, see pp.232-235 below.

It is, of course, a logical necessity in establishing any such legislative derivation to demonstrate that the draftsman of the later statutes had access, or at the very least could have had access, to the text of the statute as passed in the colony whence it was allegedly derived. In many cases, as is shown in the examples given in this and other chapters, there are clear indications in the contemporary record to show that the earlier law was known to the later legislators. In a number of others, it is a fair assumption that this was the case, because it is known that copies of a statute, or a collection of statutes, had been supplied by the originating colony to another. Frequently this took the form of a standard exchange of statutes exchanged between the respective colonies. Thus South Australia in 1842 requested, and received, from New South Wales and Van Diemen's Land copies of all statutes passed in those colonies from 1838 on and gave in exchange the South Australian statutes for the same years.²⁹ This seems to have been the inauguration of systematic exchanges, to replace earlier more haphazard receipt of laws from other colonies.³⁰ A similar exchange appears to have taken place between Western Australia and South Australia.³¹ In such cases, it may reasonably be assumed that the text of the earlier statute was available to any person who wished to copy it. Texts may also have been available through the exchange of parliamentary material. Such exchanges appear to have been made on a large scale during some parts of the nineteenth century - the Tasmanian Parliamentary Library was receiving material from Canada and Newfoundland as well as Britain and the other Australasian colonies.³²

In other cases, evidence that earlier models were known comes from references made during parliamentary debates. A example is provided by the Tasmanian Liquor Licence Bill 1889, where there were frequent comments as to the licensing law and practice of

²⁹ Jackson to Colonial Secretary of New South Wales 28th September 1842 and 18 November 1842; Jackson to Colonial Secretary of Van Diemen's Land 28 September 1842 and 8 December 1842; file GRG 24/3, SAPRO.

³⁰ e.g. see Watson to Fisher, 21 August 1838, G.M. Stephen to Colonial Secretary, New South Wales 8 December 1838 and 10 May 1839, file GRG 24/3, SAPRO.

³¹ Jackson to Colonial Secretary, Western Australia 17 February 1843 and 8 August 1843, file GRG 24/3, SAPRO.

³² Report of Royal Commission into Tasmanian Parliamentary Library 1867 printed in 1867 Tas.H.A.Jo. No.57, file TA 720/RC 26/1, AOT.

New South Wales, Victoria, New Zealand and South Australia.³³ A similar degree of knowledge as to the laws of other colonies, albeit as to a much more technical area of law, is shown by consideration of legislation concerning the auditing of Government expenditure. In 1872, the Attorney-General of South Australia brought in a bill to repeal the Audit Act 1862, and to substitute for it a statute which would make the Auditor-General an officer of Parliament, and not an employee of the Government. The Bill introduced was expressly stated to be virtually identical to New South Wales legislation of 1871, and in the debate in the House of Assembly, reference was also made to the relevant statutes in Britain, Victoria, Tasmania, Queensland and New Zealand.³⁴

Where there is no such external source to guide the investigator, reliance must be placed on the drawing of inferences from the similarity of the texts of the statutes of the different colonies. The use of the textual comparison technique may be illustrated by considering early Australasian marriage statutes. The first general statute on the subject of marriage was the Marriage Regulation Act³⁵ 1838 of Van Diemen's Land.³⁶ Later statutes in other colonies included the South Australian Marriage Act 1842 and the New Zealand Marriage Ordinance 1847.³⁷ Both the latter are heavily indebted to the Van Diemen's Land statute - the South Australian statute is identical with it for the first fourteen sections, excepting references to places, and a number of later sections are also identical. The New Zealand ordinance is essentially the same as the South Australian, although slightly reworded in that the provisos to section 6 in the South Australian and Van Diemen's Land Acts appear as separate provisions, sections 3 4 and 5, in the New

³³ See *Hobart Town Mercury*, 5 September 1889.

³⁴ 1872 SAPD 280.

³⁵ It should be noted that although enactments by a subordinate legislature should be more properly called Ordinances, the Legislative Councils of New South Wales and Van Diemen's Land invariably titled their enactments as Acts. The Legislative Councils of Western Australia and South Australia varied their nomenclature between Acts and Ordinances without any apparent pattern. The titles given at the time of passage by the relevant legislature have been used.

³⁶ The colony was renamed as Tasmania in 1853.

³⁷ Marriage Act 1842 (SA) and Marriage Ordinance 1847 (NZ).

Zealand statute. The only difference of substance is in section 16 of the New Zealand ordinance, which provided that a minor with no adult relatives in the colony could seek an order for consent to the marriage from the Supreme Court if consent was unreasonably refused by the minor's parent or guardian. This appears to have been drawn from the New South Wales law, though it was removed later.³⁸ Indeed the issue of the requirement of parental consent may be used even in respect of later legislation as a mode of determining the origins of legislation. at a later date. As indicated earlier, the South Australian Marriage Act 1842 largely reproduced the Marriage Regulation Act 1838(VDL), including the provisions in it which required a declaration by a minor that either consent had been obtained from parent/guardian, or that no such person existed to give it. The alternative mode used in some colonies was to insist that the minor show either consent from a parent or guardian or, where no such person existed, the consent of an appropriate person authorised by statute. In New South Wales this could be given by the Supreme Court or by any Magistrate or person authorised in that behalf. Victoria, many years later, enacted in the Marriage Act 1859(Vic) that a minor (in this case, as in all the colonies, a minor did not include a minor who had become a widow or widower) had to provide written evidence of the granting of consent by the minor's father or guardian or mother or the consent of a Justice of the Peace if there was no parent or guardian in the colony, or if such a parent or guardian existed but was incompetent to act. The Queensland Solemnisation of Marriage Act 1864 essentially reproduced that same provision. As late as 1898, it was still being suggested that a formal consent procedure was needed for illegitimates under the age of 21.³⁹

If one accepts, as logic indicates one must, that both the South Australian and New Zealand legislation of the 1840s was derived from the Van Diemen's Land Marriage Regulation Act 1838, the next question is whether New Zealand took its wording direct from that statute, or from the South Australian version. Here again, textual comparison

³⁸ It was removed by the Marriage Amendment Act 1856(NZ), the enactment of which was proposed by Martin CJ: Gore Browne to Labouchere, 20 September 1856, CO 209/138.

³⁹ See file VPRS.10265/27, VPRO.

provides an answer. The Van Diemen's Land Act was heavily amended in detail in 1843⁴⁰ and these amendments are not to be found in either the South Australian or the New Zealand acts. This would therefore indicate a high probability that the New Zealand Legislative Council was working from the South Australian Act and not from the then current Van Diemen's Land law. Such a hypothesis is strengthened by the frequency with a similar pattern can be shown for other ordinances passed in Governor George Grey's first term of office in New Zealand.⁴¹

While no attempt at quantification of the extent to which legislation in any one colony was derived from that of another has been made or seems reasonably possible, some indication of the degree to which such legislative borrowing took place can be gathered from a brief survey of some of the more obvious instances of its occurrence. It should be noted that the instances described here are not ones which call for special comment as to the manner in which the original legislation came to be adopted elsewhere.

A convenient example, on a small scale, of the occurrence of borrowing is provided by looking to the legislation of the colony of Canada, Vancouver Island and British Columbia over the years 1859-1861⁴². There are some striking examples of legislative borrowing in this period. It is notable that the trend of borrowing was for the Pacific colonies to adopt Canadian laws, or those of each other⁴³ - there is no evidence at this time of any reverse borrowing by Canada. This is perhaps not surprising, given the comparatively rudimentary state of the legal system of the Pacific colonies at the time.⁴⁴ The pattern was to change to some extent in later years.

⁴⁰ Marriage Act 1843 (VDL).

⁴¹ For further examples, see below, esp. pp.122-4.

⁴² Comparison is facilitated because the first parliamentary consolidation of Canadian colonial statutes was enacted in 1859.

⁴³ This is not to say that Canada was the only source drawn upon. British Columbia used as models legislation from as far away as New Zealand, see above, pp.29-30.

⁴⁴ see Williams, David R. *"The Man for a New Country" : Sir Matthew Baillie Begbie* (Gray's Publishing Co, Sidney British Columbia, 1977).

The period 1859-61 nevertheless furnishes some striking examples of legislative borrowing. Perhaps the most notable is the Vancouver Island Marriage Act 1859. This is in all but mechanical sections identical with the Canadian consolidation of 1859 - in itself a compilation and re-ordering of various earlier Canadian Acts, the most recent of which had been in 1857.⁴⁵ The Vancouver Island Act of 1859 followed exactly the 1859 Canadian Act - and not that of its 1857 predecessor.⁴⁶ A similar pattern is found with a Vancouver Island statute concerning the property of religious institutions,⁴⁷ which is virtually identical to the consolidated Canadian act of 1859, although some provisos in the Vancouver Island statute appear as separate sections in the Upper Canada Act. As with the Marriage Act, there is no British Columbian legislation in this area between 1859 and 1861.

The Pacific coast colonies did not always act in concert with their legislation - although both British Columbia and Vancouver Island passed acts⁴⁸ to deal with non-British migrants, the acts are far from identical. Both would appear to be derived from the consolidated Aliens Act 1869(Can), but while Vancouver Island stuck closely to the Canadian original, the British Columbian Act provided for a much simpler system, with fewer procedural steps, and perhaps surprisingly, very different oaths to be sworn.

In many areas, of course, colonies legislated independently, and there is no evidence of any significant borrowing. There is little similarity between the legislation of the various colonies governing aspects of land law. Although Canada, Vancouver Island and British Columbia all passed acts providing for a system of registration of land titles in the years 1859 to 1861,⁴⁹ the acts varied greatly from each other (and indeed from

⁴⁵ Marriage Act 1857(UC). Earlier Marriage Acts of 1793, 1798 and 1831 were consolidated at the same time.

⁴⁶ As the Canadian Act was assented to on the 4th of May 1859, and the Vancouver Act was passed on the 26th May 1859, it must be presumed that the Vancouver Island draftsman worked from a copy of the Canadian statute in its bill stage.

⁴⁷ An Act respecting the Property of Religious Institutions 1859(Vancouver Island).

⁴⁸ Aliens Act 1859 (BC) and Alien Act 1861 (Vancouver Island).

⁴⁹ Registration of Deeds Act 1859(Can); Land Registry Act 1860 (Vancouver Island); Land Registry Act 1861 (BC).

Australasian legislation of the period).⁵⁰ Similarly Canada and Vancouver Island passed, almost contemporaneously, statutes providing for the resolution of claims to land where no Crown title had yet issued⁵¹ but although both used judicial commissioners, the statutes were distinctly differently drafted. One of the few examples of borrowing in this area of the law at this time is the appearance, in the Pre-emption Acts of Vancouver Island and British Columbia in 1861, of identical provisions dealing with establishing the boundaries to land claimed under the Act,⁵² and even then it should be noted that the earlier legislation of the two colonies had been different in this regard.⁵³

A similar pattern of inter-colonial borrowing is to be found in the Australasian colonies, although tending to be more complex in the inter-relationships of the colonies. Many of the clearest cases of borrowing will be canvassed later in the course of the discussion of the factors influencing legislation, but for present purposes it is sufficient to consider two instances of Australasian borrowings at different periods and in different ways.

The first example is drawn from legislative provisions governing orders for maintenance and support of de facto spouses and children born out of wedlock. While the North American colonies appear largely to have tried to operate a system akin to that operating in England, the Australian colonies eventually diverged significantly. The law passed on by England was neither recent nor suited to colonial conditions. Two English statutes, the Poor Relief (Deserted Wives and Children) Act 1718(Imp) and the Vagrancy Act 1824(Imp), imposed duties on husbands or fathers, if they were able to do so, to maintain their wives or children so that their dependants did not

⁵⁰ e.g. Land Registry Act 1860(NZ).

⁵¹ The statutes may be referred to as the Claims to Land Act 1859 (Can) and the Imperfect Titles Act 1860(Vancouver Island). These short titles are acknowledged to be anachronistic, since the original statutes had only long titles ("An Act respecting claims to Lands in Upper Canada for which no Patents have been issued" 1859 (22 Vic. c.80)(Canada), and "An Act to Cure Imperfect Titles" 1860(Vancouver Island) respectively). However for convenience all statutes which had no short title have been designated by a short title reflecting the long title.

⁵² Pre-Emption Act 1861(BC), ss 2 and 3; Pre-Emption Act 1861 (Vancouver Island), ss.5 and 6.

⁵³ Pre-emption Act 1860 (BC) and Pre-emption Proclamation 1861 (Vancouver Island).

become a burden on the parish.⁵⁴ These enactments presupposed the existence of the English poor law administrative machinery and organised parish system, a presupposition not well founded in the colonies. At least one North American jurisdiction attempted to widen the powers of Justices of the Peace to allow them to hear cases brought by the mothers of illegitimate children for maintenance.⁵⁵ By contrast in 1834 the Newfoundland legislature adopted formally in 1834 several statutes which enshrined the English system save for recent English reform legislation.⁵⁶

In the Australasian colonies there was even less of a legal or administrative structure to deal with maintenance issues and the greater mobility of the colonial population made it easier for men to evade their responsibilities. At best there seems to have been some limited attempt by the Governor's Courts to order the payment of maintenance - Justices of the Peace did not have jurisdiction to order payments against free men until the 1840s.⁵⁷ Yet it was some years before legislative action was forthcoming. The first Australian attempt to create and enforce any form of obligation to maintain a spouse was the Parramatta Female Factory Act 1829(NSW), by which married female convicts in the Parramatta Factory (which, despite its title, was in fact a part of the official convict gaol system) were to be discharged into the hands of their husbands if the husband was a free settler or a convict on at large on remission of sentence, unless the husbands paid the comparatively large sum of 2/6d per day in maintenance to the Parramatta Factory. This measure must be seen more as an attempt to deal with the escalating costs of the prison system than as being intended to form a precedent for a general obligation to maintain spouses. It is also curious to note that although the Act was passed at a time when the Chief Justice no longer was required to certify the Act to be acceptable as not

⁵⁴ As to the English system and its nineteenth century reform, see Elisofon, H. "A Historical and Comparative Study of Bastardy" (1973) 2 Anglo-American LR 306.

⁵⁵ New Brunswick in 1792 passed the Maintenance of Bastard Children Act 1792(NB).

⁵⁶ Stephen to Aberdeen 10 March 1835, commenting on Maintenance of Children Act 1834(Newf), CO 323/51, PRO.

⁵⁷ CALH, p.81.

repugnant to the laws of England, the text of this Act was still sent to Francis Forbes for his prior approval.⁵⁸

As time went on, the number of unsupported women and children came to be a serious social problem. The legal difficulties were compounded by the high proportion of settlers living in de facto, not de iure, marriages. The liability of a 'husband' in such a case was far from clear, although a father was responsible for the maintenance of his children, illegitimate or not. The problems were first tackled in Van Diemen's Land where the Report of a Select Committee of the Legislative Council led to the enactment of the Deserted Wives and Children Act 1837(VDL).⁵⁹ This enactment provided for actions for maintenance by or on behalf of, any child (legitimate or otherwise) or by a wife. It also went further than the common law, and provided that any woman who had cohabited with a man and had been allowed by him generally to assume the character of his wife was conclusively deemed to be his wife.⁶⁰ This statute was adopted in all the other Australasian colonies with greater or lesser variations. New South Wales in 1840 adopted most of the Van Diemen's Land provisions⁶¹ but chose not to follow those allowing maintenance actions by de facto spouses.⁶² South Australia in 1843 legislated on lines similar to Van Diemen's Land and New South Wales⁶³ (without the provision for de facto wives), but had one radical new feature which had not appeared in the earlier legislation. This was a provision which extended the obligation to maintain any destitute person to the parents, grandparents or children of that person, as well as the spouse, if the relative was in a position to provide support and had failed to do. The South Australian ordinance also contained provisions relating to the education and

⁵⁸ Darling to Forbes 17 September 1829 and Forbes to Darling 19 September 1829, Chief Justice's Letterbook, File 4/6551/243-4, GANSW.

⁵⁹ Also see Craig, W.H. and Scott, M.F.C. "The Maintenance of Concubines" (1963) 1 U Tas LR 685.

⁶⁰ Section 4.

⁶¹ Deserted Wives and Children Act 1840(NSW).

⁶² Gipps to Russell, 1 January 1841, HRA, ser.1 vol.21, p.147.

⁶³ Deserted Wives and Children Act 1843(SA).

welfare of child apprentices which were not found in the earlier acts.⁶⁴ Next to act was Western Australia, with the Destitute and Deserted Persons Ordinance 1845.⁶⁵ This largely reproduced the South Australian statute, save for the adoption from Van Diemen's Land of the action for maintenance by a de facto wife. Last in the Australasian sequence was New Zealand, which passed the Destitute Persons Ordinance in 1846. The majority of the ordinance followed the South Australian provisions closely,⁶⁶ but there were some differences. The New Zealand ordinance included provisions as to the education of illegitimate children⁶⁷ which do not appear in any other Australasian statute of the period; nor is there any Australian equivalent of the New Zealand section 6, which dealt with the evidential requirements for a paternity claim. Such a degree of legislative similarity between the Australasian colonies is explicable only in terms of significant derivative influences of the earlier legislation on the later statutes.

It is also notable that there was some consideration given to harmonisation of the law of the various Australian colonies in later years. Most colonies had some form of procedure whereby the father of an illegitimate child could be ordered by a court to pay maintenance, although the systems were not without their problems. Orders against a European male in favour of an Aboriginal or black or half-caste woman must have been rare - in Western Australia one historian could find no evidence of any being made in the last quarter of the nineteenth century.⁶⁸ In New South Wales it was considered that the system operated unfairly to women in that there was no provision for them to receive costs when they successfully defended an application by the male to vary the

⁶⁴ See ss.11 and 12 of the South Australian Act, largely reproduced as New Zealand ss.13 and 14 and ss.15 and 16 respectively.

⁶⁵ See also Russell, p.52.

⁶⁶ The wording of sections 1-4, 7, 11-15 and 19 are essentially identical with various provisions of the South Australian ordinance.

⁶⁷ sections 8 and 9.

⁶⁸ Hasluck, Paul *Black Australians (A Survey of Native Policy in Western Australia 1829-97)* (Melbourne UP, 1942) p.158.

quantum of maintenance ordered.⁶⁹ Toward the end of the century the Victorian Law Department put forward the question of the enforcement of maintenance orders where the parties were in different colonies as an issue which could be discussed before a Premier's Conference. The draft papers noted that the desertion of a wife and/or children was not an offence in Victoria and asked what action might be taken. The then Premier replied by recommending that since desertion was an offence in other colonies, it should be made criminal in Victoria as well, and he went so far as to enclose a copy of the relevant New South Wales provision, with a note that the same law applied in Queensland.⁷⁰

The second example is drawn from the legislation concerning telegrams and telegraphic messages. Most of the colonies at one time or another passed statutes to regulate and control the handling of messages sent as telegrams, and to allow official documents such as writs of elections, warrants of arrest, and court orders to have legal force when the text was sent by telegram. Such statutes usually also contained some provisions enjoining telegraph employees to secrecy as to the content of messages handled. The first Australasian legislation appears to be the Victorian Electric Telegraph Act 1853(Vic). This legislation was copied by New South Wales in 1857,⁷¹ with the sole difference of substance being that the New South Wales act omitted a Victorian section allowing an authorised person to give copies of telegram to person to whom it was addressed. Meanwhile some of these provisions had been adopted in New Zealand in the Telegraphic Service of Messages Act 1872(NZ). That New Zealand had worked from the Victorian, rather than the New South Wales, Act seems probable since New Zealand adopted the Victorian section as to the provision of copies of telegrams. In the same year, Queensland, which had inherited the New South Wales Act of 1857, re-

⁶⁹ e.g. Beaver to Minister of Justice, 7th Sept. 1887), Justice Department file 5/7722.1, GANSW.

⁷⁰ See the papers in VPRS.10265, VPRO. Unfortunately the papers do not bear identifying names and dates, but internal evidence indicates they refer to the Premiers' Conference at Hobart in 1895.

⁷¹ Telegraphs (Establishment of Electric) Act 1857 (NSW).

enacted it in 1872 with only minor changes.⁷² South Australia adopted the Queensland 1872 format in a statute of 1873,⁷³ but added for the first time a provision the interpretation section relating to returning writs of elections. This latter provision is then adopted by Queensland in the Telegraphic Messages Act Amendment Act 1876(Qld). That statute is important for the innovative provision that allowed for the introduction of telegrams as evidence in court. The new amendment created rebuttable presumptions that a telegram purporting to be from X was from X, and that when a telegram was paid for and despatched to X, X had received it. These provisions were then adopted in toto in Western Australia.⁷⁴ Many amendments of detail were passed in various jurisdictions later - it is notable that the New Zealand consolidating statute, the Electric Lines Act 1884(NZ) contains a provision, section 30, as to the violation of secrecy which appears in a New South Wales statute, and another provision concerning false messages, section 31, which seems modelled on a Queensland provision.

There are, of course, occasions where the borrowing of legislation is at the suggestion of the colony where the statute first originated. Such statutes were not particularly common, but they did occur. An example is furnished by the request of the New South Wales Government in 1838 that South Australia enact a statute similar to New South Wales's Escaped Offenders Act 1838(NSW); a request which the South Australian Government was happy to meet.⁷⁵ Not all such requests met such willing acquiescence - South Australia reacted coolly to the suggestion, by Western Australia, of common Australian legislation to regulate sea-going boats and sealers on the basis that there had been no serious difficulty with the sealing trade in South Australia, and therefore that

⁷² Telegraphic Messages Act 1872(Qld) The Act was S W Griffith's first effort as legislator: Bernays, C A *Queensland Politics during 60 (1859-1919) Years* (Government Printer, Brisbane, 1921), p.61.

⁷³ Telegraphic Messages Act 1873(SA).

⁷⁴ Telegraphic Messages Act 1874(WA).

⁷⁵ G M Stephen to Colonial Secretary, New South Wales, n.d. but apparently November 1838, file GRG 24/3, SAPRO.

colony would not legislate unless "this seems essential to the security of settlers in Western Australia".⁷⁶

In other cases, several colonies would agree to some common policy which involved the passage of essentially similar legislation in the different colonies. Such agreements were reached on occasion on very diverse subjects. Some were of relatively little public impact, though significant for individuals. A good case in point is furnished by the changes made to the requirements for admission to the colonial legal profession by the New Zealand Law Practitioners Ordinance 1853 and kindred legislation in the Australian colonies. The New Zealand ordinance was apparently the first to allow legal practitioners to be admitted in that colony as of right on the basis of admission in the other Australasian colonies. It also permitted applicants for admission to rely on having served articles partly in the colony and partly in the United Kingdom or in some other colony. The principles underlying such innovations were quickly adopted in Van Diemen's Land and in New South Wales,⁷⁷ and in other colonies later.

In other cases, the common objective involved far more significant questions of governmental, and indeed Imperial, policy. A good example is the abortive attempt of some Australian colonies to create a greater freedom to negotiate intercolonial trade and tariff agreements. In 1870 there was a conference attended by representatives of New South Wales, Victoria, South Australia and Tasmania to discuss idea of a "Customs Union", along lines suggested by the then Secretary of State for the Colonies, Lord Buckingham. The conference could not agree on a Customs Union, since the Victorian Government had firmly espoused a free trade policy and New South Wales protectionism. However, the participants all agreed that the colonies should be able to make their own intercolonial arrangements for free trade if they so chose. Any such colonial power would have been in breach of the United Kingdom statutes and policy which forbade differential duties being imposed by colonies. The conclusions of the

⁷⁶ Colonial Secretary, South Australia to Colonial Secretary, Western Australia, 5 June 1840, file GRG 24/3, SAPRO.

⁷⁷ Chief Justice to Colonial Secretary, 9 January 1854, file 4/6654/100-105, GANSW.

conference were, apparently, supported by New Zealand, and rather less warmly, by Queensland. The Tasmanian Government in early 1871 drafted and passed through a bill ("A Bill to make better provision for the Interchange of Colonial Products and Manufactures between the Colonies of Australasia") to give effect to the conclusions of the conference. This bill followed closely on the lines of a disallowed Tasmanian Act of 1870, but differed from it in not including a schedule of the types of goods which could be the subject of intercolonial trade agreements. The Tasmanian Ministers, were to be disappointed in their expectation of the passage of "identical, if not simultaneous" legislation by the participants in the conference, as well as by New Zealand and Queensland. Only South Australia and New Zealand actually passed bills similar to Tasmania's. Even these did not become law, since the Colonial Office was not prepared to countenance such colonial actions in Australasia, even though similar legislation had been allowed in the British North American colonies only a few years earlier. However, unlike the Australasian statutes, the Newfoundland and Prince Edward Island statutes of 1856 were concerned only with a narrow range of primary produce such as timber or agricultural produce, and thus did not impinge on European interests in the trade of manufactures.⁷⁸ Ostensibly the refusal to sanction the colonial legislation was because it would involve a breach of the treaty between Britain and the German Zollverein; the reality was more likely to have been that Britain thought it impolitic to allow the colonies the freedom to act in ways which might discriminate against German goods.⁷⁹

Nor was this the only occasion in which colonial interests were opposed to those of Great Britain itself. Such differences of opinion, and the common legislative expression of common colonial policies, become more frequent late in the nineteenth century, and are to be found in fields as diverse as divorce law and the restriction of coloured

⁷⁸ A Canadian Act of 1868 did allow trade duty agreements on a wider range of products, but this was only acceptable because it was tied to Canadian negotiations with colonies which had not yet federated.

⁷⁹ See Intercolonial Trade Acts proposals, 1871 21 Tas.H.A.Jo. No.28, from which the foregoing account is derived.

immigration. Both of these are considered in more detail later,⁸⁰ as are some later cases of legislation deriving from common concerns of the colonies.⁸¹ However even in the latter part of the century when communications were better and more sophisticated debate was possible, it is clear that in many cases intercolonial negotiations were difficult and frequently unproductive.⁸²

Lastly, account must be taken of the occasions on which statutes of similar form and content are passed in different colonies as a result of the influence of the Colonial Office. The role of the Colonial Office in reviewing colonial legislation is discussed below,⁸³ and as indicated in that discussion, has already been the subject of some meritorious academic scrutiny and discussion. Far less attention has been paid to the role of the Colonial Office in promoting new legislation (as opposed to particular amendments to statutes first conceived or drafted in the colony in question). While most of the Colonial Office correspondence with the various colonies throughout the nineteenth century contains occasional recommendations or instructions in regard to statutes, actual or proposed, there is a clear change in the nature of the comments or instructions made. In the period before responsible government, most of these directions concern amendments which the Colonial Office believed were required for colonial statutes already passed to be acceptable to the British authorities. This aspect of Colonial Office influence on colonial law is considered in more detail later. On occasion in that period, the British Government would give instructions, or make suggestions, that a colony enact a particular law. After the inception of responsible government, such statements are almost invariably cast as suggestions; their frequency varying with the enthusiasms of particular Secretaries of State. Some of the suggestions bore fruit almost immediately and in several colonies. The first legislation relating to

⁸⁰ See below pp.198-215 and pp.77-84 respectively.

⁸¹ See below, pp.256-7.

⁸² As to this see Dalziel, Raewyn "*Misunderstandings Rather Than Agreements, Intercolonial Negotiations 1867-1883*" in Sinclair, Keith, (ed) *Tasman Relations, New Zealand and Australia 1788-1988* (Auckland UP, 1987) pp.79-80.

⁸³ See chapter 4.

defence secrets in the various colonies are the Official Secrets Acts⁸⁴ which appear in various colonies after 1891. These were consequent on a circular despatch from the Secretary of State requesting legislation to prevent the sketching or drawing of naval or other defence facilities.⁸⁵ Other requests for colonial action were less successful - only Sir George Grey during his first governorship of New Zealand appears to have responded favourably to a circular despatch seeking to have the colonies allow the importation of wine for military messes without payment of duty.⁸⁶

Even during the period when a Secretary of State for the Colonies could order, rather than request, the introduction of particular legislation, the precise form of the statutes introduced was rarely prescribed. Where any comment as to the desired form of the future statute was made, it would normally go no further than a suggestion that an English statute be followed - as with the suggestions in 1870 and 1871 that a recent United Kingdom amendment to its Vaccination Act be adopted in the colonies. The suggestion bore fruit in a number of colonies,⁸⁷ a result the less surprising because earlier English acts had been copied in much of Australasia.⁸⁸ On occasion, though in only a very few cases, the Colonial Office supplied to one colony a copy of a statute from another colony with the suggestion it be used as a guide - the new colony of Hong Kong was supplied with a copy of the New Zealand Supreme Court Ordinance as a model from which a local statute could be derived, although in that case the resulting

⁸⁴ e.g. Official Secrets Act 1892(Tas); Official and Colonial Defences Secrets Act 1891(NZ); Official Secrets Act 1892(NSW).

⁸⁵ See Inglis Clark to Governor, 5 March 1892, file TA315/GO 50/1, AOT.

⁸⁶ Grey to Gladstone, 7 November 1846, CO 209/46.

⁸⁷ See Du Cane to Kimberley, 12 May 1872, CO 280/381, replying to Colonial Office circular despatches by Lord Kimberley of 17 October 1870 and 27 September 1871.

⁸⁸ The Vaccination Amendment Act 1855(SA) and the Vaccination Act 1854(Vic) were based on an English statute of 1853 (See Minutes of Exec Co. of South Australia, 31 July 1855 and 30 August 1855, GRG 40/1/3, SAPRO and Hotham to Sir George Grey, 11 January 1855, VPRS.1084/2, respectively). Later English legislation was copied in the Vaccination Act 1861(WA) (see Russell, pp.52-53) and Vaccination Act 1863(NZ) (see Grey to Newcastle, 6 January 1864; CO 209/178).

ordinance departed so much from the model supplied, and was open to so many objections, that it had to be disallowed.⁸⁹

Where there was any attempt to prescribe more closely the provisions to be adopted, some colonies were likely to be reluctant to comply. An example, again furnished by Van Diemen's Land, was the attempt by the Colonial Office to direct the colonial authorities to tighten the laws relating to merchant seamen. One consequence of the gold rushes to New South Wales and Victoria in the early 1850s was a great increase in the frequency with which crew members deserted their ships in Australian ports, even in the colonies where there was no gold-mining activity. This increased rate of desertion prompted British ship-owners to press for more stringent legislation, with greater penalties for desertion and a greater degree of administrative supervision of the recruitment and discharge of seamen, including the institution of a Public Shipping Officer and a Register of Seamen. The Van Diemen's Land Government received this rather coolly. The Governor, Denison, informed the Secretary of State that local law was adequate to the requirements indicated by the Colonial Office, except as to the proposed Public Shipping Officer and Register of Seamen, and that Denison would consult the local mercantile community for their views on the desirability of such innovations.⁹⁰

There were also cases where the Colonial office would find itself forestalled because the need for legislation had become apparent to the colonial authorities who had acted before the Colonial Office instructions had reached them, as with the Bank Liabilities Act 1840(NSW).⁹¹

Of course, in a number of cases the development of the law involved a complex series of interchanges between colonies and the Colonial Office in which is difficult to

⁸⁹ Miners, N J "Disallowance and the Administrative Review of Hong Kong Legislation by the Colonial Office 1844-1947" (1988) 18 Hong Kong LR 218, 225.

⁹⁰ Denison to Newcastle, 25 June 1853.

⁹¹ See Gipps to Russell, 1 January 1841 HRA, Series 1, vol 21, p.150.

determine the extent to which an enactment was a colonial initiative and to which it should be attributed to the directions of the British Government. A prime example is furnished by the laws passed in New South Wales, Western Australia, New Zealand and South Australia in the late 1830s or early 1840s to make admissible the evidence of members of the indigenous population, whether or not they had become Christians. In general the Australian courts rarely allowed non-Christian Aborigines to give any evidence in court, either from an inability to find adequate interpreters, or on the basis that the Aborigine could not validly take the required oath because he or she lacked knowledge of a Supreme Being and a future state.⁹² In New Zealand, the authorities were at first quite unsure whether or not Maori evidence should be admitted.⁹³ Certainly it seems that while the courts sometimes admitted Maori evidence, there were occasions where Justices of the Peace would not do so.⁹⁴

The inability to introduce native evidence meant that successful prosecutions for offences against natives were rare. To the authorities, both colonial and British, as well as to pressure groups such as the Aborigines Protection Society,⁹⁵ legislative intervention seemed a necessity. Indeed there were calls from missionaries and churchmen for action as early as 1836.⁹⁶ The then Colonial Secretary, Lord Normanby, may well have been influenced by the missionary lobby when he sent two despatches to Governor Gipps in New South Wales first suggesting, then ordering, the introduction of a suitable enactment.⁹⁷ Yet the first New South Wales enactment, the Aborigines Evidence Act 1839(NSW) was actually passed on the recommendation of the local Attorney-General, prior to receipt of the first of Normanby's missives. Even so, that

⁹² Burton to Labouchere, 17 August 1839; file A 1280, ML.

⁹³ See Hobson to Gipps, 26 November 1840, file G36/1/181, NZNA(W).

⁹⁴ See Ward, Alan *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand* (ANU Press, Canberra, 1974), pp.42 and 66.

⁹⁵ Labouchere to Burton 17 August 1839, enclosed with Normanby to Gipps August 31 1839, file A 1280, ML.

⁹⁶ See Threlkeld to Broughton, 31 December 1836, printed in *Votes & Proceedings of New South Wales Legislative Council 1837*, p.603 and Threlkeld to Colonial Secretary 30 December 1837, printed in *Votes & Proceedings of New South Wales Legislative Council 1838*, p.595.

⁹⁷ Normanby to Gipps 17 July 1839, and 31 August 1839; file A 1280, ML.

Act contained a suspending clause, inserted at the request of the Chief Justice, as he and the other judges thought the Act invalid for repugnancy.⁹⁸ That New South Wales Act was disallowed as neither the principle nor the drafting were approved.⁹⁹ A replacement bill introduced in 1843 into the new representative Legislative Council was defeated, largely at the instigation of Richard Windeyer, quondam counsel for the defendants convicted, on the evidence of Europeans, of the massacre of aborigines at Myall Creek in 1838.¹⁰⁰

Meanwhile Western Australia had been also been taking steps to deal with the problem. The first stage was the drafting of a local Bill which would allow Aboriginal evidence in any criminal case. The Bill was in part similar in effect, though not in drafting, to the New South Wales law in that it made evidence admissible, but left its weight to the trier of fact. However the Western Australian Bill went further in providing that Aboriginal evidence could never be taken as conclusive and always required corroboration. It also provided that notes of statements or depositions made by Aborigines were admissible as evidence, since Aborigines were unlikely to attend a trial on a particular day. Governor Hutt was of the opinion that the Bill needed only to deal with evidence in criminal cases, because "civil law, being the offspring of civilization, nothing relating to the Aborigines can have reference thereto".¹⁰¹ This Bill was sent to the Colonial Office for its consideration, and after approval in principle was given, the bill was passed as the Aboriginal Evidence Act 1840(WA). The Act remained limited to criminal cases, and did not include a clause suggested by the Colonial Office which would have provided that in cases where aboriginal evidence had been admitted and a conviction resulted, no

⁹⁸ Gipps to Normanby, 14 October 1839, *Historical Records of Australia*, ser. 1, vol. 20, p.368 and Gipps to Russell 10 February 1840, *ibid*, pp.494 ff. The problem of repugnancy was expressly obviated by the Colonies (Evidence) Act 1843(Imp), see Roberts-Wray, Sir Kenneth, *Commonwealth and Colonial Law* (Stevens, London 1966) p.400.

⁹⁹ Campbell and Wilde to Russell, 27 July 1840, in HRA ser. 1, vol. 20, p.756, and see Molony, J.N. *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869* (ANU Press, 1973) pp.150-1.

¹⁰⁰ Windeyer, J.B. "Richard Windeyer : Aspects of his work in New South Wales 1835-1847" JRAHS, 1964, vol. 50, p.97.

¹⁰¹ Hutt to Glenelg, 3 May 1839, CO 18/22.

sentence should be carried out until the conviction had been confirmed by the Chief Justice. The reasons given for the decision to omit such a provision indicate that the Western Australian administration envisaged a quite different role for the Act from that espoused by the Colonial Office. Governor Hutt stated that most crimes committed by aborigines were minor, and only summary punishment were awarded, and in such cases the delay involved in having the case reviewed by the Chief Justice was impractical and undesirable.¹⁰² This indicates that the purpose first stated for legislation - to ensure the punishment of persons offending against Aborigines - had somehow become transmuted into a need for such an Act to ensure the conviction and punishment of Aborigines. It may be noted here that this apparent local divergence from Colonial Office policy casts doubt upon the claim made by Sir Paul Hasluck¹⁰³ that the Western Australian statute was based upon the adoption by Hutt of ideas put forward to him by the then Captain George Grey for the treatment of native populations in the Australasian colonies, and later endorsed by the Colonial Office, which recommended to colonial governors their adoption.¹⁰⁴ The date of the first draft of the Bill, as well as the apparent local policy, would suggest that it does not owe anything to Grey's ideas; the issue is not now resolvable. The Colonial Office disallowed the Act on the basis of the exclusion of Aboriginal evidence in civil cases, and instead instructed the Governor to propose an bill to allow Aboriginal evidence in all cases, so as to maintain a legal equality of the two races.¹⁰⁵ This instruction was complied with in the Aborigines Evidence Extension of Testimony Act 1842(WA).¹⁰⁶

Despite the suggestions of the Colonial Office and of pressure groups such as the Aborigines Protection Society, and on occasion local officials,¹⁰⁷ neither South

¹⁰² Hutt to Normanby, 19 August 1840, CO 18/25.

¹⁰³ Hasluck, P *Black Australians (A Survey of Native Policy in Western Australia 1829-97)* (Melbourne UP, 1942), pp 127-128.

¹⁰⁴ In Volume II of Grey's *Journal of Two Expeditions of Discovery in Northwest and Western Australia*, London 1841; endorsed in Russell to Hutt, October 8 1840, and Hasluck, loc. cit.

¹⁰⁵ See minute by J F Stephen, 5 April 1841, on Hutt to Normanby, 19 August 1840, CO 18/25.

¹⁰⁶ See Hutt to Stanley, 18 October 1842, CO 18/34.

¹⁰⁷ Eyre to Grey, 1 January 1843, file GRG24/6/170, SAPRO.

Australia nor New Zealand acted to pass legislation to ensure the admission of unsworn testimony from indigenes until 1844.¹⁰⁸ The South Australian delay is the more curious because the governor was then that same George Grey who had advocated such legislation! Indeed, it seems that Grey only moved on the issue when directly so instructed by the Secretary of State for the Colonies.¹⁰⁹

While the legislation in the different colonies has the common element of Colonial Office influence, it is diverse in its drafting. Certainly the Western Australian and New South Wales acts appear to have come as much or more from local influences as from that of Britain; the later enactments in the other colonies may be the more readily attributed to Colonial Office influence.

However, despite the various qualifications that must be borne in mind, it seems clear that the statute law of the colonies, particularly of the Australasian colonies, was to a significant, and hitherto under-represented, degree the result of the use in different colonies of statutory models first enacted in other colonies. The extent to which there was such borrowing, and the channels through which it occurred, varied according to a wide range of circumstances - the period, the subject matter of the legislation, the state of development of government and society and the influence of particular individuals. A useful analytical framework is furnished by considering colonial developments in terms of the constitutional development of the particular colony rather by a strictly chronological distinction, or by a consideration of laws on different subjects. It is to this more extended treatment that attention is now turned.

¹⁰⁸ Unsworn Testimony Ordinance 1844(NZ); Aboriginal Evidence Act 1844 (SA).

¹⁰⁹ Hague, p.1403.

Chapter 3

Forms of government and their effects on legislation.

Any discussion of the development of colonial law must begin with the superficially trite observation that among the significant underlying influences on the process of legislation and its products were the form of government and the nature of the legislatures to be found in the colonies at varying periods during their history. Put simply, the nature of the legislature affected the nature of the legislative process; the nature of the government affected the areas in which new legislation was initiated and the shape that such legislation took.

Those North American colonies with which this study is concerned generally had some form of representative institution from the late eighteenth century. As a result colonial governors were, to some slight extent, limited in their actions by the need to ensure a working majority in the legislature on critical questions. The resulting system, which may be referred to conveniently as "representative government", was later transformed into responsible government by requiring the ministry to command a majority in the legislature. By contrast in almost all the Australasian and South African colonies, government began with a period of Crown colony government, where governors ruled through nominee Councils, and the members of the local legislature were appointed rather than elected.

The duration of the period of representative government varied between the different settlement colonies. In the Australasian colonies alone there was a considerable spread. In Victoria, which never had a period of Crown Colony Government but was created with a separate representative legislature, the period between representative and responsible government was only a matter of a few months; in Queensland even less. In New Zealand the transition came within the lifetime of the first parliament. By contrast, in Western Australia it endured for more than 20 years. In the North American colonies, representative government was the norm until responsible government was conceded; in South Africa there was again a considerable period of

representative government prior to responsible government being established. The differences in the pace of these constitutional developments, and the differences in the periods in which they occurred, are such as to require caution in forming any generalisations about the pattern of enactment of statute law in the various colonies at this stage of their development.

Nor was this the only significant change. As is noted below, political and social change within the colonies had by the last two decades of the century brought to power in several colonies cliques or coalitions which were more active, and more doctrinaire, in enacting reforming legislation.

Crown colony government

In most new colonies among the first tasks facing the new Government was the provision of a suitable body of laws appropriate to the particular circumstances of the colony. In the Crown Colonies, legislation was to be passed by a Legislative Council, comprising the governor and certain other officials, in some cases together with some settlers who were independent of the Government. The Governor's Instructions as to the conduct of business in the Legislative Council varied a little between colonies, but had a common core. There was to be a separate act for each matter; appropriately numbered and styled. The Governor was to reserve for the British Government's assent (unless prior approval had been given) any Bill which affected the Royal prerogative, and any ordinance for the naturalization of aliens, or the property of British subjects resident in the United Kingdom, or affected British shipping or trade.¹ In some colonies, such as New Zealand, there was prohibition on the introduction of divorce bills (in this context, bills to dissolve marriages between specified persons, rather than any general reform of matrimonial law), though these were usually acceptable in other colonies provided they were reserved for the assent of the United Kingdom government.²

Such a Legislative Council could enact laws more swiftly than was usually the case with an elective assembly or parliament.³ This is not to say that a Governor would invariably succeed in having enacted any particular piece of legislation which he desired to see passed. There were instances where opposition within a Legislative Council, even one numerically dominated by officials, made it necessary, or at the least politic, for a Governor to depart from his own preferred policy. One of the more common grounds for such opposition to the Governor was where the proposed law trespassed upon privileges or perquisites enjoyed by the official members of the Council, as with the

¹ Russell, p.37. Foden, N.A. *Constitutional Development of New Zealand in the First Decade 1839-49* (privately published, Wellington 1938), pp. 84-89 reproduces Governor Hobson's instructions virtually verbatim.

² As to colonial developments in the law of divorce, see pp.198-215, below.

³ For example, the New Zealand Legislative Council in 1841-44 often legislated very speedily.

Postage Act 1835(NSW). This statute was intended by Governor Bourke to prevent officials from abusing their privileges of franking mail, since earlier laws had not even required the officials to covenant that mail despatched was connected with official business

"The clauses in the Bill introduced by me which proposed a stricter rule, copied from an Act lately passed in Van Diemen's Land, were violently opposed by the Colonial Secretary..."

As the Colonial Secretary was not alone in his opposition, Bourke felt it necessary to give way.⁴

There were other examples of failure by a governor to achieve his desired ends - two early New Zealand ordinances may stand as examples. The Land Claims Ordinance of 1842 was enacted as a copy of an earlier New South Wales Act because an earlier bill drawn up locally was fiercely opposed by the non-official members of the Legislative Council, and Governor Hobson believed it necessary to yield to the opponents of his own measure.⁵ The Marriage Ordinance of 1847 was heavily amended from Governor Grey's original draft but he nevertheless assented to it, in the belief that it could be improved when public opinion pressed for a better law.⁶ Such inability to legislate as the Governor wished was, however, not at all common.

In most cases, therefore, the Governor, with and through his Council, could act with considerable despatch, if they were so minded, to address the legislative needs of a new colony. The Legislative Council of Van Diemen's Land during the Crown colony period frequently met for only a few weeks of the year, and in that time passed a substantial number of statutes.⁷

Naturally the pace of legislation could vary substantially from colony to colony, or even within one colony at different times, or even within a legislative session. Some bodies appear to have been quite dilatory - for instance the South Australian Legislative

⁴ Bourke to Glenelg, 24 December 1835, HRA, ser. 1, vol.18, pp 239ff.

⁵ Hobson to Stanley 29 March 1842; CO 209/14.

⁶ Grey to Earl Grey, 25 August 1851, CO 209/92.

⁷ e.g. see Arthur to Stanley, 2 October 1834, CO 280/50

Council, which sat at regular intervals throughout the years 1839 and 1840, appears never to have taken less than three or four weeks to pass any Bill, and could take far more time. The South Australian Slaughterhouse Ordinance of 1840 provides an extreme example. It was first mooted by the Governor to the Council⁸ on the 11th of September 1839; a draft Bill was introduced on the 8th of October that year, and as was the common colonial practice, ordered to be printed in the Government Gazette so as to ascertain public sentiment on the matter. The Bill then received its first reading on the 7th of January 1840, was discussed again on the 4th of February 1840, and re-advertised; then received a second reading on the 18th of August 1840, had its third reading a month later and was finally assented to and passed into law on the 8th of December 1840.

There were occasions where legislation involved such major policy issues that the governor would seek prior approval from Britain before taking steps to give the proposal legal form - a decision whether or not to bestow such approval could be withheld for very long periods. An extreme case was the delay of more than three years in the giving of a definite reply to Governor Bourke's proposal to reorganise the New South Wales school system on the Irish 'National' School Model.⁹ Normally approvals would be forthcoming more speedily than that, but with despatches from Governors to the Colonial office, or vice versa, taking between four and seven months in transit on each of transmission to or from Australia until the 1840s,¹⁰ any reference to the British Government would likely involve a delay of at least a year. Material did, of course, reach the North American colonies more quickly.

However the greatest cause of delay in legislation was not so much any dilatoriness by the enacting body as difficulties in determining the form new legislation ought to take.

⁸ Unusually, the South Australian government at this time had but one council with both legislative and executive functions.

⁹ Bourke to Arthur 12 March 1835, Arthur paper, file A2168, ML.

¹⁰ Times can be gauged from the dates shown in the registers of despatches, e.g. file 4/1605, SGA.

The sources that were available to provide suitable enactments, and some of the uses made of them, are illustrated by a description of early laws passed in Western Australia:

"The most important [source of law] was the needs of the community; as needs arose, so were they dealt with. There are many examples in the statute book, particularly in the first few years when Acts, considerably different in content from those on similar subjects in England, were passed in Western Australia. Amongst them were the Acts regulating the sale of liquor, the establishment and management of ferries, the fencing of town lots, and the operation of banking companies. The second source was English legislation, which naturally provided the basis for the majority of Western Australian statutes. Some English Acts were altered to suit the conditions of a new colony, while others were adopted in toto.... A third source was legislation of the other Australian colonies. In some instances, ordinances of New South Wales or Van Diemen's Land were referred to for assistance in drafting legislation to deal with a similar local problem, while in other cases it seems that the fact that a statute had been passed elsewhere was deemed sufficient reason for copying it in Western Australia."¹¹

It is debatable whether such a description correctly estimates the relative importance of local initiative, English law and other colonial models, but there can be little doubt that all three were at times of importance.

One of the greatest difficulties facing colonial legal establishments was always that of reconciling English law to colonial circumstances¹². The common law position was that in British colonies acquired by settlement the British colonists took with them those elements of English law, both common law and statute, that were applicable to the circumstances of the colony.¹³ The law thus transferred to colonies varied according to the date of acquisition of sovereignty over the colony, or at least such other date as the local legislature might later determine as the New Zealand Parliament did with the English Laws Act 1858(NZ).¹⁴ Importantly, any British statute passed after that date only applied to the colony if the statute so provided. If the statute did not apply to the colony the local legislature could of course adopt it. It should be added that there were

¹¹ Russell, p.41.

¹² The following page draws heavily on previously published material of mine: Finn, J. "The Imperial Laws Act 1988" (1989) 4 Canterbury LR. 93.

¹³ Blackstone, *Commentaries* (15th ed.), Vol. 1, p.106. There is a curious statement in Hight, J.D. and Bamford H.A. *Constitutional History and Law of New Zealand* p.119-120 that the principle derives from the judgment of Lord Mansfield CJ in *Campbell v Hall* (1774) 1 Cowp. 204; 98 E.R. 1045. This statement is apparently based on an alleged dictum not to be found in the reports of that case.

¹⁴ Report on Acts by Stafford, enclosed with Gore Browne to Bulwer Lytton, 12 October 1858; CO 209/147.

times when there was an intentional passage of statutes which did no more than repeat existing English law so that some political end might be achieved. Into this class come such measures as the repetition in New South Wales of the Roman Catholic Emancipation Act 1829(Imp). This British Act would by its terms have applied automatically in all the colonies (even though probably the religious disabilities in the earlier English law had not been part of colonial law). However, the repetition was intended to have a political significance in palliating colonial Roman Catholic sentiment.¹⁵

It is perhaps as good a measure as any of the inadequate calibre of some colonial law officers that not all of them were aware of any such limitation on the applicability of British statutes. This led to the New South Wales judges, Forbes CJ and Stephen J, having formally to certify to the Governor of New South Wales that statutes passed in the United Kingdom after the Colony was established, and not having specific provisions making the statute applicable to the colony, were not in force in New South Wales, because the local Attorney-General and Solicitor-General contended such statutes were in force in the colony.¹⁶

Even where the date of a statute made it prima facie a part of the law of the colony, the question arose of whether the circumstances of the colony were such as to exclude a particular element of English law from applying in the colony. The determination of the applicability, or otherwise, of elements of English law was frequently a source of difficulty.¹⁷ One solution, again put forward by a less than competent colonial official,

was to resort to a declaration that all British statute should apply to a colony :
 "notwithstanding the offices and forms contemplated by Parliament for the execution of others of the said statutes be less complete in the said colony than in England, and notwithstanding that in the application of such statutes it may be necessary to reject particular parts thereof".¹⁸

¹⁵ Murray to Darling, 22 April 1829, printed in HRA, ser.1, vol.14, p.716.

¹⁶ Forbes to Darling, 13 March 1828, GANSW, file 4/6651/152.

¹⁷ See e.g. the disputes leading to the statutory embodiment of the common law principle in the English Laws Act 1858(NZ); Williams, D.V. "The Foundation of Colonial Rule in New Zealand" (1988) 13 NZULR 54.

¹⁸ Saxe Bannister, (then Attorney-General of New South Wales), to Darling 12 June 1826, file 4/6651/73, GANSW

Such a policy would have amounted to an abdication of colonial responsibility for local law. Not surprisingly there was little support for it; it was even suggested that such a bill could not properly be passed in New South Wales because it would have been contrary to the British statute regulating New South Wales.¹⁹ Even so, it was not uncommon for there to be opposition, even from members of the colonial administration, to a proposed colonial statute on the ground that the bill in question diverged too far from existing English law.²⁰

Nor was there support in the Colonial Office for the wholesale and indiscriminate adoption of British (or English) law in any new colony. The preferred policy of the British Government was summed up in 1846 by W. E. Gladstone, then Secretary of State for the Colonies, to Governor Charles Fitzroy of New South Wales concerning the legal needs of a projected new settlement to be established as the colony of North Australia:²¹

"North Australia will at first be destitute of any local laws adapted to the wants of the Inhabitants. Yet the Law of England is a code which without some adaptation of it to local circumstances must immediately raise the most perplexing and even insuperable difficulties. It will probably therefore be convenient that the first Act of the Legislature of North Australia should be the adoption of the modification of the Laws of England in force in New South Wales and that the second Act should give to the Court of Quarter Sessions of North Australia the power at present exercised by the Supreme Court of New South Wales. Commencing with these measures, the new legislature may gradually and at leisure adapt the other parts of the English and New South Wales law to the exigencies of the new Society".²²

Insofar as it reflected a preference for a temporary adoption of the existing body of law in another colony, Gladstone's policy reflects the actual course of events in New Zealand, where the first ordinance passed by the Legislative Council was to adopt all applicable New South Wales law as the law of New Zealand.²³ Curiously in that case

¹⁹ Forbes to Darling 8 July 1826, file 4/6651/74, GANSW.

²⁰ See the comments of Baxter on instructions to draw up a Bill to suppress vexatious litigation by making the plaintiff's attorney personally liable for costs; Attorney-General to Colonial Secretary, 5 September 1831, file 9/2677, GANSW.

²¹ The project was intended to establish a new repository for the transportation of convicts; it was abandoned when it became clear that colonial public opinion would not permit it: Knaplund, Paul *The British Empire 1815-1939* (Harpers, New York, 1941), p.274.

²² Gladstone to C. Fitzroy, 7 May 1846, file 4/1619, GANSW.

²³ New South Wales Law Adoption Ordinance 1841(NZ).

the Colonial Office had apparently favoured a more selective approach, directing Hobson's attention to the useful precedents which New South Wales could furnish for future New Zealand ordinances.²⁴ However it is clear that reliance on English law was not seen as appropriate for fledgling colonies. In general this seems to have been from a belief that the law of England was not fitted to colonial circumstances, though there may also have been a belief that reliance on English, rather than local, law placed too much influence, and responsibility, upon colonial judges.²⁵ A similar adoption of a body of colonial law had taken place in New Brunswick in 1786, on the separation of that colony from Nova Scotia,²⁶ and would again occur in Australia with the separation first of Victoria and then of Queensland from New South Wales.

There were cases where particular English laws were speedily rejected by colonial governments as creating difficulties which ought to be avoided. The most obviously inconvenient elements of English law were various statutes regarding usury which were not repealed until 1854.²⁷ These statutes, which regulated the amount of interest which could lawfully be demanded on any loan, were premised on the medieval concepts of a "just profit". The 5% maximum level of interest²⁸ might have been enforceable in the British capital market, where average yields were significantly lower than in colonial economies. In the colonies such a statutory limit was simply not practical, given the profitable alternatives available to any capitalist with funds for investment. The Legislative Council of Van Diemen's Land estimated in 1830 that two-thirds of the loans in the colony would be void if United Kingdom usury laws applied;²⁹ it ensured they did not by the passage of a declaratory statute. A similar legislative

²⁴ Governor's Instructions, printed in Foden, N.A. *The Constitutional Development of New Zealand in the First Decade (1839-1849)*, (privately published, Wellington, 1938) p.98.

²⁵ Hall, H.L. *The Colonial Office; A History* (Longmans Green, London, 1937), at p.136 attributes this view to James Stephen.

²⁶ Stockton, A.A. *The Judges of New Brunswick and their Times*, from the manuscript of the late Joseph Wilson Lawrence, edited and annotated by A.A. Stockton (published by *Acadiensis* magazine, St. John, New Brunswick, 1907) pp.8-9.

²⁷ Usury Laws Act 1854(Imp).

²⁸ Set by Usury Act 1726(Imp).

²⁹ Minutes of the Leg.Co. of Van Diemen's Land, 4 April 1830, file TA315/EC4/2, AOT.

declaration that the usury laws did not apply is to be found in New South Wales, where the local statute, the English Usury Laws Non-Application Act 1834, provided that the British usury legislation was not to be in force in New South Wales, and that unless the parties agreed otherwise, a rate of 8% was to apply to all loans.³⁰ The New South Wales statute was clearly influenced by the Van Diemen's Land Act, imitation of which was recommended by a Select Committee of the Legislative Council on the New South Wales Bill.³¹ Nor was there much colonial enthusiasm for the principle underlying usury legislation. An Usury Bill put forward in New South Wales in 1843 initially proposed to limit the interest on all mortgages, present and future, to 5 per cent. The bill failed, even though the interests of mortgagees of current mortgages, almost all at much higher rates than 5%, were propitiated by excluding current mortgages from the Bill.³² Some years later, on the suggestion of Earl Grey, then Secretary of State for the Colonies, a bill was introduced to allow trustees of savings banks to lend monies to the Government for works of public utility. That bill also provided for a fixed rate of interest on such loans; the rate-fixing provision was deleted by the New South Wales Legislative Council on the basis that such a fixing of interest rates was a matter for the market, not for Government.³³ Even after the usury statutes were repealed in England, the desire to ensure that past transactions were not impugned for breach of the English law impelled the New Zealand Parliament to declare that the usury laws had never been in force in that colony.³⁴ Such a statute was presumably necessary after the acquisition of British sovereignty over New Zealand although it had been decided by the New South Wales Supreme Court in 1833 that English usury laws did not apply in New Zealand.³⁵

³⁰ The form of the statute appears to have been the work of the then Chief Justice of the colony, Francis Forbes, see Currey, C.H., *Sir Francis Forbes* (Angus and Robertson, Sydney, 1968), pp. 424-6.

³¹ Report, printed in V.& P. N.S.W. Leg.Co., 12 June 1834.

³² Therry, R. *Reminiscences of Thirty Years Residence in New South Wales and Victoria* (first published 1863, facsimile edition 1974, Sydney University Press, with introduction by J.M. Bennett) p.235.

³³ Wood to Merivale, commenting on the Savings Bank Act 1848(NSW), 27 July 1850, CO 323/61, PRO.

³⁴ As a proviso to the English Laws Act 1858(NZ).

³⁵ *Macdonald v Levy*, judgment printed in V.& P. N.S.W Leg.Co. 1834, pp.175-185

Nor were the problems posed by usury legislation confined to Australasia. In Upper Canada, the colonial legislature had enacted a local statute virtually reproducing the original Elizabethan prohibition on usury. This was not repealed until 1853, and in the meantime was a significant restriction on the developing industrial and market economy of Upper Canada.³⁶

There were, of course, formal limitations on the ability of colonial legislatures to enact law differing from that of England. The principal limit was imposed by the shadowy and uncertain doctrine of repugnancy. Colonial legislatures could not, it was held, enact laws which were repugnant to those of England.³⁷ If they purported to do so, the colonial law was invalid. In the older Australian colonies, New South Wales and Van Diemen's Land, the Governor was supposed to seek a certificate from the Chief Justice that any proposed Bill was not repugnant to the laws of England.³⁸ In later colonies no such formal procedure existed but the Colonial Office viewed with disfavour any Governor who disregarded opposition to a measure on the ground that it was allegedly invalid for repugnancy. It was also possible for a Governor to seek to save a statute on the basis that the exigencies of the local situation required a departure from the rules of English law. A classic instance of this kind of special pleading is to be found in the Bushranging Act 1834(NSW) which authorised the arrest, without warrant and on suspicion, of persons believed to be connected with the then epidemic of robbery and other crimes in rural areas of the colony. As Bourke, the governor put the matter to the

Legislative Council:

"I have before intimated that nothing but a conviction that the Act is necessary for the security of H.M's subjects should incline the Council to prolong it. Upon this ground, and this alone, can so wide a departure from the Law of England be justified".³⁹

³⁶ Usury Act 1811(UC); Risk, R.C.B. "The Golden Age: The Law about the Market in Nineteenth Century Ontario " (1976) 26 U Toronto LJ 307, 319.

³⁷ As to the difficulties of determining the limits of the doctrine of repugnancy, see Roberts-Wray, Sir Kenneth, *Commonwealth and Colonial Law* (Stevens, London 1966), pp.400-02.

³⁸ NSW Charter of Justice, s.29, CALH p.131.

³⁹ Governor's message to Legislative Council, 8 April 1834, V.& P. N.S.W. Leg.Co. 1834.

He therefore invited the Council to insist, as it was entitled to do, that the Act be left in operation until Her Majesty's determination, an invitation with which the Council promptly complied.

The requirement that colonial statutes not be repugnant to the laws of England was not necessarily seen as a matter of great importance by the British administrators of the colonies. A rather light-hearted picture of the reasons for the inclusion of the phrase 'not repugnant to the laws of England' in the New South Wales Charter of Justice was given by J.F. Stephen in a letter to a kinsman in New South Wales:

"... in the first place, think it might serve as a '*pons asinorum*' over which no colonial crown lawyer should pass without giving proof of more than asinine sagacity - Secondly, because it sounds highly constitutional and decorous. Thirdly, because it may perhaps now and then prevent some egregious absurdity..."⁴⁰

The consequences of the requirement that colonial ordinances not be repugnant to English law varied significantly between colonies, and with the personalities of the persons involved. In New South Wales, Forbes CJ appears to have been prepared to do his best to assist the Governor to make the system work, to the extent of making any textual amendments he saw as necessary in the bills prior to their certification.⁴¹ Where the bill required more substantial amendment, Forbes would indicate with considerable particularity the amendments needed. Thus when considering the Auctioneers Bill 1828, Forbes commented that although in most features the New South Wales bill followed the latest British statute, that Act only prescribed the form of any licence to be granted, it did not of itself restrict the individual's liberty to conduct auction sales. The colonial bill purported to give the Governor a discretion to issue licences, and the exercise of such a discretion would not be challengeable with the Courts. Forbes therefore suggested a form of words to obviate the difficulty.⁴²

⁴⁰ Reproduced in Therry, *op cit*, n.33, p.318. Emphasis in original.

⁴¹ See eg Forbes to Darling, returning a certificated and engrossed copy of bill for the General and Quarter Sessions Act 1829, 13 February 1829, file 4/6651/222, GANSW.

⁴² Forbes to Darling, 16 July 1828, file 4/6651/175-6, GANSW.

However, in other circumstances, arguments over repugnancy could be a cause of severe friction between the Governor and the judiciary. In the Crown Colony period, the worst occurrences appear to have been in Van Diemen's Land. In the early years, it was not uncommon for Chief Justice Pedder to raise doubts as to the validity of legislation because of alleged repugnancy, but such protests were not always sufficient to prevent the passage of the legislation in question. Pedder regarded certain provisions of both the Quarter and General Sessions Act 1830(VDL) and the Hobart Town and Launceston Police Act 1834(VDL) as being invalid for repugnancy. In both cases the Legislative Council voted to override the Chief Justice's view - in the first case because the point was seen to involve only a breach of the letter, not the spirit, of the English legislation allegedly making the local bill repugnant; in the second the statute was modelled on existing New South Wales law, and the Chief Justice's criticism (that the repugnancy arose because a power to arrest sailors in the towns at night without passes was not mentioned in the preamble to the statute) may have seemed unconvincing and unreasonable.⁴³ The Colonial Office in each case confirmed the statutes, though admonishing the Governor not to override the Chief Justice's view on repugnancy without good reason.⁴⁴ Certainly some governors were inhibited in proposing legislation by a fear that the resulting statutes might be invalid for repugnancy. Governor Arthur, for instance, had doubts about legislating for a Post Office in Van Diemen's Land because he thought any colonial bill would be invalid as infringing on the legal position of the United Kingdom Postmaster-General. However, the colonial Attorney-General convinced him that a temporary Act, (until the Postmaster-General provided specific rules for the colony) would be valid. The upshot was the local Post Office Act 1828(VDL).⁴⁵

⁴³ Arthur to Murray, 16 April 1830, CO280/28, and Arthur to Stanley, 8 January 1834, CO280/46.

⁴⁴ See anonymous memorandum of 8 November 1834 by some Colonial Office official, attached to Arthur to Stanley, 8 January 1834, CO280/46.

⁴⁵ Arthur to Murray, 6 October 1828, CO280/17.

Whether or not the occurrences affected Pedder's views, it is clear that in general, Arthur's successor, Sir John Franklin had less difficulty on the repugnancy issue with the Chief Justice. This did not mean that the issue caused no problems at all. Franklin often found that although Pedder CJ would usually certify proposed legislation as not repugnant to English law, Montagu J would nevertheless claim the statute to be invalid for repugnancy, even though his opinions on the subject were usually rejected by the British authorities if the matter was referred to them.⁴⁶ Later still both Pedder and Montagu were to assert that the Dog Act 1847(VDL) was repugnant to British law in that it was in effect a taxing statute. The resulting dispute became long and bitter - not least because Governor Eardley-Wilmot was incensed that Pedder had declared invalid and repugnant a bill for which he had voted in the Legislative Council.⁴⁷ Montagu's conduct during the imbroglio was such that it became one of the twin grounds for his dismissal from office in 1847 (the other being that he had sheltered behind his judicial office when sued for debt).⁴⁸

Van Diemen's Land was not the only colony to be wracked with problems arising from judicial claims that statutes were invalid for repugnancy. Nor were such problems to be easily resolved in later years. It may be noted now, although the events occurred well after the cessation of Crown Colony Government in most Australasian colonies, that disputes as to the nature, scope and application of the repugnancy doctrine were not laid to rest until the passing of the Colonial Laws Validity Act 1865(Imp).⁴⁹ That Act, largely prompted by the antics of Boothby J in South Australia, made it clear that the colonial parliaments were free to legislate in complete contradiction to English law, though such statutes remained subject to disallowance for other reasons.

⁴⁶ Fitzpatrick, K. *Sir John Franklin in Tasmania 1837-43* (Melbourne UP 1949), pp.96-7.

⁴⁷ See Denison to Grey, 18 February 1848, CO 280/224, and see Howell, P.A. "The Van Diemen's Land Judge Storm" (1965) 2 U Tas LR 253.

⁴⁸ Keon-Cohen B.A. "Mad Judge Montagu: A Misnomer?" (1976) 2 Monash LR 50.

⁴⁹ The fullest and best treatment of this is in Swinfen, ch.11.

There were also occasional questions as to the validity of laws which might be considered to be outside the powers of the colonial legislature. The most common difficulty arose with colonial laws which purported to have extra-territorial effect, including legislation having effect at sea. Certainly the British Government was not inclined to allow much scope for colonial legislation on matters maritime, and was prepared to use its powers of disallowance to keep such statutes in check. The Colonial Office policy was that legislation which was to have effect up to a league (three miles) from the shores of the colony, and was "indispensable" to the welfare of the colony would not be disallowed for exceeding the limits of a colonial legislature. Matters which might be come within such a concession included pilotage, quarantine, customs duties and fisheries. However any statute regulating or prohibiting any behaviour on ships more than a league from shore was considered null and void by the Colonial Office and was not to be confirmed.⁵⁰ There were other cases where issues as to the powers of the colonial legislature arose - in 1805, New Brunswick forbade the importation of goods into the colony by any persons other than British citizens. The legal adviser to the Colonial Office considered the Act to be invalid as being ultra vires; however any difficulty was avoided by allowing the Act, a temporary one, to expire without renewal.⁵¹

There emerges therefore a general pattern of Crown colony legislation which shows that although there was a substantial degree of reliance on aspects of English law, either inherited or adopted by the colonial Legislative Council, there was also a significant body of law which was derived from that of other colonies.

⁵⁰ Stanley to Gipps, 15th December 1842, HRA Ser. 1 vol.22, pp.413-4; Marston, Geoffrey "Historical Aspects of Colonial Criminal Legislation Applying to the Sea" (1979) 14 UBCLR 299.

⁵¹ Importation Act 1805(NB); and see Baldwin to Castlereagh, 21 July 1805, CO 323/38, PRO.

Parliamentary government: representative and then responsible.

The events by which representative institutions and later responsible government came to be conferred on the colonies are well known, and need not be recounted here. It is however important to remember that the initiation of responsible government carried with it a number of consequential changes which collectively affected the factors controlling the process of legislation in the colonies.

One important development was the requirement that the government's chief legal advisers be represented in the legislature. In some colonies, as in New Zealand, it was not uncommon for the Attorney-General to sit in the upper house; in others the choice of law officers was severely constrained by the need to select from the ranks of elected members in the lower house. One such case arose in South Australia in 1865, when the Government was returned at election, but without its Attorney-General who had been defeated at the polls. The formation of a new cabinet took some weeks and was only made possible when one of the three lawyers in the lower house changed his allegiance.⁵²

Secondly representative and responsible government significantly increased the opportunity for legislation to be initiated by members of the legislature independently of the executive. This was a most important element in the shaping of colonial law, and is treated at some length below.⁵³

In part this may have reflected the lack of a developed party system, so that Parliament was more ready to entertain proposals from non-ministerial members. It may also have been due in part to a belief that the relatively small size of the colonial elite made it easier for proponents of change to use their personal contacts to find sufficient backing to ensure full consideration of their proposals for change.

⁵² See *Adelaide Advertiser* 11 and 15 March 1865.

⁵³ See Chapter 8.

There were, inevitably, some Governors who maintained a tight control over the legislation of the representative institutions. In Western Australia, for instance, between 1880 and 1885, 286 bills were introduced into the Legislative Council. Of these, only 25% were introduced by private members independent of the Government. The rest were introduced by officials or by members nominated by the Government. Only 10% of the bills introduced were rejected, but the rate of rejection of government bills was one quarter of that for private member's bills.⁵⁴

Lastly there is the development, late in the century, of genuinely "party" political legislation - that is legislation intended to implement specific measures promised in advance at elections as a way of enhancing a policy favoured by the majority party, or the likelihood of electoral success of a political faction or group in that parliament or in future governments. A close corollary of such legislation was the enactment of legislation which is aimed at enhancing or preserving the social or economic position of those factions temporarily in control of the legislature. Sometimes, of course, the categories of private members' legislation and party politics overlapped to such an extent as to make it any attempt at distinction futile.

One of the other features, easily forgotten by modern historians, is the relatively small scale of colonial political life. Most colonial parliaments were small - in South Australia, for example, there were in the nineteenth century only 36 seats in the Legislative Assembly, and only half as many in the Legislative Council. In the days before significant political parties developed, the forming of governments was often a matter of balancing small factions centred on individuals, in unstable and ever-shifting coalitions. To take again the South Australian example, albeit an extreme case, there were 27 different Ministries between 1857 and 1875.⁵⁵ In addition, it is easy to forget that many colonial politicians of the last century were very conscious of their position

⁵⁴ Boyce, P J "The Governors of Western Australia under Representative Government, 1870-1890" *University Studies in History*, 1961, vol.4., p.126.

⁵⁵ Edgar, P.L. "Sir James Penn Boucaut: His Political Life 1861-75" (B.A.Hons. Thesis, University of Adelaide, 1961), p.iii.

and desirous of securing their place in colonial history as best they could. On occasion this spirit manifests itself in a degree of self-importance which obscures the small stage on which such players actually strutted. It might well have been said of them, as it has been said of more recent colonists, that :

"The settler politicians were naturally inclined to adulate themselves. They strode like giants across the pages of each other's newspapers".⁵⁶

In later years colonial societies did increase in size and politics became more a matter of doctrine and party policy than individual views and personal allegiances. One side-effect of this was that legislation of similar character was enacted in different colonies in the 1890s after the coming to power in these colonies of governments of markedly liberal or even radical hue as a result of popular dissatisfaction with the conservative parties during the economic recession of the early 1890s. The most marked parallels are between the first Liberal government of Ballance and, later, Seddon in New Zealand and the South Australian liberal governments headed by Charles Kingston. In both colonies there are strong elements of state socialism in the measures introduced by the reformist governments, together with measures to reform labour relations, break up concentrations of wealth and limit exploitation of workers. It seems clear that in part the similarity of measures was due to the propagation of socialist ideas within the trade union movement, a movement which then conveyed proposals from one colony to another. However the main measures were assured of widespread publicity because of their very novelty. Determining priority of invention between different colonial politicians is difficult if not impossible, but it is clear that there was a considerable degree of cross-fertilization between the different progressive governments. One simple example is the Industrial Conciliation and Arbitration Act 1894(NZ) which provided for unions and employers to resolve disputes through a Conciliation Council, a meeting presided over by a Government appointed mediator, with appeal lying to the newly created Court of Arbitration. That court comprised representatives of both unions and

⁵⁶ Tidrick, Kathryn *Empire and the English Character* (I.B. Tauris & Co., London, 1990) p.136, speaking of (white) Kenyan politicians in the 1920s.

employers, with a legally qualified chief judge. The Court of Arbitration could determine if need be (that is, in the absence of agreement by the parties) the terms of employment for workers in particular industries or unions. In New Zealand the act is largely credited to William Pember Reeves,⁵⁷ though it is generally accepted that elements of the new regime were drawn from the legislation of New South Wales and South Australia. By contrast South Australian writers would apparently give primacy of invention to Kingston, whose first Arbitration Bill was introduced in 1890 though no measure was passed until 1894, some months later than in New Zealand⁵⁸

Provincial Councils

It must be borne in mind that in one colony, New Zealand, there were more than two decades where Parliament was not the only source of legislation. New Zealand was divided into provincial areas by the New Zealand Constitution Act 1852(Imp), each with a small provincial legislature of limited competence. Each of these Provincial Councils produced a body of legislation, of varying quality and importance. No adequate study of Provincial Council legislation exists, but it seems that in general the provincial legislation had relatively little effect on the national law. One of the more significant fields of provincial activity was the establishment and control of some form of police power. Until 1867, when a national police force was established, each province had its own police, a system akin to that then existing in Britain.⁵⁹ Each of the provinces also enacted provisions for minor offences under which the police could regulate forms of anti-social behaviour ranging from the truly criminal (e.g. the

⁵⁷ See Holt, James *Compulsory Arbitration in New Zealand: The First Forty Years* (Auckland UP, 1986) ch.1; Woods, N.S. *Industrial Conciliation and Arbitration in New Zealand* (Government Printer, Wellington, 1963), ch.1 and Pember Reeves, William *State Experiments in New Zealand* (Horace Marshall, London, 1902), vol. 2, pp.85ff.

⁵⁸ Campbell, C. "Charles Cameron Kingston: Radical Liberal and Democrat" (B.A. Hons. Thesis, University of Adelaide, 1970), pp.68-70; cf Castles & Harris, pp.191-2. Campbell indicates that Pember Reeves had acknowledged an intellectual debt to Kingston's work, a view which perhaps overstates Kingston's contribution.

⁵⁹ For a very detailed study of the provincial police forces see Hill, Richard S. *Policing the Colonial Frontier* (Government Printer, Wellington, 1986), vol.1, part 1, chs 6-8.

offences of being in possession of burglarious implements by night or being in possession of stolen property) to matters now regulated by local body by-laws or public health legislation (such as obstructing streets, selling unsound meat or throwing dead animals in streams used for water supplies). There are considerable similarities between the various provincial ordinances but they are not uniform. It seems probable that the variations largely reflect local modifications of different statutory precedents, either English or Australian, although the latter tended to be themselves variations on the English law. Many of the more serious offences created by these ordinances entered the general colonial law through the Vagrancy Act 1866(NZ), which may well have been derived from the Otago Vagrancy Ordinance 1861, itself largely drawn from the Vagrancy Act 1851(NSW) with elements of the Victorian Criminal Law (Prevention of Offences) Act 1852.

Nor were divergences between the various provinces limited to penal laws. Most of the provinces enacted ordinances governing the registration of deeds. Registration was seen as necessary for various purposes, perhaps most importantly to protect the interests of lenders and creditors, who could otherwise find themselves without security for moneys owing. The New Zealand Legislative Council had passed the Deeds Registration Ordinance 1841 though the ordinance appears not to have been effective. Most of the provinces sought to vary the regime there established, with Auckland and Taranaki in particular adopting a more experimental approach.⁶⁰

At times the New Zealand central legislature was spurred to action by a diversity of provincial legislation. In 1858 alone such considerations led to the passage of the Special Partnerships Act(NZ) and the Foreign Seamen Act(NZ), the latter being taken from New South Wales legislation rather than from any of the conflicting provincial ordinances.⁶¹ In other cases, such as that dealing with the sale of liquor, the various

⁶⁰ Douglas Whalan "The Immediate Success of Registration of Title to Land in Australasia and Early Failures in England" (1967) 2 NZULR 416, 419 and 431.

⁶¹ Stafford, enclosed with Gore Browne to Bulwer Lytton, 12 October 1858; CO 209/147.

provinces were left very much to their own devices, and it was not for some years after the abolition of the provinces that a uniform regime was introduced for New Zealand.⁶²

⁶² Stout, Sir Robert "Is the Privy Council a Legislative Body?" (1905) 21 LQR 9, 16-17.

Relations between the colonies and Britain.

As the century progressed, there were more and more occasions on which it became clear to both colonists and the British authorities that colonial interests and "Imperial" (usually, but not always, a euphemistic synonym for British domestic) interests could not be reconciled. In the days of crown colony government or even of representative government, the British authorities could relatively easily override colonial actions which conflicted with British governmental policies. Once responsible government was embedded in the colonial way of life, this was no longer the case. In some cases, as with family law legislation,⁶³ the British authorities were for many years able to restrain colonial parliamentary activity by recourse to disallowance of statutes or the threat of it. Such blunt and direct measures were relatively rare, and it is clear that there were many occasions on which the colonies succeeded, in one manner or another, in enacting legislation contrary to the wishes of the British government. In some cases the disputes were low-key and evoked little or no public interest. As is discussed below,⁶⁴ much of the development of colonial intellectual property law was determined by colonial governments which considered that colonial interests were best enhanced by insistence on specific colonial statutes to regulate in each type of intellectual property right.

In others, of which colonial legislation to restrict or prevent non-European immigration into the settlement colonies is the paradigm case, colonial public opinion was so strong, and colonial leaders so steadfast in their views, that the British Government had to concede and permit colonial legislation which it had sought to prevent.

There were three different periods in which there was a significant quantity of colonial legislation aimed at restricting immigration by non-Europeans. In practice the concern was with Asian migrants, though the terms of the statute were usually applicable also to other non-European races.

⁶³ See Chapter 9.

⁶⁴ See below, pp.292-299.

The first wave of legislation comes in the 1850s in Australia, when colonial governments sought to restrict Chinese migration. This migration was fuelled by the gold-rushes, as was the hostility to Chinese miners which led to serious anti-Chinese rioting on more than one gold-field.⁶⁵ It is not clear whether the principal cause of antipathy was racial prejudice simpliciter or whether the prime issue was economic, with the working classes fearing displacement by Chinese workers who would work for lower pay (or, on the gold-fields, lower returns).⁶⁶ Most colonial governments were prepared to respond to the public hostility to Chinese migrants but were also aware of the revenue possibilities inherent in taxes that could be levied on the immigrant trade. This caused uneasy attempts to reconcile electoral interest with the imperatives of garnering governmental revenue. It must be remembered that restriction of Chinese immigration was popular among the otherwise more progressive elements in politics - in New South Wales, the same "Liberal" government that introduced the secret ballot introduced the first anti-Chinese laws in 1858.⁶⁷ When it did so, the Government proposal was somewhat half-hearted in that it proposed to limit Chinese migration by levying a poll-tax of £3 per head. In the Legislative Assembly the Government was forced to raise the tax to the same level as prevailed in Victoria, £10 per Chinese migrant.⁶⁸ One side-effect of the widespread animosity toward Chinese migrants was to strengthen calls for uniform legislation in all the Australian colonies, as proponents of a common approach could point to the practical difficulties occurring when diverse laws were passed.⁶⁹ In practice only three colonies did legislate in the 1850s - Victoria (in

⁶⁵ Blainey, Geoffrey *The Rush that Never Ended* (2nd ed., Melbourne UP, 1969) pp.87-89.

⁶⁶ The issue is discussed by Woodcock, George (1978) 9 Can JH 238 in a review of Huttenback, Robert A *Racism and Empire: White Settlers and Coloured Immigration in the British Self-Governing Colonies 1830-1910* (Cornell UP 1976). Woodcock considers the economic interests predominated. It may perhaps be doubted whether this is true of the more virulent legislation of the 1890s. See also Digby, E. "Immigration Restriction in Australian" (1903) 5 JCL&IL (2nd series) 143. The introduction of Asian labour into Australia had been advocated as early as 1836, see Mackay to Governor, October 1836, printed in V. & P. of N.S.W. Leg.Co. 1837, p.581.

⁶⁷ Martin, A.W. *Henry Parkes: a Biography* (Melbourne UP, 1980) p.153 .

⁶⁸ Hirst J.B. *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Allen & Unwin, Sydney, 1988), p.158.

⁶⁹ Ward, J.M. *Earl Grey and the Australian Colonies 1846-1857* (Melbourne UP, 1958), p. 350 and pp.377-8.

1855) and South Australia (in 1857) being the others.⁷⁰ These colonial statutes did cause some anxiety to the British Government in that is they were frequently not in accord with a British treaty with the Chinese Empire - even if not contravening the wording of the treaty, they were certainly not in keeping with the spirit of it.⁷¹ This presented a dilemma to the Colonial Office. Normally the officials in the Colonial Office would pass colonial legislation relevant to the workings of any other department of the British Government over to that department for comment. However in the case of the anti-Chinese legislation, this would have been to invite conflict between the Foreign Office with its concerns for British treaty obligations and colonial politicians secure in the knowledge that their stance against the Chinese enjoyed widespread support in the colonies. The Colonial Office appears to have attempted to avoid the issue by not forwarding the statutes for comment.⁷²

The next colony to attempt legislation appears to have been Queensland. Here the position was slightly different in that the first regulation of non-European migrants was in 1861 and was effected by regulation rather than statute. The regulations were however struck down by the Colonial Office. The Queensland Government responded by passing the Laborers (Introduction of from British India) Act 1862 to regulate immigration and to control the employment in the colony of indentured Indian labourers (principally in the sugar industry). This Act was passed solely because the Colonial Office would not permit recruitment of such labourers until it was satisfied with the terms of the law. Both the Governor and the Premier considered such legislation unnecessary and insistence on it demeaning to Queensland as other sugar colonies had no such laws.⁷³ Acceptance by the Colonial Office was only procured by the arguments

⁷⁰ Butterworth, A.R. "The Immigration of Coloured Races into British Colonies" (1900) 1 JCL&IL (ser.II) 336.

⁷¹ See eg Barkly to Lytton, 15 March 1859, Despatches of Governor of Victoria to Secretary of State for the Colonies, File A2346, ML.

⁷² Swinfen, p.35.

⁷³ Murphy, D.J. and Joyce, R.B. (eds) *Queensland Political Portraits 1859-1952* (U Queensland Press, 1978), p.28.

of the Premier, Robert Herbert, in person during a visit to London.⁷⁴ Some years later, in 1877, Queensland passed a new act, the Chinese Immigrants Regulation Act, on the model of the Victorian legislation. Because most other colonies had repealed, or allowed to lapse, their anti-Chinese laws in the 1860s because fewer migrants had sought entry, the renewed Queensland measure attracted much interest from other colonies.⁷⁵

The renewed debate led, a few years later, to an Intercolonial Conference in Sydney over the summer of 1880-81 at which the issue was discussed extensively - indeed it was virtually the sole matter of debate. However concerted action did not eventuate. Although there was general agreement that colonial laws should restrict the immigrant trade by a tax of £10 per ton on the immigrant ships bringing them, together with a maximum number per ship, action on these lines did not eventuate in all colonies. This is not surprising, since both Queensland and South Australia (then including what is now the separate Northern Territory) wanted Chinese labour for agriculture and mining in the tropics and Western Australia, then desperate to attract labour, had actively sought Chinese migrants for its northern outposts. Thus although the various Premiers had agreed to introduce legislation on the common pattern, not all colonies enacted the proposals. Although one Australian historian, A.W. Martin, has stated that the resulting legislation diverged widely from the agreed model, this does not seem to reflect the contemporary views. Martin claims that Queensland and South Australia passed only a loose form of restriction (though South Australia exempted the Northern Territory from its operation) while Western Australia did nothing at all. In Tasmania legislation on the Queensland model was rejected and only in New South Wales and Victoria were effective restrictions enacted.⁷⁶ (Martin does not mention that New Zealand attended the

⁷⁴ Knox, Bruce (ed) *The Queensland Years of Robert Herbert, Premier; Letters and Papers* (University of Queensland Press, 1977), pp.25ff. Herbert, who had gone into colonial politics from the favoured position of Secretary to the Governor, later quit Queensland and became an official in the Colonial Office.

⁷⁵ See Butterworth, A.R. "The Immigration of Coloured Races into British Colonies" (1900) 1 JCL&IL (ser.II) 336, and Ayers to Griffith, 2 June 1877, Griffith papers, file MS.Q185, ML.

⁷⁶ Martin, A.W. *Henry Parkes: a Biography* (Melbourne UP, 1980), pp.315-6, commenting on the Influx of Chinese Restriction Act 1881(NSW).

conference and the Chinese Immigrants Act 1881(NZ) follows the agreed pattern).⁷⁷ However the Governor of Victoria considered that the statutes passed in Victoria, Queensland, New South Wales and South Australia were all essentially similar and in accordance with the resolutions of the Intercolonial Conference.⁷⁸

In the meantime the North American colonies had encountered, on a lesser scale, the issue of Asian immigration. The first to arrive in substantial numbers were again gold-miners, travelling to the gold-fields of British Columbia in the 1850s and 1860s. While discrimination did then exist it does not appear to have reached the same level as in Australia until at least the 1870s, when the level of mining activity had dwindled. The first anti-Chinese laws proposed were not aimed so much at restricting immigration as at encouraging Chinese already there to leave. Various bills for an annual tax of \$50.00 on each Chinese were unsuccessfully introduced into the British Columbian legislature in the 1870s. In 1871 British Columbia joined the Confederation of Canada. This had the effect of limiting the powers of the province to restriction immigration - this being a federal matter. However the province was able to restrict naturalised Asians from land ownership and voting rights.⁷⁹ Various other rather transparent anti-Chinese laws were proposed (aimed principally at the distinctive hair style or queue), but anti-Chinese sentiment foundered on the need for Chinese labour to build the promised Trans-Continental railway. Popular concern about the issue mounted and in 1885 the federal Government appointed a Royal Commission on the issue. The Royal Commission recommended, inter alia, a system of a head tax of \$50.00 on Chinese entering Canada, and a restriction on the numbers arriving in any one ship, a measure which would largely eliminate any regular shipping service. This became law in the Chinese

⁷⁷ See also Williams, D.V. "New Zealand Immigration Policies and the Law: A Perspective" (1978) 4 Otago LR 185.

⁷⁸ Normanby to Kimberley, 17 January 1882, file VPRS 1084/7, VPRO.

⁷⁹ As to this, see Angus, H.F. "The Legal Status in British Columbia of Residents of Oriental Race and their Descendants" (1931) 9 Can Bar Rev 1; Spencer, J. "The Alien Landowner in Canada" (1973) 51 Can Bar Rev 389 and Williams, David R. "The Man for a New Country": Sir Matthew Baillie Begbie (Gray's Publishing Co, Sidney, British Columbia, 1977), pp.123-8.

Immigration Restriction Act 1885(Can). Its provisions were extended to Japanese and other Asians over the next few years.

Despite suggestions at the Colonial Conference in London in 1887 that the colonies should moderate their immigration laws, a further Australian conference was held in Sydney in 1888 (New Zealand was not present) and again the colonies agreed on the need for effective legislation against the Chinese. Some at least of the colonial concern appears to have been instigated not so much by renewed immigration as by attempts to make party political advantage of it - in South Australia in part the issue became a matter between the upper House, where the Northern Territory was better represented, and the House of Assembly.⁸⁰

At the Conference a draft Bill was agreed on and each Premier promised to introduce it in his Parliament.⁸¹ The bill as drafted appears to have significant similarities to the Canadian Act of 1885, though it is not clear whether this was deliberate or that each represented the culmination of a technically feasible method of restriction. The draft bill agreed at the Conference was enacted in Tasmania, New South Wales, South Australia and Victoria in 1888, in Western Australia in 1889 and in Queensland in 1890. The British Government had attempted to dissuade the colonies from so acting on the basis that any colonial Act which treated Chinese on a different footing from other races caused friction in the relations between Britain and China. The Secretary of State for the Colonies indicated instead that he believed China would accept a regime similar to that in force in the United States of America where immigration was not overtly discriminatory but was restricted by low annual quotas.⁸² However no colony took the proffered hint.

⁸⁰ Way to Stephen, 5 June 1888, Way papers, file PRG 30/8, Mortlock Library.

⁸¹ Butterworth, A.R. "The Immigration of Coloured Races into British Colonies" (1900) 1 JCL&IL (ser.II) 336.

⁸² Knutsford to Robinson (South Australia), 6 June 1888, copied to the other Australian Governors, file TA315/GO19/1, AOT.

The issue became even more acute in the later 1890s, when a fresh round of colonial statutes were more overtly discriminatory against Asiatics of all races. Tasmania, New South Wales, South Australia and New Zealand all passed even more stringent restrictions in 1896. Most of these statutes simply banned those of Asian descent from migration to the colony, irrespective of nationality. The British Government was faced with a major difficulty, since the statutes did not merely affect foreign nationals but many British subjects as well. The New South Wales statute was disallowed.⁸³ The Tasmanian Immigration Restriction Act was eventually allowed because it did not in terms ban Asian migration, but instead admitted Asiatic who could prove their status as British subjects by a certificate from the Governor of their colony. The Bill was however criticised because there was no discretionary power to deal with temporary visitors - Japanese merchants, scientists or crew members were instanced.⁸⁴

The colonial laws gave rise to heated debate at the Imperial Conference of 1897 in London, but a compromise was found. The colony of Natal had earlier in 1897 experimented with a provision which made entry by persons of any race subject to an educational requirement, which allowed immigration officials to test the immigrant's command of a nominated European language. This could easily be manipulated to keep out Asiatic migrants by the selection of a European language with which they were unfamiliar, but it did so under a cover of evenhandedness. This was seized upon as a way out of the impasse. One distinguished historian of the British Empire⁸⁵ has suggested that Joseph Chamberlain, the Secretary of State for the Colonies, actually recommended to the other colonies the use of the education test. However this seems to be based on a misreading of the actual statement by Chamberlain.⁸⁶ It seems more probable that Chamberlain was not so much advocating its use but stating that all other

⁸³ Anon., (1897) 2 JCL&IL (ser.I) 167.

⁸⁴ Gormanston to Chamberlain, 30 Nov 1896, CO 280/399 and annotations thereon.

⁸⁵ Knaplund, Paul, *The British Empire 1815-1939* (Harpers, New York, 1941) p.354.

⁸⁶ Chamberlain's speech is largely reproduced in Butterworth, A.R. "The Immigration of Coloured Races into British Colonies" (1900) 1 JCL&IL (ser.II) 336, 348-9.

forms of restriction were totally unacceptable. A fresh round of colonial immigration Acts in the next few years adopted the Natal provisions.⁸⁷

As these examples show, the constitutional rules which in theory permitted the British Government to control the legislation of the colonies were significantly weakened as the nineteenth century progressed. Not the least of the effects of self-government was the release of the colonies from any significant degree of supervision of colonial legislation by the Colonial Office. In earlier decades such supervision had been influential in shaping the colonial law, so much so that it warrants examination in some detail.

⁸⁷ e.g. Immigration Restriction Act 1897(WA); Immigration Restriction Act 1898(NSW); Immigration Restriction Act 1899(NZ), and see Manson, Edward "The Admission of Aliens" (1902) 4 JCL&IL (2nd series) 114.

Chapter 4

The Colonial Office and the review of legislation.

"...on a rough estimate I take at 21,000 the number of laws which in my time I have had to report my opinion. Such a mass of uninteresting details it would be difficult to bring together from any other quarter".¹

Before considering aspects of the operation of the Colonial Office in supervising colonial legislation in the nineteenth century, it may be useful to consider the origins of the Colonial Office itself. The English (first) and then British governments were slow to develop a suitable administrative structure for the colonies. In the seventeenth century, what little control was exercised over the American and West Indian colonies which had then been acquired was initially exercised either directly by the Crown or through the Privy Council. The need for oversight was lessened somewhat by the fact that several of the American colonies were administered, in a loose and usually uneconomic fashion, by the proprietors who had been given the original royal Charter for the colony. As the century progressed, the number of colonies grew as did their economic and military significance. The need for tighter control became evident during the English civil war when some colonies sought to support the Crown even after the triumph of Parliament in England. After the Restoration, a more formal structure was implemented, and colonial affairs came to be supervised by a special committee of the Privy Council, the Board of Trade and Plantations.² This body continued to supervise the affairs of the overseas possessions of the Crown (other than those of the East India Company in India and elsewhere) until the end of the American War of Independence. After a period of uncertainty and experiment, control was placed in the hands of the Secretary of State for War and the Colonies in 1794 and remained there until 1854, when the separate Secretaryship of State for the Colonies was created, and the Colonial Office became a formally separate institution. However, it is clear that from the 1790s, the Colonial Office was for almost all purposes functioning as a separate entity.³

¹ Minute by J.F. Stephen, 17 October 1840, on memorandum by Russell, 10 October 1840; CO 318/148, PRO.

² "Plantation" being a then common term for a colony, particularly one where English people had been settled.

³ The foregoing account is based on material drawn from a range of sources, including McIntyre, W.D. *Colonies Into Commonwealth* (2nd edition, Blandford Press, London 1968); Calder, Angus *Revolutionary Empire* (Jonathan Cape, London, 1981); Young, D.M. *The Colonial Office in the Early Nineteenth Century* (Longmans, London, 1961); Knaplund, Paul *James Stephen and the Colonial System 1813-1847* (U Wisconsin Press, 1953); Swinfen, D.B. *Imperial Control of*

A sufficiently workable and efficient system was developed only after 1812, by the then Political Under-Secretary, Henry Goulburn. The structure developed at this time endured, with some minor changes, for the remainder of the century. By the 1820's the practice had developed of dividing the colonies into groups with clerks nominated to handle each area. The 'Eastern colonies' were initially New South Wales, Van Diemen's Land, Mauritius and Ceylon, other Australasian colonies were added later. A similar growth took place in other areas. 'North America' initially comprised Canada, New Brunswick, Nova Scotia, and Prince Edward Island, with Bermuda and Newfoundland soon being added to this section. There were also the 'Mediterranean and Africa' and 'West Indies' sections; the colonies in these areas rarely intrude upon the scope of the present work. Responsibility for decisions lay with the Secretary of State for the Colonies, or his Under-secretaries - a Political Under-Secretary who was usually a rising politician who sat in the other Chamber of Parliament from the Secretary of State, and a Permanent Under-Secretary. At that time it is clear that the Permanent Under-Secretaries could, and did, exercise great influence over the formulation and execution of British colonial policy, to the extent that they could be seen by informed observers as effectively controlling the administration of the Empire.⁴

For a legal historian interested in the development of colonial statute law interest must focus on the development of a mechanism for the scrutiny and supervision of colonial legislation. Of course, this was only a small part of the activity of the Colonial Office, which had to concern itself with a plethora of detail on matters ranging from religious establishments to agriculture, native policy to government accounting. A crude indication of the place which the supervision of colonial legislation occupied among the competing concerns of the Colonial Office staff and its political masters can be gauged by considering the number of despatches which dealt with legislative matters as a proportion of the total sent. Such statistics are not always easy to

Colonial Legislation 1813-1865: A study of British Policy toward Colonial Legislative Powers (Clarendon Press, Oxford, 1970); Cell, J.W. *British Colonial Administration in the Mid-Nineteenth Century; the Policy-making Process* (Yale UP, 1970); Hall, H.L. *The Colonial Office ; A History* (Longmans Green, London, 1937) and Beaglehole, J.C., "The Colonial Office 1782-1854" *HSANZ*, 1940, vol.1, p.170.

⁴ Taylor, Henry *Autobiography* (London, Longmans Paul, 1885), passim, but esp. pp. 66 and 233. The book gives a most informative and interesting picture of the functioning of the Colonial Office in the first half of the nineteenth century.

derive, but a survey of despatches to the Governor of New South Wales in the late 1830s and 1840s indicates that only a small percentage of despatches related to colonial statutes. Of Lord Glenelg's 208 despatches to New South Wales in 1838, only three related to legislation. In the following year Glenelg sent 134 despatches, of which nine concerned statutes. His successor as Secretary of State for the Colonies, Lord John Russell sent 69 despatches to New South Wales in 1839, of which only one related to New South Wales statutes. Similar results are to be found in Russell's despatches for the following two years - 14 out of 186 despatches in 1840, and 13 out of 96 in 1841. Lord Stanley, taking office in the latter part of 1841, sent 96 despatches; only 5 were related to legislation.⁵ Such a pattern would not appear atypical for the first half of the century; for obvious reasons the degree of supervision decreased with the growth of responsible government.

The British Government had always asserted and maintained the right recognised by then current constitutional theory to over-ride the decisions of colonial legislatures, whether elective or nominated. Legislation passed by a colonial legislature to which assent had been given by the local Governor could be disallowed by the Crown by Order-in-Council at any time within two years of its passage. The power of disallowance could be exercised on a number of grounds, which may be summarised as being:

- (i) that the legislation was ultra vires as being concerned with something outside the powers of the colonial legislature;
- (ii) that it was contrary to the Governor's instructions;
- (iii) that it was inexpedient or undesirable;
- (iv) that the statute was repugnant to English law.

Of these four headings, repugnancy and ultra vires have already been discussed,⁶ although it should be noted in regard to repugnancy that the Colonial Office became increasingly prepared to leave any challenge to the validity of a statute on the basis of repugnancy to the courts, rather

⁵ All figures given are based on my reading of the correspondence as summarised in Register of Despatches to Governor of New South Wales from Secretary of State for Colonies 1837-42, file 4/1605, GANSW.

⁶ See above, pp.66-70.

than to resolve it administratively by disallowance. Thus where a Queensland act of 1862 required British doctors to be registered in that colony before practice there, arguably contrary to British legislation authorising them to practice anywhere in the colonies, the Colonial Office chose to leave any issue of repugnancy to the courts should any medical practitioner be prepared to challenge the colonial statute.⁷

The other grounds of disallowance merit somewhat more discussion. Each colonial governor was given instructions which, *inter alia*, included directions as to the handling of certain kinds of legislation.⁸ Some of the more significant limitations on the governor's powers were that he was not to assent to any enactment which impaired the Royal prerogative or granted the privileges of naturalization to any alien (unless prior consent had been given). Such bills had to be reserved for the Crown's own determination - in practice for its fate to be determined by the Secretary of State for the Colonies. Nor was consent to be given in the colony to legislation which discriminated against various classes of people, such as natives, absentee property owners and transient British visitors. Despite these fairly clear and comprehensible limitations, colonial governors not infrequently transgressed their instructions and assented to bills which should have been reserved for the Royal assent. Some of the occasions on which this occurred may have been the result of inadvertence by the governor, or incompetence on his part or the part of his colonial advisers. In other cases colonial governors found it politically expedient to depart from their instructions and assent to bills which should have been reserved so that any resulting odium would fall upon the distant shoulders of the Secretary of State and the Colonial Office. This seems to have been at least in part the case with the granting of gubernatorial assent to the legislation passed in Victoria and other Australian colonies in the early 1850s which forbade the migration to the mainland colonies of transported convicts who had been released on conditional pardons in Van Diemen's Land. Such statutes were clearly contrary to the penal policy then in force in Britain, a point which had been forcefully made by the

⁷ See Swinfen, p. 61, citing Bowen to Newcastle, minute by Rogers 10 July 1862, CO 234/6, PRO.

⁸ Foden, N.A. *Constitutional History of New Zealand 1839-1849*, (privately published, Wellington 1938), pp. 84-89 largely reproduces the Crown's instructions to Captain Hobson in 1839.

Governor of Tasmania (as Van Diemen's Land was renamed in 1852),⁹ and therefore should not have been assented to. Yet fear of a crime wave by such persons in the newly rich goldfields areas was to create in the colonial governors a belief that such legislation was necessary, as well as a belief that withholding assent would be resented by all elements of the colonial legislatures.¹⁰

There were occasional other instances where disallowance was sought to remedy oversights in the drafting of the statute in question. In 1843, the Lieutenant-Governor of Prince Edward Island asked that the Small Debts Act(PEI) be disallowed because a clerical error in its drafting would have removed from the Legislative Assembly all members who had become Commissioners for the hearing of debt cases under the Act - thus disqualifying many leading supporters of the Government in the colonial legislature.¹¹ A similar legislative slip lead the Governor of Victoria to request the disallowance of the Liens on Growing Crops Act 1857(Vic), since it was discovered after it was passed that its provisions created an irresolvable conflict with certain sections of the Bills of Sale Act.¹² Occasionally it was realised that a legal impasse had been created, extrication from which could only be achieved by disallowance of the colonial law. Such a difficulty arose with a Nova Scotia statute of 1817 which provided for the coining in Britain of £2000 worth of copper coins of a specific Nova Scotia currency. Unfortunately, it was then discovered that English law made the minting of coins, other than legal tender of the United Kingdom, in Britain a form of high treason.¹³

However it is clear that the Colonial Office would not permit the review procedure and disallowance to be turned into a method whereby a colonial government could have a second chance to defeat legislation passed in a form of which it disapproved. If there were serious objections to the drafting or substance of such legislation, the Colonial Office might suggest

⁹ Denison to Pakington, 20 October 1852, CO 280/294; and Denison to Hotham, 29 November 1854 ; file VPRS 1095/1, VPRO.

¹⁰ Swinfen, pp.141-144.

¹¹ See Stephen to Stanley, commenting on Small Debts Act 1843(PEI), 6 November 1843, CO 323/61, PRO.

¹² Newcastle to Barkly 1 November 1862, VPRS 1087/15, ML.

¹³ Coinage Act 1817(NS) ; and see Stephen to Bathurst 2 April 1818; CO 323/40, PRO.

reconsideration of the statute, or its later amendment; disallowance was not seen as appropriate¹⁴.

Last but not least was disallowance because the legislation was inexpedient or impolitic. Disallowance on the basis of policy covered a multitude of circumstances. If the colonial statute appeared to advance colonial interests to the disadvantage of British ones, or to create an risk of embarrassment for the British government, disallowance was highly likely. This was the case with the Harbours Amendment Act 1842(NSW), which the Colonial Office regarded as unduly favouring colonial vessels over British ones in the manner in which pilotage fees were levied. The Act was also criticised as failing to provide properly for ships of foreign nations given favoured status by a treaty between that state and Britain. The Act was disallowed and the Governor instructed to propose a new bill free of these defects.¹⁵

At other times the objection might be more one of principle, such as the belief that the legislature of any colony should not appear to be sanctioning gambling by authorising the holding of lotteries. Thus Nova Scotia acts of 1789 and 1818 which authorised lotteries were disallowed¹⁶. (It was probably as well for the progress of the British Empire that no such concern for morality had been evident in earlier times - the survival of the Virginia Company, and thus the colony of Virginia, was materially assisted by the grant by Royal Warrant of the right to conduct lotteries).¹⁷ A quite different objection led to the disallowance of a New Brunswick Marriage Act of 1832, which would have required any minor to obtain the consent of his or her parent or guardian.¹⁸ The concern with this Act was that many of the poorer classes in the colony had neither parent or guardian; nor could they afford an action for a court order for consent. In such cases the act operated unfairly and unwisely.¹⁹ A later New

¹⁴ Stephen to Huskisson, 19 May 1828, CO 323/45, PRO.

¹⁵ Stanley to Gipps 14 April 1843, HRA ser.1 vol.21, p. 659.

¹⁶ The disallowed statutes were the Winkworth Tonge Estate Lottery Act 1789 (NS) ; also see Selwyn to Sydney 15 August 1789, CO 323/34, PRO; and the Avon River Bridge Act 1819(NS); also see Stephen to Bathurst, 18 August 1819, CO 323/41, PRO.

¹⁷ Calder, Angus *Revolutionary Empire*, (Jonathan Cape, London, 1981), p.139.

¹⁸ As to consent to the marriages of minors in Australia, see above, p.38.

¹⁹ Stephen to Stanley 31 August 1833, CO 323/49, PRO.

Brunswick act omitted any requirement of parental consent for minors²⁰. Policy factors were again behind the disallowance of the Marriage Ordinance 1851(NZ). The architect of that statute, Governor Grey, had provided for the issue of marriage licences by the heads of the various religious bodies in the colony. This was contrary to the policy followed in regard to other colonies, where the issue of marriage licences had been regarded as a matter for the civil, rather than the ecclesiastical, authorities since marriage was regarded as essentially a matter of a civil contract between the parties.²¹

There were many other objections which were raised on occasion - that the statute was inadequately drafted to achieve the desired effect; that it gave too great a discretion to the court; that it could be used in a manner which was oppressive to an individual or class of people, or that it was undesirable for political or policy reasons. At least in the early part of the nineteenth century, any attempt by a colonial legislature to enact laws which imposed burdens on absentee owners above and beyond those imposed on residents would normally not be countenanced; this was bitterly resented in some colonies, such as Prince Edward Island, where much land was held by such absentees.²²

It is not surprising that in a number of cases the policy arguments advanced against some colonial laws were of the "thin end of the wedge" type. When Upper Canada proposed to extend the privilege of giving evidence on affirmation rather than on oath, to Quakers, Moravians, "Mennonists" and "Dunkers", Stephen successfully argued to the Secretary of State that, although such a provision might be appropriate for such well-established sects as Quakers and Moravians, there would be nothing to stop other sects "claiming a similar privilege, by assuming to themselves some barbarous appellation".²³ A variant on the thin end of the wedge argument was the concern that a development in one colony would rapidly be taken up in others - when New Brunswick first legislated to disqualify from membership of the Legislative

²⁰ Marriage Act 1834(NB).

²¹ Rogers to Merivale 29 January 1852, CO 323/73, PRO

²² Knaplund, Paul, *The British Empire 1815-1939* (Harpers, New York, 1941), p. 226; Swinfen, pp.151-156. Eventually the Colonial Office had to allow such colonial legislation.

²³ Stephen to Bathurst, 13 November 1826, CO 323/43, PRO.

Assembly any person who was a servant of, or a contractor with, the Crown, Stephen was quick to point out that the statute was "without precedent, either in the colonial or in the British Statute book" and that

"it will not escape your Lordship's notice that if this Act be allowed, it will become a precedent for imitations in the other provinces of British North America".²⁴

The Act was allowed, and was indeed imitated in other jurisdictions.

The overall frequency of disallowance is hard to assess, but it certainly does not appear to have been great in the later part of the nineteenth century. Swinfen has estimated that only 42 colonial statutes were disallowed in the period 1844-1865. This was from a body of over 11,000 such statutes passed, a rate of 0.34%.²⁵ By contrast, in some Crown Colonies, the rate was much higher - in Hong Kong it ran at nearly 5% of all statutes in the period 1844-65.²⁶ A rate for the settlement colonies prior to the 1840s is hard to calculate, but it would appear to have been well above the 0.34% of Swinfen's calculation for the later period, if still below the Hong Kong figure. Certainly the frequency of disallowance, which might be estimated in most settlement colonies as being one or two statutes a year on average, was sufficient to keep the need for caution before the eyes of colonial draftsmen, without significantly inhibiting originality of thought or proceeding.

Because little was done for many years to police the instructions that colonial governors send copies of their enactments to the British authorities, there was no systematic review of legislation until the latter part of the eighteenth century. By that time the practice had been instituted that all colonial statutes (or at least all that were received in London) were sent to counsel employed by the Board of Trade and Plantations for consideration, and for a recommendation as to whether or not the enactments should be confirmed or disallowed. The operation of the system at this time falls outside the present study, but it is noteworthy that

²⁴ Stephen to Stanley 5 July 1842, CO 323/57, PRO.

²⁵ Swinfen, pp. 187-88

²⁶ Miners, N.J. "Disallowance and the Administrative Review of Hong Kong Legislation by the Colonial Office 1844-1947" (1988) 18 Hong Kong LR 218, 219-220. Without access to Hong Kong records, it is impossible to verify Miners's calculations. The figures given for disallowance seem surprisingly high.

many of the matters which caused difficulty and complaint then were still occurring well into the nineteenth century. Thus a New York statute of 1767 to adopt a number of English Acts referred to only by regnal number and year was disallowed on the advice of the Board of Trade's legal adviser. That adviser, one Richard Jackson, advanced four grounds - that the acts adopted were not of utility in New York, that legal difficulties would flow from their adoption, that it was an undesirable practice to adopt Acts by reference without setting out the text and not least that no one statute should adopt a number of Acts, since this made the decision on assent or disallowance problematic where the adoption of some of the statutes was desirable.²⁷

After the conclusion of the American War of Independence, all legislation from the colonies was referred to William Selwyn, later to take silk and to be Treasurer of Lincoln's Inn in 1793,²⁸ who acted as adviser on the validity of the legislation until 1796 when William Baldwin took over and acted as adviser until 1813. It may be doubted whether either gave great assistance to the Secretary of State, since both were very sparing with their comments. Swinfen has calculated that Selwyn reported on 1,050 Acts of which only 21 drew comment beyond remarking on clerical errors in the drafting.²⁹ Baldwin was hardly more prolific in his comments; an analysis of his reports on statutes reveals only a small number were commented on in any detail; rarely more than two or three a year drawing any substantive comment.³⁰ Only with the appointment of James Fitzjames Stephen³¹ as legal adviser in 1813 did a more regular and comprehensive series of commentaries on colonial legislation begin. The scale of operations involved in such a scrutiny of colonial law was immense; it is hard to conceive of it being performed by one individual. Only part-way through his career, Stephen was once moved to comment:

²⁷ Johnson, Herbert A. *Essays on New York Colonial Legal History* (Greenwood Press, Westport Conn, 1981), pp 203ff.

²⁸ DNB, vol. 17, p.1171.

²⁹ Swinfen, p.26.

³⁰ See Baldwin's reports in CO 323/34 to CO 323/38, PRO.

³¹ Stephen's career, and influence on many aspects of colonial policy, is discussed in a number of works. The most comprehensive account, if somewhat marred by occasional touches of hagiography, is Knaplund, Paul *James Stephen and the Colonial System 1813-1847* (Univ. Wisconsin Press, 1953).

"...on a rough estimate I take at 21,000 the number of laws which in my time I have had to report my opinion. Such a mass of uninteresting details it would be difficult to bring together from any other quarter".³²

Stephen continued to report on legislation even after his appointment to the regular staff of the Colonial Office, of which he became Permanent Under-secretary in 1834, and the dominant figure of the early Victorian empire. After Stephen's retirement, the obligation of reporting on colonial laws came to Frederic Rogers, later Lord Blachford³³ who held the responsibility at the time of the passing of the Colonial Laws Validity Act(Imp) in 1865. The twin influences of that Act and of the conferring of responsible government on most of the settlement colonies meant that far less importance was attached to the scrutiny of statutes from the settlement colonies. In the latter part of the century review rarely took place unless the Governor had specifically drawn attention to an enactment as requiring review, or had reserved a bill for Royal assent.

During the period between 1813 and about 1860, when review of legislation was of importance, the procedure within the Colonial Office appears to have varied somewhat in the degree of adherence to the strict formalities to be observed. As a matter of law, the procedure should have been more or less as follows.³⁴ After receipt of the colonial acts by the Colonial Office they were referred by the Secretary of State to the Colonial Office's legal counsel for his opinion 'in point of law'. As explained earlier this entailed a consideration of whether the acts were consistent with a governor's instructions and commission, as well as any question of repugnancy. The opinion might also canvass whether an act would have the effect intended. The counsel's report, together with the acts, was then returned to the Secretary of State. The acts and report were transmitted to the Lord President of the Council with a request that they be brought under His Majesty's consideration. These documents were then laid before His Majesty at the next meeting of the Privy Council. Strict theory required that the King in Council then refer the acts, with the letter from the Secretary of State, to the Committee of

³² Minute by Stephen, 17 October 1840, on memorandum by Russell, CO 318/148, PRO.

³³ See Marindin, G.E. (ed) *Letters of Frederic Lord Blachford, Undersecretary of State for the Colonies 1860-71* (John Murray, London, 1896).

³⁴ The following account is derived largely from Young, D.M. *The Colonial Office in the Early Nineteenth Century* (Longmans, London, 1961). pp. 199-200.

Council on Trade and Foreign Plantations for their consideration and report. If disallowance or confirmation were needed, an Order-in-Council in appropriate terms would then issue.

In practice it is clear that a number of the steps were rarely taken, or were reduced to a fairly perfunctory formality. No report would be sought from the Council Committee unless there was a specific matter of importance - a bill reserved for Royal assent, or disallowance of some statute³⁵ - and in practice the decision of the Secretary of State for the Colonies would be adopted by the Privy Council automatically unless it raised either a question which involved some other department of the English Government - such as the War Office or the Treasury - or raised a particularly difficult legal issue. In the former case it would be referred for comment by the departments affected; in the latter it might be sent to the British Law Officers for their opinion.³⁶ In either case, the review process was very considerably lengthened. This was of course a matter of concern, since any disallowance had to be promulgated within two years of the passage of the colonial act. Some colonial legislatures, and some governors, sought to take advantage of this by delaying the despatch of statutes to Britain, or by passing laws which were only to operate for a limited term, in the expectation that disallowance would not occur because no review would be possible until after the act had expired.³⁷

It seems clear that the Colonial Office staff perceived their role in regard to the laws of the settlement colonies to be a reactive, rather than what is sometimes called a proactive one. The Colonial Office's function was to control colonial initiatives, to withhold approval if need be or to suggest such alterations to colonial proposals as seemed appropriate. The Office might go so far as to suggest the adoption of a particular measure. It was not for the Colonial Office to try to force the adoption of particular measures or to ensure that colonial law was generally identical.

" The officials who operated the review process might have gone further and tried to so mould colonial laws as to produce general uniformity throughout the Empire. There were some suggestions that such a policy might be tried, but no serious attempt was made to implement it - indeed opinion within the Office

³⁵ *ibid*, p. 200.

³⁶ Swinfen, pp.2-4

³⁷ *Ibid*; compare Stephen's statement that he could express no view on the three New Brunswick statutes of 1818 because they had expired by the time he received them; Stephen to Bathurst, 18 August 1819, CO 323/41, PRO.

was generally against any such unpractical experiment. There were, however, individual cases where uniformity of law was obviously desirable and was encouraged."³⁸

The areas in which uniformity was to be encouraged do not appear to have received any precise definition at that time; greater precision is hardly possible now. Certainly there were some areas which, although regarded as matters of local law rather than of general Imperial interest, did offer the potential for difficulty if there was any significant divergence between the law of the different colonies, or between the law of a colony and that of Britain. In such cases, the Colonial Office not infrequently sought to induce the colonial legislatures to act in a way which maintained effective harmony between the different bodies of law involved. The most obvious example is furnished by the law relating to marriage and divorce, where differences of law could easily cause severe difficulties. It was for this reason that the Colonial Office recommended to some colonies which had not passed divorce laws of their own the enactment of a measure based in essentials on the Matrimonial Causes Act 1857(Imp).³⁹ There were other areas in which harmony between the colonies, and between colonial and British law, was encouraged - most of these had to do with the status of an individual, as with naturalization laws.⁴⁰

It has been suggested by Knaplund⁴¹ that in general the Colonial Office opposed the literal transcription of English laws into the colonies; Swinfen would generally concur with this judgment, but suggests that this was particularly the case where colonies "sought to apply English statutes of an early date to contemporary conditions".⁴² The accuracy of these generalisations is to be doubted. It is clear that the Colonial Office did disallow as inexpedient or unwise a number of colonial statutes which sought to adopt several of the more antique elements of the English statutory criminal law. However, all the examples given of such disallowance appear to be concerned with the colonies in which slavery had existed up to its abolition in 1833; in these colonies the statutes were (probably correctly) suspected to be aimed

³⁸ Swinfen, p.6

³⁹ Stanley to Barkly 17 April 1858, VPRS 1087/11, VPRO.

⁴⁰ Swinfen, pp.72-77

⁴¹ Knaplund, Paul *James Stephen and the Colonial System 1813-1847* (U Wisconsin Press, 1953), ch.9.

⁴² Swinfen, p.64.

either at terrorising the slave population or, after 1833, attempting to restore the absolute domination of planter over labourer that had been lost with the passing of slavery. In other parts of the empire the adoption of old English statutes was countenanced, even if regarded as being unwise. As late as 1846 the province of Canada included in a Land Registry Act⁴³ a provision that any person forging a memorial under the Act would be liable to "the punishments enforced by 5 Eliz. I c.14",⁴⁴ that is a liability to double costs and damages, as well as for the defendant to be put in a pillory, to have both ears cut off, both nostrils slit and cut and seared with a hot iron. Although one Colonial Office official, Rogers, disapproved of the bill in that form, Stephen disagreed with him, and the Act was allowed as originally drafted.⁴⁵ There do not appear to have been any occasions on which the penalties prescribed were enforced.

It can be plausibly argued that the major consideration, at least in the first part of the nineteenth century, for the Colonial Office in dealing with the legislation emanating from the settlement colonies was not so much to discourage excessive reliance on English models as to determine whether colonial innovations might be sanctioned. Certainly there appears at this time to have been a considerable readiness to accept that in most cases the colonial conditions required departure from the English pattern, and that in general the colonial authorities would be best able to judge the extent and nature of the alterations required. Thus when Prince Edward Island passed an act which countenanced the creation by tenants in tail of leases of 999 years duration⁴⁶, the statute was considered by Stephen to be "a considerable innovation upon the law of England", but one which could be useful in colonial conditions as providing a simpler procedure to achieve the breaking an entail than was available in England.⁴⁷ It is a possibility that the concept of leases of such long duration derived from the use in Ireland of long leases to evade the burdensome provisions of legislation affecting land-holding by Roman Catholics, though no direct evidence of such a link has been traced.

⁴³ Registry Laws (Upper Canada) Act 1846(Can).

⁴⁴ Forgery of Deeds and Writings Act 1562(Eng).

⁴⁵ Rogers to Grey 28 September 1846, and Stephen to Hawes 29 September 1846, CO 323/61, PRO.

⁴⁶ Long Leases Act 1829(PEI).

⁴⁷ Stephen to Murray 22 July 1829, CO 323/46, PRO.

Certainly there was more resistance to some colonial innovations later in the century, although these tended to be particularly to legislation which affected either personal status, such as legislation on divorce or the various Deceased Wife's Sister Marriage Acts, or imperial interests (such as immigration restriction) than in other areas of law. The British treatment of such reformist legislation is considered in more detail elsewhere in this thesis.⁴⁸

What then did the Colonial Office generally do with legislation of which it did not approve, but which was not so objectionable as to call for disallowance? It sought to persuade, or direct, the colonial authorities to amend the legislation so as to remove the objections that were seen to exist.

There were times where the suggestions of the Colonial Office bore fruit in colonies other than those to which they were initially addressed. When Governor Gipps was managing the passage through the New South Wales Legislative Council of bills for the municipal government of Sydney and Melbourne, he received a copy of the Secretary of State's comments on a recent South Australian statute incorporating Adelaide City, including a criticism that it did not contain an express clause declaring that the local legislature could remove, alter or abridge any privileges and powers of the corporation. Gipps therefore procured the amendment of the Melbourne Corporation Bill to include such a clause, and passed a declaratory Act to make it clear that such powers existed in relation to the Sydney Corporation.⁴⁹

To balance those occasions where the Colonial Office position was adopted in a colony without express suggestion or direction, one must take account of the occasions, not infrequent, where the Colonial Office proposals received a less warm reception. It is clear that suggestions from Britain were not always welcome, nor were they always suitable for adoption. It is notable that the most obvious cases of inappropriate amendments being put forward are ones where the Colonial Office was forwarding suggestions from other departments of the British Government, rather than amendments advocated by the Colonial Office staff. This was presumably because

⁴⁸ See esp. chapter 9.

⁴⁹ Gipps to Stanley, 17 November 1842, HRA, ser. 1, vol. 22, p.365; see Melbourne Corporation Act 1842(NSW), s.115; and Sydney Corporation Act 1842(NSW).

the other British departments were less aware of colonial conditions, or at the least less inclined to accept colonial circumstances as a justification for departure from the British model. The Home Office on several occasions made suggestions as to the form of New South Wales regulating the colonial prisons in which transported offenders might be detained; these suggestions were frequently found by the colonial authorities to be inappropriate or impractical, and were therefore not adopted.⁵⁰

In summary, one can describe the role of the Colonial Office as essentially a restraining one. It acted to shape colonial law more by its refusal to let certain kinds of statute pass than by any direct inspiration of new statutes. On occasion this was an important role; but it did little toward the creation of any distinctive colonial legal culture. For that, one must have regard to the officials, and to the parliamentarians, of the colonial governments.

⁵⁰ Stanley to Gipps, 25 September 1841, and Gipps to Stanley, 17 November 1842, HRA, ser. 1, vol.22, pp 368-372, discussing Prisons Act 1840(NSW).

Chapter 5

Of English and colonial law

Although the primary contention of this work is that the contribution of English law to colonial law has been overstated, it cannot be disputed that the English contribution was of vital importance. In many cases English law was adopted almost verbatim by colonial legislatures; in other cases there was a process of adaptation and modification of English law to arrive at something more appropriate to colonial conditions. The question of direct adoption of English law largely falls outside the scope of the paper. However the process whereby English law was used as a model for change to colonial law, or was adapted in some way by colonial lawmakers to produce something more fitting for colonial conditions is deserving of some study. In particular, the process of adoption and adaptation sheds some light on the difficulties inherent in any bi-polar view of colonial legal development which seeks to ascribe either an English or an indigenous source to any statute. As is shown below, in relation even to areas of law which were extensively based on English statutes, colonial legislators made a significant contribution to the final shaping of the law.

It is of cardinal importance in determining the extent to which English law was applied in the colonies to bear in mind that English law was itself undergoing substantial reform for much of the nineteenth century. While many of the reforms were scarcely more appropriate to colonial conditions than had been the older law, there were some reforms which were quickly adopted in the colonies. It was considered a part of an Attorney-General's duties in the 1840s in New South Wales to

"attend to the Acts of each session of the British Parliament, and apprise the local Government of such measures as might advantageously be adopted and declared to extend to New South Wales".¹

This process may be illustrated by considering two areas of law, the law of dower and the criminal law.

¹ Therry, R. *Reminiscences of Thirty Years Residence in New South Wales and Victoria* (first published 1863, facsimile edition 1974, Sydney UP, with introduction by J.M. Bennett), p. 361.

The law of dower was a medieval survival whose "early history is singularly obscure".² In general, dower gave a widow a claim to one-third of all lands possessed by her husband during his life. The existence of such an uncrystallised right of dower proved so inconvenient and was such a restraint on free alienation of land that in England it was commonly barred by a conveyance to uses, giving the purchaser only a life estate, with a remainder to the grantees and their heirs during the lifetime of the purchaser, with remainder to heirs of the purchaser. At the same time, the purchaser was given a general power of appointment during his life. Dower might also be barred by jointure. In the colonies, where land changed hands or was used as security for moneys more frequently than in England, dower was even more of an hindrance to business and finance. In many colonies, therefore, the application of the law of dower was circumvented by statutes securing the rights of purchasers or mortgagees of land against claims based on dower, or by allowing a married women to give up her claims to dower. The Colonial Office did not object to such statutes on any ground of principle, though it did scrutinise the drafting to ensure that no countervailing difficulties were created. A Prince Edward Island statute of 1820 was intended to allow a woman to give up her claims to dower. Following objection by J.F. Stephen, the Colonial Office's legal adviser, to the generally poor drafting of the statute, and particularly to a provision which could be read as giving the jurisdiction to receive deeds renouncing dower to Justices of the Peace, the Act was disallowed in 1821.³ In Van Diemen's Land, the colonists also sought to deal with the problems of dower, but in a different manner. There the solution attempted was to seek to allow claims to dower to proceed, but without the cumbersome procedure of fines and recoveries existing at common law.⁴ Other Australasian colonies did not attempt reform until after there had been statutory modification of the rule in England, by the Dower Act 1833(Imp). This British reform was then swiftly adopted by New South Wales,⁵ and later by New Zealand.⁶ Even so, the process of adoption of reforms was not always a smooth one. In South Australia, a Government Bill

² Plucknett, T.F.T. *A Concise History of the Common Law*, (Butterworths, London, 1956) p. 566.

³ Stephen to Bathurst, 5th December 1820, CO 323/41, PRO.

⁴ Conveyances by Married Women Act, 1833(VDL), and see Arthur to Stanley, 8 January 1834, CO 280/46.

⁵ Dower Act 1837(NSW).

⁶ Dower Act 1854(NZ).

for the "Abolition of the Law of Primogeniture, Dower and Curtesy" , that is to abolish the 'heir-at-law' and treat intestates' real estate as if it were personalty, was introduced into the Legislative Council in 1870, but withdrawn after the second reading because of the amount of opposition expressed to the bill. That there was opposition seems almost entirely due to its introduction late in the session; a Select Committee in South Australia had recommended legislation the previous year and the bill as drawn followed closely on the model of other colonies.⁷ Indeed the Attorney-General, R.C. Baker, stated that "with exception of one word and the necessary alteration in the name of the Province, it was a copy of the New South Wales Act" of 1862, and a similar act had been passed in Victoria in 1867⁸

As the case of dower shows, one difficulty in discussing, and determining, the extent to which English law was applicable to the circumstances of the colonies is that the English law itself underwent a great deal of reform in the nineteenth century. As mentioned earlier, there were occasions when the shape that reform took in Britain was of no more use or applicability to colonial circumstances than the old law, but this was certainly not always the case. Reforming statutes were frequently taken up by the colonies. There was a series of statutes in the late 1820s in Britain which collectively reformed the English criminal law which were speedily taken up by the Australian colonies. In New South Wales, the principal reason for adoption of the reforms appears to have been to avoid otherwise severe difficulties in determining whether Acts repealed by the United Kingdom reforms were, or were not, still in force in the colony.⁹ Forbes, the Chief Justice (and chief proponent of adoption) recommended the passing of a simple declaratory Act declaring that the English Acts were in force, rather than a transcription of those Acts.¹⁰ The form of the legislation as passed and printed appears to have been a rather clumsy compromise - the Imperial Criminal Acts Adoption Act 1828(NSW) is a brief statute, taking up only one page in its printed form and, at that, the preamble is longer than the rest of the enactment. However the statutes adopted are reproduced over the next 54 pages of the

⁷ 1870 SAPD 1811ff.

⁸ 1871 SAPD 1904.

⁹ Forbes to Darling 26 December 1827, file 4/6651/127, GANSW.

¹⁰ Ibid.

statute book. Why such a clumsy format was chosen is not clear on the record - it may be that it was believed that reproduction of the statutes would be of assistance to courts in outlying areas by providing a convenient and authentic text.¹¹ It is a salutary reminder of the importance of the relative isolation of the Australian colonies, and of the consequential delays in communication between them and Britain, that the local legislation was overtaken by an Imperial Act for the government of New South Wales, the New South Wales Act 1828(Imp), section 24 of which defined the date for the reception of English law as being 25 July 1828. This date had apparently been chosen in England as suitable because it ensured the application to New South Wales of the English reforms.¹²

Adoption of the English reforms came a little slower in Van Diemen's Land. The Criminal Law Act 1834(VDL) almost exactly reproduces the English statutes, but for the retention of the death penalty for the theft of cattle or sheep stealing. Removal of the death penalty had been proposed in Governor Arthur's draft measure, but opposition in the Legislative Council led to retention of the older penalty provisions.¹³ Such opposition was only to be expected where the Legislative Council members, officials as well as non-officials, were generally members of, or connected with the dominant pastoralist interest - and the fact that Van Diemen's Land was a convict colony would not have furthered the prospects for reform!

By contrast, the Canadian colonies were slow to adopt the English reforms - for instance Nova Scotia did not pass a statute to abolish benefit of clergy in criminal cases until 1841, fourteen years after it had been abolished in England.¹⁴

Some of the colonies had particular circumstances which made certain English laws less applicable there than in other colonies - in Western Australia it was quickly determined that the common law rule that cattle wandering at large were "estrays" belonging to the Crown but

¹¹ A similar procedure was followed some years later for the adoption of various statutes concerning land law and rules of equity: Imperial Acts Adoption Act 1834(NSW).

¹² Currey, C.H. "The Influence of the English Law Reformers of the Early Nineteenth Century on the Law of New South Wales" JRAHS, 1937, vol.23, p. 227.

¹³ Arthur to Stanley, 2 October 1834, CO 280/50.

¹⁴ Doull, John "Benefit of Clergy" (1941) 19 Can Bar Rev 22.

could be reduced into private ownership by confinement for a year and a day was not suitable to colonial pastoral practices, and the rule was abrogated by statute.¹⁵

Such inapplicability of English law was particularly the case (or at least was claimed to have been the case) in the colonies to which there was transportation of convicts from Britain or other parts of the Empire. When it was proposed that the Prisoners Counsel Act 1836(Imp) be adopted in New South Wales, the Legislative Council decided to defer the bill. The reasons given were firstly that in New South Wales there were no courts of oyer and terminer and gaol delivery, and secondly that the Act would unduly protract trials, and thereby inconvenience witnesses, who would then be reluctant to come forward at all. However, there seems little doubt that the real reason for refusal to enact the English measure was that it would interfere with the settler elite's control over its assigned convict labour which was assured by the sanctions provided by prosecution before a bench of lay magistrates drawn from that same settler elite.¹⁶

There were also a significant number of cases in which the colonial legislatures began with English precedents to follow but more or less gradually departed from the English law with the result that the final form as found in the colonies was significantly different from either the English original or its successors in England. A good illustration of this is provided by the colonial treatment of Courts of Requests where, fortunately, there exist a range of archival sources which reveal a great deal about colonial legislative processes in the first half of the nineteenth century.

In England the first Court of Requests was created under the prerogative power by Henry VII as a court for poor suitors to claim small sums. The judge was to make decisions in summary fashion on oral evidence with the parties able to represent themselves. After the Restoration the jurisdiction which the court had operated came to be exercised in the eighteenth and nineteenth

¹⁵ Wild Cattle Act 1842(WA); see Hutt to Stanley, 8 January 1843, CO 18/34.

¹⁶ V. & P. N.S.W. Leg. Co, file A1267-14, ML.

centuries by courts created by statute.¹⁷ Many cities and boroughs sought to erect a Court of Requests for their own particular area to deal with small civil claims, each such court being authorised by a separate act of parliament. The resulting courts lasted until the introduction of the new County Court system in 1846. Since in general Courts of Requests provided a reasonably speedy, cheap and efficient way of handling small civil claims it was not surprising that the institution was seen as suitable for the new colonial judicial establishments.

Some of the North American colonies adopted the Court of Requests system, although it appears that the jurisdiction of the court was not always satisfactorily delimited. In Upper Canada, the Court of Requests Extension Act 1816(UC) provided that Justices of the Peace, sitting as Commissioners of Requests, could hear all civil claims for sums up to £5, although they could not give judgment for more than 40/- unless this was on a debt evidenced in writing by the debtor or, in other claims, there was evidence independent of the plaintiff. The Court had no jurisdiction to hear cases arising from the sale of liquor in taverns nor to hear cases of debt arising from gambling. These latter provisions, it may be surmised, were inserted to ensure that inn-keepers did not take advantage of intoxicated customers in the fashion for which shanty-keepers in later Australian colonies became notorious. This statute, although apparently not disallowed, was the subject of considerable criticism with the Colonial Office. In the view of J.F. Stephen, the Act made too many departures from comparable English law, in that the sweeping jurisdictional provisions failed to make it clear that the Court of Requests had no jurisdiction in claims for realty nor in cases arising under an ecclesiastical jurisdiction. Neither were there provisions to limit the quantum of imprisonment for debt and there was no limitation period for claims. Stephen was prepared to concede that local circumstances might necessitate these divergences, but though the need for them should be made clear.¹⁸

At about the same time, Commissioner Bigge was preparing his report on New South Wales. Barron Field, one of the first judges in New South Wales recommended the creation in the

¹⁷ See Arthurs, H.W. "Without The Law': Courts of Local and Special Jurisdiction in 19th Century England" (1984) 5 J.L.H. 130 and Slatter, Michele "The Norwich Court of Requests - A Tradition Continued" (1984) 5 J.L.H. 97.

¹⁸ Stephen to Bathurst, 10 December 1816, CO 232/40.

colony of Courts of Requests on the English model¹⁹. In 1828 an English statute conferred power on the Governor of New South Wales to create Courts of Requests with a jurisdiction in civil claims to a maximum of £10. The procedures and rules of this court were to be determined by the Governor and the Chief Justice. The wording of the English empowering statute caused some concern in Van Diemen's land, since the Governor and Attorney-General of that colony, who had "accidentally" seen a copy of Forbes's draft were concerned that the power to make rules for the Court of Requests (and other courts) was in the hands of the Governor and the Chief Justice of New South Wales, not in the Lieutenant-Governor and the Chief Justice of Van Diemen's Land.²⁰

The first Courts of Requests in the Australian colonies were those set up under two New South Wales statutes in 1829, the Provisional Court of Requests Act 1829(NSW) and, later the same year, the Court of Requests Establishment Act 1829(NSW) (these two acts, though assented to more than six months apart are in fact the second and third statutes for 1829).²¹ It seems probable that the first statute was prompted by the views of the judges that local legislation was needed because of the terms of the English statute of 1828.²² The second statute may well have been inspired by perceptions that the first statute was defective. There is an extant copy of a draft bill for establishing a Court of Requests, drafted by Alexander Baxter, the then Attorney-General.²³ As with many other documents in the file, there are many pencil notations by unknown hands²⁴ on Baxter's draft, mostly critical of it. It is clear that Baxter was working from the statute setting up a Court of Requests in London, but, as one annotator made clear, that statute was not without its defects particularly in relation to the appropriate test for determining whether the case was appropriately brought in the Court of Requests or should have been brought elsewhere, a question which affected the recovery of costs. Van Diemen's

¹⁹ HRA, ser.IV, vol.1, p.865.

²⁰ Arthur to Murray, 5 July 1828, CO 280/17.

²¹ The former was assented to on 20 February 1829, the latter on 9 September 1829.

²² Forbes, Stephen and Dowling to Darling 5 February 1829, file 4/6651/218-21, GANSW.

²³ Colonial Secretary's Records; Drafts of Legislation 1826-31, File 4/1104, GANSW.

²⁴ One set of annotations is by a person unknown, whose, indecipherable, initials are "W.K." or "W.J." or "W.S."; others, unsigned and in a different hand, are more brusque.

Land passed a Court of Requests Act one year later, though since it is not printed in the collections of colonial statutes it is impossible to determine how closely it followed the New South Wales Act.

A few years later the statute regulating the New South Wales court was significantly amended. The Court of Requests Act 1832(NSW) made a number of significant changes to the prior law. A debtor could now only be sued to the court nearest his place of residence unless he had expressly agreed to pay the debt in a particular place, in which case he could be summonsed to that place. A debtor was not summonable at all if he lived more than 30 miles from a court. More importantly the Commissioner of Requests was not allowed to question the parties, and viva voce evidence was permitted. Lastly, and even more significant, was a provision which prevented lawyers appearing as advocates in the court. The first three of these amendments appear to have been the result of suggestions by the Chief Justice, Sir Francis Forbes²⁵ and Roger Therry, the then Commissioner of Requests.²⁶

However the last, the ban on legal practice in the court, had a more unusual genesis. The amendment was moved in the Legislative Council by the then Colonial Secretary, Edward Deas Thomson.²⁷ The lawyers of Sydney then raised a petition against the amendment and were granted leave to have a representative put their arguments before the Council, which however persisted in Deas Thomson's amendment.²⁸

In the meantime, Van Diemen's Land too had taken the opportunity of amending its legislation, with the Court of Requests Act 1836(VDL). Most unusually for the time, this was not a bill originating with the Government. It appears that the Government acquiesced in its passage because of the popular demand for improvement in the law, despite opposition from the legal profession and a technical objection by the Chief Justice.²⁹

²⁵ Currey, C. H. *Sir Francis Forbes* (Angus and Robertson, Sydney, 1968), p.455.

²⁶ Attorney-General to Colonial Secretary, 24 April 1832, Correspondence Books, 1831-33, file 9/2677, GANSW.

²⁷ For Deas Thomson's life, see Foster, S.G. *Colonial Improver: Edward Deas Thomson 1800-1879* (Melbourne U.P., 1978).

²⁸ See Minutes for 19 January 1832, V.& P., N.S.W. Leg.Co., 1825-37.

²⁹ Arthur to Glenelg, 10 September 1836, CO 280/67.

The next enactment, in chronological sequence, was a New South Wales Act of 1839 which established Courts of Requests at Melbourne and Port Macquarie. This too had a slightly chequered history. It appears that the creation of these new courts was sought by members of the Legislative Council and the need for it agreed to by Therry.³⁰ However the Act as passed was objected to by the Judges on the ground that it stipulated for the appointment of Commissioners by the Governor in the name of the Crown, rather than by the Crown itself.³¹ The Bill was passed in the form objected to, but the change was made the following year after instructions from the Colonial Office.³²

Western Australia and South Australia had not adopted the Court of Requests system, instead conferring on the Resident Magistrates a substantial civil jurisdiction. In South Australia at least this was not due to ignorance of the system. In 1840 Charles Cooper, the judge of the Supreme Court, returned from a visit to Sydney convinced of the desirability of amending the jurisdiction of the Resident Magistrates court to bring it into line with the Court of Requests in New South Wales. In 1841 Cooper prepared a bill to do this, but there was much criticism of the bill because it provided for a maximum claim of £10 and the proposal lapsed.³³ However in future years the possibility of amendments to create something akin to a Court of Requests was still canvassed.³⁴

The government of the infant colony of New Zealand preferred to create Courts of Requests, setting one up in the Court of Requests Ordinance 1841(NZ). This Ordinance was obviously derived from the New South Wales Act of 1832. Many of the sections are identical and any changes are generally not significant, save that New Zealand conferred on the court a jurisdiction to hear claims up to £50, that there was less protection against vexatious suits in the

³⁰ V.& P., N.S.W. Leg. Co., 31 July 1839, p.57.

³¹ V.& P., N.S.W. Leg. Co., 29 August 1839. The judges had been asked to comment generally on the Act: Colonial Secretary to Judges 28 July 1838, File 5/4758, GANSW.

³² Russell to Gipps, 28 April 1840, Despatches, File 4/1605 GANSW.

³³ Hague, p.1217.

³⁴ Ibid, p.1236.

New Zealand legislation and the New Zealand Ordinance did not permit minors to sue for wages on their own behalf as they could under the New South Wales Act³⁵

New South Wales then returned to the issue and extensively amended its Act in 1842. Amongst the changes was the removal on lawyers appearing as advocates in the court, a change which allowed some lawyers to build an extensive practice in the court - Redmond Barry noted in 1842 that he had appeared as counsel in the Court on four successive days.³⁶ The Van Diemen's Land Legislative Council appears to have drawn heavily on the New South Wales law when it redrafted its legislation later in the same year.

The last stage of this efflorescence of legislation in the 1830s and 1840s was the New Zealand ordinance of 1844. Although this ordinance appears to have been influenced by the earlier legislation in the other colonies, its drafting is both simpler and clearer than any equivalent elsewhere. The architect is not known, but the 1844 ordinance stands out as the least derivative of any on the subject. Despite this the Court did not find favour with Governor Grey, who significantly undercut its function by conferring substantial civil jurisdiction on the Resident Magistrates Court which was created in 1846. This appears to have been deliberate, not accidental, since Grey would have preferred to get rid of the Courts of Requests completely.³⁷

The difficulties of analysis of law as "English" or "local" are perhaps most clearly shown by examination of one area, the broad field called "commercial law", in which there appears for many years to have been a perception that colonial law, particularly in Australasia, closely followed English law. A writer³⁸ on the commercial law of New South Wales said in 1898:

"...The statutes passed in this colony on the subject of personal property consist, almost entirely, of more or less close copies of English Acts. There are many differences, no doubt, but these differences are nearly all what may be termed accidental ones. We have omitted to pass some English Acts, and we have omitted to amend English acts already in force as they have been amended in England. Again, in some cases, we have attempted to improve on the English Acts. Then some of our Acts are made up of sections of different English Acts. But many of our statutes, such as the Companies Acts, the Bankruptcy Acts, the Bills of Exchange Act, the Partnership Act, and others have been copied with

³⁵ A simpler provision to this effect does appear in the Court of Requests Ordinance 1844(NZ), s.31.

³⁶ Day Book, Redmond Barry Papers, file MS 8386/602/1(b), LaTL.

³⁷ Grey to Eyre 10 April 1848, File G 31/1, p.77, NZNA(W).

³⁸ Millard, G.W. *The Law of Personal Property in New South Wales* (Maxwell & Co., Sydney, 1898), p.5. The passage cited is substantially repeated in the 7th edition of the work (by Helmore, B.A., Law Book Co of Australasia, Sydney 1965), p.2.

little or no alteration from the English Statute book. Speaking generally, it may be said; and said without any reflection whatever on our legislators, that there is nothing at all original in our legislation on the subject of personal property".

Any such view of colonial commercial law can only be considered wrong, since there are many aspects of the commercial law where for significant periods of the nineteenth century the colonies experimented with statutes which deliberately departed from English law in the hope of creating a corpus of law more suitable to colonial conditions. Two areas in which such colonial initiatives were both marked and significant, chattel securities and the law of contractor's liens, are discussed later³⁹ but the law of bankruptcy provides an interesting example of the development of an area of colonial law.

The English law of bankruptcy and insolvency⁴⁰ is statutory, not judge made, and is essentially an outgrowth of the law relating to the enforcement of payment of debts. Legislation from the thirteenth century on provided for the imprisonment in some circumstances of a debtor who did not pay his due debts. But locking the debtor up was not always just, and certainly not always commercially productive.

"Imprisonment was an inadequate means of gathering the assets of a stubborn or fraudulent debtor, and a cruel fate for an innocent debtor. Bankruptcy legislation, which began in the mid-sixteenth century, was designed to gather and distribute the assets of the stubborn or fraudulent debtors. This purpose limited its scope for centuries: debtors were not given discharges until 1705, debtors themselves could not initiate proceedings until 1844, and the legislation only applied to traders until 1861. Relief for an imprisoned debtor, especially one who was not a trader, was first given by the Privy Council and by a series of temporary insolvency statutes. In the early nineteenth century these insolvency statutes became settled and comprehensive, and permitted release from prison, although not from the liability for debts, upon the surrender and distribution of all a debtor's assets".⁴¹

Such progress as English law had made by statute was not at first passed on to the colonies. In Upper Canada this was because statute declared that the English bankruptcy laws did not apply;⁴² in New South Wales because the courts held the bankruptcy laws of England did not

³⁹ See Chapter 10.

⁴⁰ Until late in the nineteenth century, "bankruptcy" carried an imputation of dishonesty or concealment of assets; insolvency did not: Martel, E "The Debtor's Discharge from Bankruptcy" (1971) 17 McGill LJ 718, 719.

⁴¹ Risk, R.C.B. "The Golden Age: The Law about the Market in Nineteenth Century Ontario" (1976) 26 U Toronto LJ 307, 342-3. Also see Duffy, I.L.H., "English Bankrupts 1571-1861" (1980) 24 AmJLH 283 and Cohen, J. "The History of Imprisonment for Debt and its relation to the Development of Discharge in Bankruptcy" (1982) 3 JLH 153.

⁴² Risk, *op. cit.* n.41, p.343.

apply to the colony because they could not be put into practical effect,⁴³ although to some extent a quasi-bankruptcy jurisdiction was conferred on the New South Wales Supreme Court on its establishment in 1823⁴⁴. In Lower Canada⁴⁵ and in the Cape Colony the British acquired colonies with extant insolvency laws, more or less based on the Roman law system with its principle of "cessio bonorum" - that an insolvent could secure the liberty of his person by the giving up to his creditors of all his possessions. A similar principle was, of course, also to be found in Scots law. It is not surprising that colonial statutes were soon passed in an attempt to remedy the difficulties created because such legislation was not inherited.

The first colonial statutes on bankruptcy issues appear to have been occasional statutes aimed at the release of particular debtors whose creditors remained unsatisfied.⁴⁶ The first general statute appears to have been the Insolvency Ordinance 1829 of the Cape Colony, a statute which attempted to blend the Romano-Dutch law with English legislation. The Ordinance was drafted by William Burton, an English barrister then serving as a judge of the Cape Supreme Court. Burton was, however, not acquainted solely with English law and had spent some time in Holland studying Roman and Dutch law prior to embarkation for the Cape.⁴⁷

Shortly thereafter came the first Australian legislation. In 1830 the New South Wales Legislative Council passed the Debtor's Relief Act 1830(NSW) after evidence was taken from the local commercial community. The act extended to non-trader insolvents the bankruptcy provisions applying to traders and also allowed the courts to discharge debtors who had no prospect of paying their debts on the making of a proper disclosure of their assets and making the same available for distribution among the creditors. The Act, largely drafted by the then

⁴³ *Ex parte Lyons, re Wilson* (1839) 1 Legge 141, and see Gava, John "The Revolution in Bankruptcy Law in Colonial New South Wales" in Ellinghaus, M.P., Bradbrook, A.J. and Duggan, A.J.(eds) *The Emergence of Australian Law* (Butterworths Australia, 1989), p.212. For the period before 1823 in New South Wales, see Bruce Kercher "An Indigenous Jurisprudence? Debt Recovery and Insolvency Law in the New South Wales Court of Civil Jurisdiction 1788-1814" (1988) 6 Aust J of Law and Soc 15.

⁴⁴ See Gava, op.cit. n.43, p. 212.

⁴⁵ As to this, see Martel, op. cit. n.40, p. 720

⁴⁶ See e.g. in Nova Scotia the James Kidston Relief Act 1825(NS), and comments in Stephen to Bathurst, 12 April 1826, CO 323/43.

⁴⁷ For Burton's career, see Allars, K.G. "Sir William Westbrooke Burton" JRAHS, 1951, vol.37, p.257.

Chief Justice Francis Forbes, was avowedly experimental and therefore was limited to a term of two years.⁴⁸

This measure seems to have been unsuccessful, though the reasons for this are disputed. Other historians have cited the statement by Governor Bourke that the law was unsuited to the state of colonial society and productive of fraud.⁴⁹ However these criticisms must be taken to have been at least in part offset in Bourke's mind by a belief that at least some of the failure of the Act was due to the presence therein of English machinery provisions which failed to work in the colony. In Bourke's view, a replacement statute, the Insolvent Debtors Act 1832(NSW) was simpler and more likely to succeed.⁵⁰ Under the new Act a debtor could avoid imprisonment at suit of a creditor by handing over whatever property he or she had, and then promising to pay the balance if he or she was ever able so to do. This is clearly much more in line with the 1830 Act than it was with the contemporary English law. Thus it may be thought that Bourke's harsher criticisms do not deserve to be taken quite as literally as has been the case in some other writings on the subject.

After these two statutes, New South Wales passed no statute of note on insolvency itself for almost a decade, since the Debtors Relief Act 1838(NSW) did not go far beyond the 1832 Act. By contrast in Van Diemen's Land a more innovative approach prevailed. Firstly there was the Debtor's Relief Act 1834(VDL), something of a stopgap measure to alleviate the worst difficulties of insolvents in the colony⁵¹. Its provisions, inter alia, eased the plight of imprisoned debtors by making the creditor who had a debtor committed responsible for the maintenance of that debtor's family. More important, and more radical, were the provisions of the Insolvent Act 1835(VDL), which had been drawn by Alfred Stephen (at that time Attorney-

⁴⁸ V. & P. Leg.Co. N.S.W. 2 April 1830; and also see Currey, C.H. *Sir Francis Forbes* (Angus and Robertson, Sydney, 1968), pp.350ff; Gava, op.cit. n.43, p.213-4 and Bennett, J.M. and Forbes, J.R. "Tradition and Experiment: Some Australian Legal Attitudes of the Nineteenth Century" (1971) 7 U Qld LJ 175.

⁴⁹ See Bourke to Goderich, 19 March 1832, HRA ser.1 vol.16 p. 566, cited by Bennett & Forbes, op. cit. n.48, p.175; and by Gava, op. cit. n.43, p.213.

⁵⁰ Bourke to Goderich, 19 March 1832, HRA ser.1 vol.16, p.566.

⁵¹ See Arthur to Stanley, 8 January 1834, CO280/46.

General of Van Diemen's Land) from Burton's Cape legislation of 1829,⁵² though his handiwork was altered by the addition of provisions drawn from Scots law as the bill proceeded through the Legislative Council.⁵³

This somewhat altered version of Burton's statute was then considered for adoption in New South Wales, in the stead of an earlier local draft,⁵⁴ and the drafting of it entrusted to the logical choice, Burton himself, by then a judge of the New South Wales Supreme Court.⁵⁵ Certainly the chances of the new bill were enhanced by this change, since it appears that the entire bench had been opposed to the earlier draft bill.⁵⁶ Meanwhile the need for effective reform of the law had become acute, as the Australian colonies toppled into a prolonged and severe economic depression.⁵⁷ The pressure of circumstances brought readiness to experiment with new, and less harsh, insolvency laws. Under the Insolvent Debtors Act 1841(NSW), an insolvent was almost completely protected from imprisonment for debt, and would remain in possession of at least a part of his property unless a specified act of insolvency (such as departing from the colony or from his place of residence, concealing assets and the like) was committed. The Colonial Office, reluctantly, allowed the Act to stand, as it did an 1844 Act which actually abolished imprisonment for debt⁵⁸. However it is clear that this must have been at the outer limit of the tolerance that the Colonial Office (itself of course concerned that colonial laws did not adversely and unreasonably affect the interests of British investors in the colonies) was prepared to exhibit, and the Governor, Gipps, was instructed that he was not to approve further legislation of this kind.⁵⁹

⁵² Bennett & Forbes, *op. cit.* n.48, p.175 discuss this, but for some reason unknown refer to Burton's "Bill".

⁵³ See Progress Report of Committee on Insolvent Debtors Bill and Imprisonment for Debt Bill, 17 September 1839, V.& P. Leg. Co. N.S.W. pp.583ff, and evidence taken 9 September.

⁵⁴ *Ibid.*

⁵⁵ Allars, *op. cit.* n.47, p.281.

⁵⁶ Gipps to Burton on Debtor's Relief Bill 8 September 1838, and draft reply, 10 September 1838, DL Document 12, DL.

⁵⁷ As to the economic state of the colonies, see Gava, *op. cit.* n.43, pp.214-5.

⁵⁸ Insolvency Act 1844 (NSW).

⁵⁹ Shaw, A.G.L. (ed) *The Gipps - La Trobe Correspondence 1839-1846* (Melbourne UP, 1989), p.319.

It is not clear whether it was British official reluctance to see such legislation in other colonies, or a lack of initiative in those colonies, or some combination of both, but it is notable that in the other Australian colonies the legislation affecting insolvency went, by and large, no further than the New South Wales law of the 1830s. Thus the New Zealand Imprisonment for Debt Ordinance 1844(NZ) appears to be a composite made up of sections drawn from the New South Wales acts of 1832 and 1838, while the South Australian Insolvent Debtors Relief Act 1841(SA) appears to be independently drawn, though, one must suspect, with the New South Wales law in mind. A similar law was passed in Western Australia in 1842. In view of the fact that every other Australian colony had some form of insolvency provision, it is surprising to find that one historian has described the Western Australian statute as "revolutionary",⁶⁰ a description that hardly seems fitting.

While the Australasian colonies had been developing a semi-indigenous insolvency law, the North American colonies had also experimented, though less markedly. Lower Canada had, in 1839, passed an ordinance which not only adopted English legislation of 1825 allowing a debtor to assign property to his creditors voluntarily but limited imprisonment for debt as well.⁶¹ It seems probable that the latter measure was not as important as in some other colonies, since the Quebec Code permitted seizure and sale of assets by a creditor.⁶² New Brunswick too passed a bankruptcy law in 1842. Although it was far from a perfect measure, the Colonial Office left it to operate, in the hope that the colonial legislature would in time amend it for the better⁶³

Although Lower and Upper Canada were united in 1841, Upper Canada did not thereby come under the Lower Canada insolvency law, and was dependent on legislation by the new unified legislature. Various pieces of legislation were passed between 1843 and 1857, but they form a very different, and much less consistent, corpus of law than was the case in the Australasian colonies. It is notable that in Canada the rather frequently amended legislation continued to

⁶⁰ Collins, C.W. "Matters of Social Conscience: Western Australia 1829-90" *University Studies in History*, 1968, vol.2, p.1, discussing the Insolvent Debtors Act 1842(WA). Also see Russell, pp.160-3.

⁶¹ Bankruptcy Ordinance 1839(LC), see Martel, E "The Debtor's Discharge from Bankruptcy" (1971) 17 McGill LJ 718, 720-1.

⁶² As to this, see Kolish, Evelyn "Imprisonment for Debt in Lower Canada 1791-1840" (1987) 32 McGill LJ 603.

⁶³ See Minute by Stanley on J.F. Stephen to Stanley 22 June 1842, CO 323/57.

distinguish between traders, who were covered by bankruptcy provisions, and other debtors who came under an Insolvency Act. It is also important to note that, in general, imprisonment for debt was less restricted than was the case in other colonies.⁶⁴ The insolvency law of the North American colonies was therefore a somewhat inconsistent mixture of colonial expedients and borrowings from English law, except in Lower Canada where the French and civil law influences predominated.

While it might have been acceptable for the different colonies to go their own way in the early decades of the century when communications were poor and there was relatively little prospect of any individual trading in a substantial way in more than one colony, the improvements in communications of the mid-century, as well as the increasing overall British investment in the Empire, had set some British officials and politicians to thinking about the desirability of assimilating the insolvency and bankruptcy legislation of the Empire, perhaps most easily to be done by a general Imperial statute.⁶⁵ There may even have been some colonial politicians who would have supported such a move, had it ever been made seriously.⁶⁶ The possibility of such assimilation appeared to be strengthened because the English law of insolvency gradually became more comprehensible and just through a number of reforming statutes. Some of these were in turn used by the colonies to provide at least some improvement in the colonial law, while awaiting a substantial consolidation and improvement of the English statutes.⁶⁷ No such major reform was achieved until the Bankruptcy Act 1869(Imp) was passed, the first English act to treat trading and non-trading insolvencies alike.

By that time two colonies had embarked on quite different and substantial legislation on insolvency. The province of Canada passed the locally drafted Insolvent Act 1864(Can) which

⁶⁴ For the above, see Risk, R.C.B. "The Golden Age: The Law about the Market in Nineteenth Century Ontario" (1976) 26 U Toronto LJ 307, 343-5.

⁶⁵ Knaplund, Paul, *The British Empire 1815-1939* (Harpers, New York, 1941) pp.204-210 passim; also see Swinfen, p.69.

⁶⁶ See the views of Sewell who had as his personal view that "a General Bankruptcy and Insolvency Law for the whole Empire including all its colonies and dependencies [sic] ought to be framed by the Imperial Legislature", memorandum enclosed with Grey to Newcastle, 31 October 1861, CO 209/169.

⁶⁷ This was the view of the Tasmanian Government in passing the Insolvency Amendment Act 1859, see Young to Newcastle, 4 Oct 1859, CO 280/344.

was an amalgam of English, French and Scottish principles.⁶⁸ By contrast New Zealand in 1867 began what was to be a markedly different process whereby the Australasian colonies gradually adopted one or another of the English statutes on insolvency. The Bankruptcy Act 1867(NZ) eventually largely reproduced the English Act of the same year.⁶⁹ However it is clear from the parliamentary debates that the New Zealand Bill proceeded not from the final English text, but from the Bill as first introduced in England.⁷⁰ The other notable feature of the progress of the Bill through the New Zealand Parliament was the uncertainty as to its status. At times it is discussed as if it was a private member's bill, though in fact it appears to have had at least some degree of Governmental support and to have originated from a House of Representatives Committee set up on the motion of a cabinet minister.⁷¹

At about this time, too, the Australian colonies had publicly avowed the desirability of assimilating at least the Australian statutes on insolvency. In part this stemmed from a desire to have provisions in all colonies to apprehend "debtors and bankrupts absconding from any other colony".⁷² Nothing concrete came from such proposals, although suggestions about such legislation were exchanged unofficially,⁷³ and on at least some other occasions draftsmen of reform measures did communicate with one another to bring about some cross-fertilization of ideas⁷⁴. However by and large the proposals of reformers met with little success until after the passage of the Bankruptcy Act 1869(Imp), which was to be adopted in several colonies in lieu of, and at the expense of, attempts at local legislation adapted to colonial conditions.⁷⁵ Only in Queensland, where the machinery provisions of the English Act were replaced by new

⁶⁸ Hutchison, P.P. "Sir John J.C. Abbott: Barrister and Solicitor" (1948) 26 Can Bar Rev 934, 944.

⁶⁹ Stafford to Grey, enclosed with Grey to Buckingham, 8 November 1867, CO 209/203.

⁷⁰ 1867 NZPD 1048.

⁷¹ Compare 1867 NZPD 674, 1867 NZPD 1048 and 1867 NZPD 1129.

⁷² See *Report of Intercolonial Conference 1863*, printed in 1862-3 VPP, p.7.

⁷³ See Boucaut to Gavan Duffy, 30 Nov 1870, draft in Boucaut Papers (Misc. Papers 1864-89) file V98, Mortlock Library.

⁷⁴ Pring to McParlane, 31 December 1862, Attorney-General's letterbook 1861-4, file JUS/G1, QSA; cf Attorney-General of Victoria to Attorney-General of South Australia, 8 April 1867, re transmission of Insolvent Act Amendment Bill 1867(SA), noted in Index to letters Received by Attorney-General's Office, file GRG-1/4, SAPRO.

⁷⁵ See Bennett, J.M. & Forbes, J.R. "Tradition and Experiment: Some Australian Legal Attitudes of the Nineteenth Century" (1971) 7 U Qld LJ 175, 177-78; Insolvency Act 1871(Vic); Bankruptcy Act 1870(Tas) and Debtors Act 1870(Tas); see Davis, A.H. "A Lawyer's Letters" - *A Popular Guide to the Common Law and Principal Statutes of Tasmania* (Aikenhead & Button, Launceston, 1886) p.72; Insolvency Act 1871 (WA).

provisions drafted by Griffith, was anything significantly different done.⁷⁶ New South Wales, too, did not follow the English Act of 1869 - in part because of opposition from the Chief Justice, Sir Alfred Stephen, who preferred a Bill prepared in 1862 and modelled on earlier New South Wales and Tasmanian law.⁷⁷ However by the late 1880s, essentially similar laws applied in all the Australian colonies, since New South Wales, Victoria, South Australia and Western Australia all had legislation based largely on the English Act of 1883.⁷⁸ It is notable that by the time that New South Wales passed the Bankruptcy Act 1887(NSW), opinion in favour of reform was so strong that lawyers of all factions supported the Bill, even though it was clear that the Government would gain public credit for its passage.⁷⁹ New Zealand too copied the English statute of 1883, though only after a lapse of some years.⁸⁰

Thus by rather a sidewind the Australasian colonies achieved not only substantial similarity between the various colonial statutes but concordance with English law as well. Yet, for reasons which are obscure, the Canadian law was at the same time undergoing fissiparous changes. Following the federation of Canada in 1867, the federal Parliament had jurisdiction to enact bankruptcy laws and in 1869 it proceeded to pass the Insolvent Act 1869(Can), which in fact only applied to traders. Under it a debtor was released from imprisonment and discharged from his debts if he had made disclosure of all his assets and assigned it, without any form of fraud, to his creditors. This was repeated in the Insolvent Act 1875(Can), but that statute was repealed in 1880, leaving a lacuna in Canadian law which the provinces could only partially fill.⁸¹ The Creditor's Relief Act 1880(Ont) became the model for provincial attempts to legislate on the area and was widely copied by other jurisdictions over the next two decades.⁸²

⁷⁶ Bennett & Forbes, op. cit. n.75, p.178.

⁷⁷ "Memorandum by Sir Alfred Stephen CJ for a New Bankruptcy Law proposed in 1871 to the Law Commission of New South Wales", in "Papers re Proposed Royal Commission into the Operation of the Supreme Court 1886-7", file 5/7718.3, GANSW.

⁷⁸ Rose, D.J. *Lewis's Australian Bankruptcy Law* (8th ed.) (Law Book Co 1984), p.17.

⁷⁹ As to this see Parsons, pp. 175-6, 209-213 and 245-67.

⁸⁰ Bankruptcy Act 1892(NZ); see McKenzie, P.D. *Spratt & McKenzie's Law of Insolvency* (2nd ed) (Butterworths, Wellington, 1972), p.1.

⁸¹ Martel, E "The Debtor's Discharge from Bankruptcy" (1971) 17 McGill LJ 718, 721.

⁸² Law Reform Commission of British Columbia, "Report on Creditors Relief Legislation" (1979), pp.1-2.

The particular interests of creditors of persons who sold goods in bulk were addressed by a series of Bulk Sales Acts passed by various provinces over those and later years⁸³

Naturally the frequency with which English Acts were taken as models for colonial legislation, as well as the degree to which English Acts were scrutinised and redrafted to make them more suitable for colonial conditions, depended on the views, the enthusiasm and the ability of the colonial officials or legislators who prepared bills for the colonial legislature. Given the very diverse qualities of such persons, it is not surprising that the results were somewhat inconsistent. Nor was the preparation of ostensibly local bills by such draftsmen in any way standardised, as the succeeding chapter shows.

⁸³ See Williamson, J.R. "Waive the Bulk Sales Act?" (1977) 26 UNBLJ 20 and La Forest, (1958) 36 Can Bar Rev 387, 395.

Chapter 6

The preparation of statutes by officials (other than parliamentary draftsmen) and their contribution to colonial law.

Any analysis of colonial legislation and, in particular, of the degree to which the laws of any one colony were derived from those of others, must take account of the nature of the legislative process at different times, and especially must have regard to the persons who drafted bills for consideration by the various colonial legislatures. In the Crown Colony periods, legislation might be drafted by various officials - principally but not solely the law officers of the government (generally, but not invariably, styled as Attorneys-General and Solicitors-General)¹, by the governors themselves or by the judiciary. Where these officials could not or would not satisfy the demand for drafting, recourse was had to the legal profession and the preparation of measures was often briefed out. At this time most public measures were proposed by the government and there was relatively little occasion for non-governmental draftsmen to be active²

In later years there were significant differences between the colonies. The advent of representative legislatures gave increased scope for private members to propose legislation, but that was secondary to the increase in the total amount of legislation proposed by the colonial governments. The demand for increased drafting services was met in different ways. In some colonies drafting came to be largely, though not exclusively, restricted to the law officers or to practitioners specifically briefed for the task by the colonial government. In others the dominant position in drafting was held by officials appointed as parliamentary draftsmen. Their labours were on occasion supplemented by practitioners briefed for particular tasks, with only rare instances of bills being prepared by the law officers, other officials or members of the judiciary.

In the period before responsible government, the governors had an important role to play in determining the shape that legislation took. As a matter of strict theory and law,

¹ In some colonies, such as South Australia and New South Wales the principal Governmental legal officer was for some time styled the Advocate-General.

² As to unofficial draftsmen and their contribution to colonial law, see Chapter 8.

the legislation of the colonial period was that made by the governor, with the advice and consent of the Legislative Council of the colony. In practice, colonial governors almost always considered new laws to be the work of the Legislative Council - only Sir George Grey referred in official documents to enactments he had passed,³ and his career would appear to indicate that the use of such a form of words arose more from egotism than from a desire for legal precision.

Colonial governors in the Crown Colonies were a disparate group.⁴ Many had attracted the official notice and favour that was essential for preferment by a military or naval career or by political or administrative service to the English Government. Only a small percentage had any formal legal training which might be thought to assist with legislative duties.⁵ The most significant preparation that most had received (where they had received any) for their legislative functions appears to have been experience with law-making in other colonies. Some governors had been active in political life - the most unusual, perhaps, of all Australasian governors being Sir Frederick Weld, whose career included being Premier of New Zealand in 1864 and later successively Governor of Western Australia, Tasmania and the Straits Settlements between 1869 and 1887.⁶ In some other cases this experience had been acquired in administrative or quasi-governmental functions - as with Sir George Gipps, who had, prior to his term in office as Governor of New South Wales, spent some time in Canada with the Gosford Commission investigating Canadian affairs.⁷ Other governors could draw upon their own knowledge acquired as governor of some other colony. The most travelled of settlement colony governors was Sir George Grey who, in addition to serving as a Resident Magistrate in West Australia in 1839-40, was twice Governor of New Zealand

³ See e.g. Grey to Earl Grey, 25 August 1851, CO 209/92 and Grey to Pakington, 19 February 1853, CO 209/114.

⁴ The best general survey of the Victorian governors is in Cell, J.W. *British Colonial Administration in the Mid-Nineteenth Century; the Policy-making Process* (Yale UP, 1970).

⁵ Cell, *op. cit.* n.4., p.49 states that 24 of 262 colonial governors whose careers could be traced had received legal training; however my researches have not revealed that any with such training held office in any Australasian colony prior to representative government.

⁶ See Graham, Jeanine *Frederick Weld* (Auckland UP 1983), *passim*.

⁷ ADB, vol.1, pp 446-453.

as well as holding gubernatorial office in South Australia and Cape Colony.⁸ But Grey was not alone in governing more than one settlement colony prior to representative government. Other governors to have this experience include Sir George Arthur,⁹ (Van Diemen's Land and Canada); Sir William Denison (Van Diemen's Land and New South Wales, as well as army service in Upper Canada),¹⁰ and Sir Richard Bourke (Cape Colony and New South Wales).¹¹

Given the differences in background, capacity and character between the various governors, it is not surprising to find that some took their legislative roles far more seriously than others, nor that the results of their efforts should vary significantly in quantity and quality. For instance Sir Ralph Darling in 1828 attended only 2 of 18 meetings of the New South Wales Legislative Council, and 3 of 9 meetings the following year. By contrast governors Bourke and Gipps attended virtually every meeting of the Legislative Council during their respective terms of office as Governor of New South Wales between 1834 and 1841.¹²

It seems unlikely that many Governors actually drafted many bills personally. Such detailed work was more likely to be done by persons with some legal training or experience. There can be little doubt, however, that in many cases the shape of legislation passed by colonial Legislative Councils owed a great deal to the views of the Governor of the time. Many of the legislative proposals of various governors would appear to reflect laws known to be in force in other colonies and in many cases that knowledge was derived from the Governor's own prior experience. A striking example is furnished by Sir George Grey during his first governorship of New Zealand. Grey's

⁸ Biographies of Grey include Rees, W.L. *The Life and Times of Sir George Grey KCB* (Hutchinson, London 1892); Henderson, G.C. *Sir George Grey : Pioneer of Empire in Southern Lands* (JM Dent, London, 1907) and Rutherford, J. *Sir George Grey, KCB, 1812-98 : A Study in Colonial Government* (Cassell, London, 1961).

⁹ See Shaw, A.G.L. *Sir George Arthur 1784-1854* (Melbourne UP 1980), *passim*.

¹⁰ Denison, Sir William *Varieties of Vice-Regal Life* (Longmans Paul, London, 1870) and ADB vol 4, p.46.

¹¹ King, Hazel, "Richard Bourke and his Two Colonial Administrations; a comparative study of Cape Colony and New South Wales" JRAHS, 1964, vol.49, p.360.

¹² The figures are derived from inspection of Votes & Proceedings of New South Wales Legislative Council for the relevant years.

dissatisfaction with the state of affairs he encountered upon his arrival in New Zealand has been well described by Cornford.¹³ It was natural that Grey should look for a relatively simple solution to the difficulties he had inherited, which he did by drawing upon his South Australian experience. Thus he tried to establish in New Zealand the legal and administrative systems he had seen in operation, or had introduced, in South Australia during his governorship there. This can be seen in his reconstruction of the court system in 1846. One measure was the Supreme Court Amendment Ordinance 1846(NZ), which established a Court of Appeals composed of the Governor and members of the Executive Council, other than the Attorney-General.¹⁴ The court set up by this ordinance has been described by Cornford as "an adaptation of section 15 of 4 Geo.4 c.96 [the New South Wales Charter of Justice]",¹⁵ but such an attribution is not entirely accurate. The concept of a non-legal appellate colonial tribunal predates the Australian colonies - such bodies were commonplace within the West Indian and North American colonies,¹⁶ which appear to have supplied the model for Francis Forbes, the principal draftsman of the Charter of Justice.¹⁷ The particular legislative formulation found in the New Zealand ordinance owed much to South Australia. The provisions of the ordinance which constitute the court (s.3) and provide for and regulate appeals to the Privy Council are virtually verbatim copies of ss. 16 and 17, respectively, of the South Australian Supreme Court Act 1837(SA).

By contrast the Resident Magistrates Courts Ordinance 1846 (NZ) shows a reliance on a concept drawn from another colony, though the actual drafting is considerably less derivative. The first instance of the office of Resident Magistrate, that is a salaried

¹³ Cornford, P.A. "The Administration of Justice in New Zealand 1841-1846 (A Legislative Chronicle) [Part II] the Swainson Period" (1970) 4 NZULR 120, 132.

¹⁴ It must be remembered that the Attorney-General would normally have appeared as counsel for the Crown if the Crown was a party; in addition he had the right of private practice and therefore might well have been involved in any civil case of any importance.

¹⁵ Cornford, *op.cit.* n.13, p.134.

¹⁶ Stockton, A.A. *The Judges of New Brunswick and their Times* (Acadiensis magazine, St.John, New Brunswick 1907), p.52 describes a New Brunswick case of 1793 before such a Court of Appeal.

¹⁷ Currey, C.H. *Sir Francis Forbes* (Angus and Robertson, Sydney, 1968), chapter 3.

adjudicator (usually without legal training or experience) appears to have originated in the Cape Colony in 1827 and been brought to Australia by Sir Richard Bourke¹⁸ and was widely used there, although in at least one other colony, South Australia, the form of the statute was derived directly from the Cape Colony original.¹⁹ Indeed, Governor Grey had spent a year as a Resident Magistrate in Western Australia.²⁰ The formulation of the New Zealand ordinance is, however, not apparently directly taken from any of the then existing Australian precedents.

Nor were Grey's apparent borrowings from South Australia limited to the structure of the courts. Although most of the Sheriffs Ordinance 1846(NZ) was drawn either from the Supreme Court Ordinance 1844(NZ) or were transcribed from the Sheriff Act 1843(NSW) (itself possibly derivative)²¹, the ordinance did for the first time provide, in section 9, that the Sheriff was to have superintendence of convicted prisoners in the gaols of his district. This idea, and its statutory embodiment were drawn from the South Australian Sheriffs Act 1842(SA). The South Australian influence is also clear in the Constabulary Force Ordinance 1846(NZ), which largely reproduced the South Australian Police Force Regulation Act 1842(SA). It is curious that the 1842 South Australian statute should have been relied on, as it had already been superseded in South Australia by the Police Ordinance 1844(SA), which not only regulated the police force but contained many provisions relating to minor offences. Why the earlier statute was preferred to the latter is far from clear. One final instance of Grey's borrowings from South Australia is provided by the Weights and Measures Ordinance 1846(NZ), which is a re-ordered version of its South Australian counterpart, the Standard Weights

¹⁸ King, Hazel, *Richard Bourke* (OUP, London, 1971), pp 91-92.

¹⁹ Hague, p.1208.

²⁰ ADB vol 1 p. 477.

²¹ The Government Archives of New South Wales contain a letter from E Deas Thomson, the Colonial Secretary, to the Judges asking for their comments on the position of Sheriff at the Supreme Court. The curious feature is the documents include, though it is not referred to, a manuscript copy of the South Australian Sheriff's Ordinance 1842. This would indicate that the South Australian legislation was known and discussed in New South Wales before that colony's legislation was passed. See Deas Thomson to Judges 19 October 1842; File 5/4761, GANSW.

and Measures Act 1843(SA), itself substantially derived from a New South Wales statute.²² It is curious to note that the law as stated in the South Australian statute differed little from that stated in the latest British statute in the field, the Weights and Measures Act 1836(Imp), and that therefore the effect of Grey's activity was to enact a body of law which was already in force in the colony. It would not be the last time that legislative resources would be so used.

On a smaller scale, the New Munster provincial ordinances passed in 1849 also owe much to the use of South Australian and New South Wales precedents. It seems probable that these reflect the colonial experiences of Edward Eyre, the Lieutenant-Governor of that province. He had been reared in New South Wales, but had served for three years as a magistrate and Protector of Aborigines in South Australia prior to his appointment to New Zealand.²³ Eyre's later career as Governor of Jamaica falls outside this study,²⁴ but it demonstrates, as do the career of Weld and others, that "colonials" could achieve important positions in the nineteenth century colonial Empire.

One of the relatively few occasions in the latter part of the century where a Governor ventured to attempt to draft legislation personally was where Sir Henry Barkly, then Governor of the Cape Colony (and a former governor of successively, British Guiana, Victoria and Mauritius) drew on his Australian experiences to draft two mining ordinances for the South African region of Griqualand West which attempted to protect small miners against large companies. In particular Barkly attempted to ensure that a "miner's right", or licence, conferred some surface rights. The statutes in question were, however, disallowed by the Colonial Office as interfering unduly with the rights of landowners.²⁵

²² Weights and Measures Act 1832(NSW).

²³ ADB, vol. 1, pp.362-364

²⁴ Dutton, G. *The Hero as Murderer: The Life of Edward John Eyre, Australian Explorer and Governor of Jamaica, 1815-1901* (Collins, London, 1967)

²⁵ Macmillan, Mona *Sir Henry Barkly; Mediator and Moderator 1815-1898* (A.A. Balkema, Capetown, 1970), p.22.

It may be noted here that this was not the only occasion when Australian resources were drawn on for South African mining law - during the brief existence of the British colonial government of the Transvaal in 1880, the Colonial Office sought copies of the South Australian mining law for use by the colonial officials.²⁶ Since the British sovereignty was short-lived, the South Australian materials supplied had no chance to bear fruit.

²⁶ Jervois to Bartle Frere, 3 April 1880, file GRG 2/19, SAPRO.

Attorneys-General prior to responsible government

The governor of a colony was supposed to be able to obtain legal advice from the law officers for the colony; the Attorney-General and the Solicitor-General. Such assistance was, particularly in the Australasian colonies and particularly during the first decades of the nineteenth century, often not forthcoming because of the inability of holders of the offices to fulfil their duties. Many were incompetent to perform their duties at the time of taking office. In the early years of virtually every colony, the Law Officers, as was the case with officials in other departments, were of far from satisfactory character. The professional limitations of such officials could arise from a lack of experience or ability or from other defects of character or temperament which made them unreliable servants for a conscientious governor. The qualities of the early Van Diemen's Land law officers have been described thus :

" The lawyers were, except for Chief Justice Pedder and possibly Alfred Stephen, a poor lot. Judge Baxter was 'an habitual sot who beat his wife with a poker'; Montagu was 'emotionally unstable' and finally had to be removed from the Bench. Of the Attorney-Generals, Gellibrand came out to escape his creditors; McClelland was dying from consumption and Macdowell, Jones and Horne were not men calculated to inspire good behaviour in the colonies".²⁷

Such a criticism does not seem misplaced. Joseph Tice Gellibrand was an able but unscrupulous individual, whose appointment owed much to patronage. He was initially of assistance to Arthur, then formed an association with R.L. Murray, one of the leading members of the ex-convict faction who formed Arthur's principal political enemies in the colony.²⁸ In 1826 the then Solicitor-General, Alfred Stephen, finding it impossible to work with Gellibrand, sought permission to resign his office and then preferred complaints against him which led to Gellibrand's suspension. His successor, McClelland, suffered from fits of mental instability, in addition to the consumption noted above. Montagu's disabilities were not restricted to his emotional state - which indeed later in life led to his being generally considered to be insane.²⁹ When he arrived in

²⁷ Shaw, Alan, "The British Contributions", in Roe, M (ed) *The Flow of Culture: Tasmanian Studies* (Australian Academy of the Humanities, Canberra, Occasional Papers No.4, 1987), p. 82.

²⁸ Shaw, A.G.L. *Sir George Arthur 1784-1854* (Melbourne UP 1980) pp.95-97.

²⁹ Keon-Cohen B.A. "Mad Judge Montagu: A Misnomer?" (1976) 2 Monash LR 50.

Van Diemen's Land, his lack of legal experience had drawn protest from the Governor.³⁰

Nor was Van Diemen's Land in any way unique in the deficiencies of its legal advisers. New Zealand's first Attorney-General, Francis Fisher, had been so unsuccessful in his work as Crown Solicitor in Sydney in 1838-9 that a second Crown Solicitor had been appointed to handle all criminal matters so as to free Fisher to reduce the backlog of civil cases. Even then Fisher was unable to remedy matters, and had been pressured into resigning his Crown Solicitorship.³¹ In South Australia the governor lost the services of a relatively capable law officer because of his defects of character and ethical shortcomings. In February 1838, George Milner Stephen, the brother of Alfred Stephen who later became Chief Justice of New South Wales, was appointed as Advocate-General of South Australia. Despite suggestions that his appointment came because he was Governor Hindmarsh's son in law, he proved at the least reasonably competent, but was to be involved in a number of unseemly controversies. Stephen was finally to leave the colony in 1844 after unsuccessfully bringing a libel action over allegations that he had misrepresented the price he received for lands he had sold so as to inflate demand for contiguous lands he still owned. Stephen lost his libel action, his reputation and the ability to carve out a career befitting his talents.³²

The reason for the employment of advisers of such incompetence is not hard to discern. They were employed largely because there were no better lawyers available at such salaries as colonial governments were able to offer - as J.F. Stephen of the Colonial Office put it.

"...you will readily feel the difficulty. Lawyers who have distinguished themselves here will not go. Those who have been long and unsuccessfully aiming at distinction are seldom fit to send, and nothing is left but the choice amongst a lot of unfledged candidates."³³

³⁰ Arthur to Stephen 25 November 1828, Sir George Arthur Papers, file CYA 2164, Vol 4, ML.

³¹ GANSW, file 4/1137.

³² Hague, pp.167ff.

³³ Stephen to Arthur, 24 April 1829, Sir George Arthur Papers, file CYA 2164/Vol 4, ML.

Where governors were forced to try to recruit suitable candidates from the population of the colonies, the position could be even worse. William Hobson found great difficulty in finding adequate legal staff at the commencement of British rule over New Zealand.

Despite Hobson's protests, Normanby, the Secretary of State for the Colonies :
 "insisted on my trusting to the chance of finding in Sydney or New Zealand parties to fill the important situations of Judge and Public Prosecutor, although I represented to His Lordship in the strongest terms the improbability of meeting Professional Gentlemen on whom I could rely, who were not already in the receipt of much larger emoluments from their practice than any which could be offered in an infant colony".³⁴

Hobson's complaints seem warranted - the lawyers he did manage to recruit were not distinguished in ability.

Where there were several persons prepared to take such sums as were offered by colonial service, patronage was - at least in the eighteenth century and the earlier part of the nineteenth - frequently more important than merit in the selection of candidates.³⁵ The occasionally surprising nature of patronage appointments is shown in extreme form by the case of Jonathan Bliss, a Massachusetts Loyalist with a Harvard education who went to England at the conclusion of the American War of Independence. In 1784 Bliss saw in the Court register an announcement that "Samuel Bliss" had been appointed as Attorney-General in New Brunswick. Bliss communicated with the Colonial Office, to learn that he was the person appointed! It may be added that Bliss appears to have deserved the support of whatever patron secured him his office, since he capped a long career in New Brunswick with appointment as Chief Justice of the colony in 1808.³⁶ Less happy was the appointment of incompetents such as William Firth and D'Arcy Boulton in Upper Canada in the first years of the decade.³⁷

³⁴ Hobson to Gipps 24 December 1839, file G36/1/6, NZNA(W).

³⁵ Heussler, Robert *Yesterday's Rulers: The Making of the British Colonial Service* (Syracuse UP, 1963), pp.7-9.

³⁶ Stockton, A.A. *The Judges of New Brunswick and their Times*, (Acadiensis magazine, St.John, New Brunswick 1907), pp.155-160.

³⁷ See Romney, Paul M. *Mr Attorney: The Attorney-General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Osgoode Society, Toronto, 1986), pp. 40-61 for an account of their careers.

A natural consequence was that the Governors frequently found it impossible to rely with confidence on the services of their official legal advisers, even when the advisers could be taken to be prepared to give assistance with the Governor's own policies. Such loyal support was not always forthcoming - there were occasions where Attorneys-General were in opposition to the Governor. On rare occasions such a failure of co-operation arose from a matter of principle, as with the difficulties encountered by Governor Brisbane of New South Wales in 1825. Brisbane instructed his Attorney-General, Saxe Bannister, draw up a bill granting indemnity to magistrates for acts done purportedly in the exercise of their office. The magistrates in question had indulged in an apparently common practice in the colony of ordering punishment, usually by whipping, of persons convicted of thefts or robberies to force the disclosure of the location of any proceeds of the crime, or to encourage the prisoner to divulge the names of any confederates. Saxe Bannister saw such practices as amounting to illegal torture, and refused to draft the Bill unless he saw the report of the Legislative Council recommending it. Brisbane, not surprisingly, refused to accept that an Attorney-General could properly put conditions on the drafting of statutes, and after a lengthy correspondence, felt obliged to suspend Bannister from office pending a reference to the Colonial Office.³⁸ His replacement, Baxter, was little better, provoking the Governor to complain that he was incompetent and "had never held a brief in his life before his arrival here".³⁹

In other cases, rather more frequently, difficulties between Governor and officials arose because of conflicts of interest - political or personal. The latter certainly appears to have been present in the early years of the South Australian colony where Governor Hindmarsh had suspended the resident Commissioner of the South Australia Company, one James Hurtle Fisher for publishing a seditious libel, and had ordered the publication by the Colonial Secretary of this fact. Mann, the Advocate-General, then proceeded to

³⁸ Brisbane to Bathurst 11 October 1825, printed in HRA, Ser.1, vol.11, p 881.

³⁹ Darling to Hay, 27 October 1827, HRA, Ser.1, vol.13, p.565.

appear, allegedly in his private capacity, for the suspended Fisher in a civil action for defamation against the Colonial Secretary for the publication of the item whose publication had been directed by the Governor.⁴⁰ It is not hard to imagine that the Governor did not see this as proper behaviour by the Crown's principal legal adviser.

The inability of the Colonial Office to supply suitable legally qualified officials to the colonies was to have a number of significant consequences. Perhaps the most important, in the long run, was that it provided the opportunity for advancement of lawyers resident in the colonies - although in the period before 1840, these lawyers had usually qualified in the United Kingdom, there were later a number of colonially qualified lawyers who gained official positions. The careers of such leading colonial figures as Sir Richard Hanson in South Australia, Sir Alfred Stephen in New South Wales and Sir John Beverley Robinson in Upper Canada all owed much to early selection for office when patronage appointees were forced, for one reason or another, to relinquish office. The influence of such colonially experienced lawyers in turn tended to encourage the enactment of legislation specifically drawn up to accommodate the vagaries of colonial circumstances. Secondly, it undoubtedly influenced a number of governors into placing greater reliance on other sources of legal advice, most particularly into seeking advice and assistance from the judiciary. Thirdly, although direct evidence is scarce, it seems a fair inference that the inadequacy of some Attorneys-General encouraged the use of legislation drawn from other colonies - on the basis that it was safer to adopt the text of a statute which had been found to work well enough elsewhere than it was to try to draft an enactment from scratch .

⁴⁰ Hague, pp. 140-145.

There were also occasions where other officials were drafted in to assist the law officers - not always with happy results. South Australia furnishes a prime example when many

of its first statutes were drafted by the Governor's secretary with unfortunate results:

"of the seven Acts passed in 1837, two were disallowed, two more were marked down by the Commissioners for disallowance so soon as they could be replaced by better substitutes, but were forgotten, and a fifth proved almost useless".⁴¹

⁴¹ Hague, p.345.

Law Officers during responsible government

Once the colonies attained responsible government, the position of Attorney-General became a political office in all the colonies. In most colonies there was also a political Solicitor-General. One exception to this was in New Zealand, where James Prendergast was appointed as a non-political and permanent Attorney-General in 1865 and held office for 10 years.⁴² The transformation to political officeholders did not always guarantee that the Attorney-General would be competent at his duties, but it is certainly likely that the average level of competence was considerably higher after responsible government than before it. In terms of the preparation of parliamentary material and bills, however, the transition to political officeholders was not an unmixed benefit. Political officers were more able and more likely to prepare legislation of some quality. They carried more weight in the local parliament, and were therefore more likely to achieve enactment of the bills prepared. Yet the demands made on minister's time by political duties meant that colonial law officers frequently had less time to devote to the preparation of legislation. One measure of this is that the author of an institutional study of the Attorney-General in Upper Canada and Ontario Canada makes only a small number of passing references to the Attorney-General's role in the drafting of legislation, then a task under his supervision.⁴³

The advent of responsible government did not always bring to an end the difficulties of ensuring effective performance of their duties by the legal advisers to the Crown. In South Australia in 1856, the progress of a government bill, the Supreme Court Consolidation Bill, was distracted because the Advocate-General refused to bring it forward, despite the cabinet backing for it, because he considered that it was for the most part superfluous. The only new element in the Bill was to allow the title of Chief Justice to be conferred, a matter the Advocate-General thought, for reasons which were

⁴² For Prendergast's career, see Cooke, R.B.(ed) *Portrait of a Profession* (A.H. and A.W. Reed, Wellington, 1969), pp. 43-44.

⁴³ See Romney, Paul M. *Mr Attorney: The Attorney-General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Osgoode Society, Toronto, 1986), *passim*.

never comprehensibly expressed, was inappropriate for a colonial parliament. However misguided he may have been, the upshot of his refusal to act was to ensure that the proposed provision regarding the title was not enacted in that year.⁴⁴

There appears to have been a period of some years after the attainment of responsible government in each colony where the primary responsibility for the preparation of legislation fell on the Attorney-General. In several cases the demands of the office proved too great to allow this to continue, and other mechanisms had to be found to deal with the drafting of bills. The two principal expedients resorted to, the briefing out of legislation to practitioners and the appointment of permanent Parliamentary Draftsmen are considered later.

In some colonies it is clear that the Attorneys-General continued to bear the brunt of the legislative drafting. Two early Queensland Attorneys-General, Ratcliffe Pring and Charles Lilley, were prolific lawmakers - indeed the large number of statutes passed in 1867 has been attributed to the rivalry between the two.⁴⁵ In later years a large proportion of the bills brought before the Queensland Parliament were prepared by Samuel Walker Griffith. Griffith's dominant position in legal practice and in politics has been well described,⁴⁶ but his eminence in drafting has not always been emphasised. Even a parliamentary opponent was prepared to describe him as the best Parliamentary Draftsman in Australia.⁴⁷ It seems clear that Griffith drafted many bills both in office and in opposition,⁴⁸ although much work was briefed out to practitioners.

In South Australia the Attorney-General prepared eleven of 66 bills (including private member's bills) introduced in 1879, and 13 of 65 the following year. More than a

⁴⁴ Minutes of Exec.Co. of South Australia 21 June 1856, file GRG 40/1/4, SAPRO.

⁴⁵ Bernays, C.A. *Queensland Politics during 60 Years* (Government Printer, Brisbane, 1921), pp. 11, 13 and 43.

⁴⁶ For details of Griffith's life, see Joyce, R.B. *Samuel Walker Griffith* (U Queensland Press, 1984) and Graham, A.B. *The Life of the Right Honourable Sir Samuel Walker Griffith* (University of Queensland, 1938). Neither work does more than mention in passing his work in drafting legislation.

⁴⁷ (1891) 64 QPD (1st) 968.

⁴⁸ (1891) 64 QPD (1st) 969.

decade later, the Attorney-General prepared 23 bills of 54 introduced in 1894 and 15 bills (of 35 introduced) in 1899.⁴⁹ In Tasmania, too, the bulk of the work was done by the Attorney-General, though with some limited assistance from practitioners briefed for specific bills. It is notable that there is no mention of fees for statute drafting in the official return of governmental monies paid as fees to lawyers other than Law Officers for legal work over a two year period from June 1873 to June 1875.⁵⁰ In the 1890s, the Attorney-General was also assisted by the efforts of a Legislation Committee of the local Law Society.⁵¹ There also appears to have been at some time a draftsman employed within the Attorney-General's office to draft legislation, a position which in 1899 gave rise to the appointment of W.O. Wise as the first officially-styled Parliamentary Draftsman.⁵²

New Zealand and in Western Australia also appear to have relied principally on the Attorney-General. In the latter colony, one Attorney-General, Septimus Burt, claimed in 1893 that more than 100 bills had been passed into law since 1890, and only two, the bills for the Transfer of Land Act 1893 and the Customs Act 1892(drafted by the head of the Customs Department in Melbourne!) had been briefed out,⁵³ though on occasions the reliance on a busy lawyer and politician did cause delays in the introduction of legislation.⁵⁴

In all these colonies, the reason for reliance on the political officer is not hard to divine. In all the colonies mentioned, it was simply a case that employment of a permanent draftsman was an undue burden on the often fragile government budget,⁵⁵ particularly

⁴⁹ The following discussion is drawn from data in the Record of Bills introduced, File GRG 1/66, SAPRO.

⁵⁰ 1875 Tas.H.A.Jo. No.4.

⁵¹ I am indebted to Mr Stefan Petrow, Law Librarian at the University of Tasmania for this information, and for the reference in the following note.

⁵² Wettenhall, R. L. *A Guide to Tasmanian Government Administration* (Platypus Publications, Hobart, 1968), pp 87-88.

⁵³ (1893) 4 WAPD 394.

⁵⁴ See the different views of this issue by Cookworthy (1893) 4 WAPD 389 and Septimus Burt, the Attorney-General, (1893) 4 WAPD 394.

⁵⁵ Canning, (1893) 4 WAPD 391, and Burt, (1893) 4 WAPD 394.

as briefing out might still be needed in cases where special expertise was needed. Factors of this nature inclined the Queensland government in 1889 not to re-create the position of parliamentary draftsman which had briefly existed in the 1860s.⁵⁶

The paucity of official resources on occasion drove colonial leaders to various expedients to supplement the official machinery. The premier of Western Australia, John Forrest, on several occasions sought assistance from other states. He made enquiries of the New South Wales government concerning legislation in force in New South Wales relating to sweepstakes on horse-races⁵⁷ and later concerning the regulation of chemists. Forrest also made private enquiries of leading lawyers in other states. Thus in 1890 he asked S. W. Griffith for a copy of a proposed amendment to the Queensland Audit Act, going on to say:

"and I will be glad also to receive any of your acts which you can recommend to me".⁵⁸

Later that year Forrest asked Griffith:

"Have you a law relating to Entail?; if so please send it me - some of our properties are entailed and a measure must be devised of improving them"⁵⁹

Where the governor of a colony could not rely on his law officers, it was natural that recourse was had to the judiciary - an alternative and, in some cases, better qualified source of legal advice. In the first two Australian colonies the Chief Justice was a member of the Legislative Council; this pattern was not always followed in those created later. Even when the Chief Justice ceased to be a member, he was frequently consulted on draft legislation, particularly that touching the courts.⁶⁰ In South Australia the judges were not members of the Legislative Council but on occasions did attend

⁵⁶ (1891) 64 QPD 970 and (1892) 67 QPD 374. For the use of similar arguments in South Australia, see 1868 SAPD 149.

⁵⁷ Memo by Watkins, 13 December 1892, and Watkins to Under-secretary for Trade and Finance 11 October 1895, Letter-book, APCNSW.

⁵⁸ Forrest to Griffith 1 October 1890, SW Griffith papers, file MSQ.186, DL. Emphases in original.

⁵⁹ Forrest to Griffith, 17 Nov 1890, SW Griffith papers, file MSQ.186, DL.

⁶⁰ e.g. see the reference to the Chief Justice of the Court of Requests Bill 1832, Correspondence Books, Attorney-General to Colonial Secretary, 24 April 1832, file 9/2677, GANSW.

Council meetings at the request of the Governor to discuss specific items.⁶¹ Similarly, in New Zealand, Chief Justice Martin was not a member of the Legislative Council, but had a significant influence on the shape of some of the legislation affecting the courts.⁶² It is notable that much of this work involved consideration of legislation from other colonies. As Martin himself put it:

"For the work of adapting the practice of the English laws to the circumstances of this country, much benefit has been derived from the General Orders recently put forth by the Supreme Courts of the Cape and of Ceylon, from the general Rules of the Civil Court of Western Australia and from the practice of New South Wales".⁶³

Only in Western Australia was there an appointment of a judge to the Council, and even there, the then Commissioner of the Civil Court, one W.H. Mackie, was appointed to the Legislative Council as a private individual in 1842, not as a concomitant of his office.⁶⁴ Later another Commissioner of the Court was to be appointed to the Legislative Council, with less happy results. When Alfred McFarland⁶⁵ was appointed Commissioner of the Civil Court in 1858, he also sat on the Legislative Council where he caused consternation by publicly attacking various prior colonial statutes as "trampling on the liberties of the people".⁶⁶ A little later that year he caused further difficulties by criticising the drafting of a bill to adopt parts of the United Kingdom Passenger Acts, which bill the Attorney-General regarded as perfectly adequate in its technical aspects.⁶⁷ However when A.P. Burt became Chief Justice of the Western Australia, although he did not sit in the Legislative Council, the colony gained not only a good judge but also a competent and active legislative draftsman. Burt's achievements included the Criminal Law Consolidation Ordinance 1865(WA) as well as the Recovery

⁶¹ e.g. Minutes of Exec.Co. of South Australia, for 13 and 14 January 1840, discussions of the Registration Bill and Jury Amendment Bill; GRG40/1/1, SAPRO.

⁶² Shortland to Stanley, 8 May 1843, CO 209/21.

⁶³ Enclosure to Shortland to Stanley, 8 May 1843, CO 209/21.

⁶⁴ Russell, p. 37.

⁶⁵ For details of McFarland's career in Western Australia and New South Wales, see Russell, pp 82-83

⁶⁶ Kennedy to Lytton, 13 July 1858, CO 18/106

⁶⁷ Kennedy to Labouchere, 13 September 1858; CO 18/106

of Debts Ordinance 1865(WA) of the same year, and he had been instrumental in adapting English reform legislation for the Supreme Court Ordinance 1861(WA).⁶⁸

It seems that in the north American colonies the judges were also very influential in shaping legislation, sometimes because of their expertise but also, on occasion, because the colonial governor treated them as more important advisers than the law officers. William Osborne, the first Chief Justice of Upper Canada overshadowed the Attorney-General both in the giving of advice to the Governor and in the drafting of major statutes.⁶⁹

Not all colonial judges were in a position to offer much in the way of assistance. In the early years of the Australasian colonies the judges were a most heterodox group. Many of them were drawn from the junior ranks of the British legal profession - William Martin had been called to the bar only four years before appointment to the Chief Justiceship of New Zealand, and may never have appeared in court in that time.⁷⁰ His erstwhile colleague, Henry Chapman, had had even less time at the bar, although he had extensive experience in other professions.⁷¹ Other colonial judgeships went to people with tarnished reputations which made success in England unlikely.⁷²

Another recruiting ground for judges was the body of officials already in colonial service, to whom the prospect of becoming a colonial judge was more alluring than remaining in their current positions or returning to England. In the early nineteenth

⁶⁸ See Burt to Hampton, 1 May 1865, enclosed with Hampton to Cardwell, 20 July 1865, CO 18/143

⁶⁹ Romney, Paul M. *Mr Attorney: The Attorney-General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Osgoode Society, Toronto, 1986), pp. 18-19.

⁷⁰ Lennard, G. *Sir William Martin* (Whitcombe and Tombs, Christchurch, 1961), pp.2-3.

⁷¹ Spiller, Peter, *Two Judges - Father and Son: An analysis of the careers of Henry Samuel Chapman and Frederick Revans Chapman*. (thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy, University of Canterbury, 1991), pp 14-18 and 30-31.

⁷² Some appointments can only be explained by a combination of patronage in the Colonial Office or other circles of power and a dearth of other candidates. Into this class of appointments fall such persons as Sir John Jeffcott, the first Chief Justice of South Australia, who had been tried for murder (in a duel) while on leave in England from the Chief Justiceship of the Gambia (see Castles and Harris, pp.58-9) and Sydney Stephen, apparently appointed to the Supreme Court of New Zealand in compensation for his misfortunes in Van Diemen's Land where he had been struck off the rolls for contempt, a conviction later reversed by the Privy Council (see Cooke, R.B. (ed) *Portrait of a Profession* (A.H. and A.W. Reed, Wellington, 1969), pp. 50-51).

century, it was almost as common for judges to serve in a number of different colonies as it was for Governors to do so. Such a judicial career might well be marked by considerable controversy requiring a change of scene, but provided the judge had some backing from the Colonial Office, or from patrons in Britain, a new position would be likely to be forthcoming. One of Australia's first judges, Jeffery Hart Bent, who served as Judge of Supreme Court of Civil Jurisdiction in New South Wales from 1814 to 1817 furnishes an early example. Bent was removed from the Supreme Court bench for misuse of his judicial powers in 1817, but this did not later prevent his later appointments as Chief Justice of Grenada in 1819. Suspended from that office in 1830 for alleged misconduct and lack of impartiality, Bent appealed successfully to the Privy Council and was reinstated in 1832. He later became a puisne judge in Trinidad in 1833 and then was successively Chief Justice of St. Lucia (1835) and of British Guiana from 1836 to his death in 1852.⁷³ That record of movement and re-employment may stand comparison even against that of the better known career of John Walpole Willis, who had the distinction of being removed from the bench in three different colonies.⁷⁴

Not all such peripatetic judges were of inferior quality - the career of Francis Forbes reveals qualities which would have brought distinction in any company. Forbes was born in Bermuda and was educated there and in England. He read law at Lincoln's Inn, and was called to the Bar in 1812, by which time he had already been appointed as Attorney-General of Bermuda. He was then, in 1816, appointed as Chief Justice of Newfoundland, and served there for several years prior to appointment as the first Chief Justice of New South Wales.⁷⁵ Certainly once established in New South Wales he had often to draft legislation - although this perhaps owed as much to the incompetence of the Attorney-General, Saxe Bannister as to Forbes's own preference.⁷⁶

⁷³ Currey, C.H. *The Brothers Bent* (Sydney UP, 1968), ch. 2.

⁷⁴ Behan, H.F. *Mr Justice J.W. Willis* (privately published, Melbourne, 1979) and Keon-Cohen, B.A. "John Walpole Willis: First Resident Judge in Victoria" (1971-72) 8 MULR 703.

⁷⁵ See Currey, C.H. *Sir Francis Forbes* (Angus and Robertson, Sydney, 1968), *passim*.

⁷⁶ Cf Therry, R. "*Reminiscences of Thirty Years Residence in New South Wales and Victoria*" (first published 1863, facsimile edition Sydney UP, 1974) pp.333-4.

Forbes's sometime colleague, John Stephen had also had experience of the West Indies, having been in practice there before coming to Sydney as Commissioner of Requests.⁷⁷ His Australian career saw him become successively Solicitor-General of New South Wales and then a Supreme Court Judge in that colony. He also deserves note as the founder of a great Australian legal family, which included, in the period covered by this study, his sons, George, sometime Colonial Secretary and Advocate-General of South Australia, and Alfred, Solicitor-General and Attorney-General of Van Diemen's Land and Chief Justice of New South Wales, as well as, in the twentieth century, Sir Ninian Stephen, judge of the High Court of Australia and Governor-General of Australia. To what extent the family owed its Australasian opportunities to the fact that John Stephen's nephew, James Fitzjames Stephen, was successively legal adviser and the Permanent Under-Secretary at the Colonial office must remain a matter of conjecture.⁷⁸

What is notable in the early years of the Australasian colonies is the way in which the pattern of recruitment gradually alters so that increasingly the judges come from the ranks of the legal profession of the colony itself. Most of the judges so recruited had acquired their professional qualifications in Britain, but at least in the 1840s and early 1850s, it was relatively rare to find a judge appointed direct from the English Bar. More common were appointments of former colonial law officers (such as Montagu in Van Diemen's Land and Alfred Stephen in New South Wales). On occasion too practitioners, such as Henry Gresson in New Zealand, were offered judicial honours. This is not to say lawyers who had not been admitted in Britain were seen as appropriately qualified for the colonial bench - as late as 1842 the New South Wales Legislative Council could propose that only barristers admitted in the United Kingdom be eligible for appointment to the Supreme Court bench (a view which drew an unfavourable reaction from the Colonial Office).⁷⁹

⁷⁷ ADB, vol 1, pp 476-8.

⁷⁸ For a study of the family relationships, see Fitts, C.H. "Lines of Communication" (1953) 6 *Med. Leg. Soc. Vict. Proceedings* 123.

⁷⁹ Gipps to Stanley, 17th November 1842; HRA, Ser 1 Vol 22, p. 365-66.

It is interesting to compare the patterns of appointment to the bench in the British North American colonies with those in Australasia. In New Brunswick, the judges appointed in the first twenty years or so (1794-1824) were usually United Empire Loyalists who had emigrated to Canada rather than remain in the United States. Such men had received their legal training, for the most part, in the various American colonies though some had undertaken study in Britain. By the 1820s however, the practice of appointment of New Brunswick residents had come close to hardening into a convention that only resident practitioners would be considered. There appears to have been only one case, that of James Carter in 1834, in which an English barrister was appointed, and much local protest was evinced at the appointment.⁸⁰ A similar pattern of local appointments is to be found in Upper Canada, although there the early judges appear to have come more from the English Bar than from Loyalist emigres. Only one judicial appointment after 1830 went to a man not well established in practice in Upper Canada, and even then the appointee, Robert Sympson Jameson, had some local experience. Jameson had been called to the English bar in 1821, served as a puisne judge in Dominica from 1829 to his appointment in 1833 as Attorney-General of Upper Canada - the last holder of that post to be appointed by the United Kingdom, rather than the Upper Canadian Government. Jameson held that post until his appointment as first Vice-Chancellor of the new and separate Court of Equity, and was also an elected Member of the Legislative Assembly from 1835-1837.⁸¹ With that background, at least some colonial experience can be claimed for him.

The question of determining the contemporary cast of thought in colonial legal circles has been considered earlier⁸², but it should be noted that the appointment of men with colonial experience tended to increase the likelihood that the laws they advocated or

⁸⁰ Stockton, A.A. *The Judges of New Brunswick and their Times*, (Acadiensis magazine, St.John, New Brunswick 1907), pp.339 ff.

⁸¹ Read, David B. , Q.C. *The Lives of the Judges of Upper Canada and Ontario; from 1791 to the Present Time* (Rowsell and Hutchison, Toronto, 1888), pp.188-200.

⁸² See above, pp. 15-20.

administered would take account of colonial realities and practices; there was the less likelihood of any unthinking attempt to copy English law.

In New South Wales, there was again significant reliance on the judges for some matters. It appears that Sir Francis Forbes was required to prepare much of the legislation passed in the years 1823-25 because the then Attorney-General, Saxe Bannister, was not capable of preparing satisfactorily the bills required.⁸³ The three Supreme Court judges, Forbes, Stephen and Dowling proposed to Governor Darling⁸⁴ that they draft local legislation to remedy the perceived difficulties arising from the terms of the Administration of Justice Act 1828(NSW), particularly with regard to the introduction and control of juries. This offer was refused, but the judges were promised the opportunity to examine the bills prepared by the colonial Law Officers⁸⁵

Nor were these the only occasions where the New South Wales judges prepared, or otherwise influenced, legislation in the Crown Colony period. Another leading colonial jurist of the period was W.W. Burton, later Sir William Westbrooke Burton. Burton had studied law after service in the navy, was called to the English Bar in 1826, and the following year appointed a puisne judge in the Cape Colony. There his colleague Sir John Wylde, the Chief Justice, was a former Judge-Advocate-General of New South Wales. It was to that latter colony that Burton went as a puisne judge in 1832, a position he retained until appointed to the Madras Supreme Court in 1844. Burton's role in the creation of colonial bankruptcy law has already been considered⁸⁶, but Burton was also influential in shaping the form of the Crown Lands Encroachment Act 1833(NSW) passed by Bourke in an attempt to deal with the unlawful occupation of Crown land by the pastoralists who were to become known as squatters. Burton's involvement with this legislation presumably owed much to his friendship with Bourke:

⁸³ Therry, *op.cit.* n.76, pp 333-4.

⁸⁴ Forbes to Darling, 5 February 1829, file 4/6651/218-21, GANSW.

⁸⁵ Darling to Forbes, 7 February 1829, file 4/6651/221, GANSW.

⁸⁶ See above, pp.113ff.

a friendship which had first formed during Bourke's term of office as governor of the Cape Colony.⁸⁷ Burton also authored the first draft of the legislation passed in New South Wales in 1839 to permit the admission of the evidence of non-Christian Aborigines in judicial proceedings.⁸⁸

In other cases judges were asked to scrutinise bills prior to submission to the legislature - though the practice was subjected to some criticism in South Australia in the late 1860s as being of dubious constitutionality.⁸⁹ Even after colonial developments had obviated a need to rely on judges for drafting, there were still occasions on which judges took the initiative - Sir Charles Cooper as Chief Justice of South Australia in 1861 drafted a bill to regulate the sale of goods distrained for rent.⁹⁰ On other occasions the judiciary were consulted on proposed legislation. In New South Wales in 1887, for instance, the Chief Justice corresponded with the Minister of Justice over possible amendments to the legislation controlling the Supreme Court. In the same year there was further correspondence over the judges' recommendations for changes to the Probate Act. The next year saw the judiciary recommending the repeal of the Criminal Law Amendment Act 1884(NSW) which they regarded as imposing unreasonably harsh sentences.⁹¹ In 1892 the Judge in Bankruptcy appears to have been the primary source of instructions as to the drafting, by the Parliamentary Counsel, of the Bankruptcy Amendment Bill.⁹² Nor was legislative drafting solely a matter for the superior court judges. In South Australia G.F. Dashwood, a stipendiary magistrate, prepared a bill for the payment of jurors in criminal cases.⁹³

⁸⁷ King, Hazel "Richard Bourke and his Two Colonial Administrations; a comparative study of Cape Colony and New South Wales" JRAHS, 1964, vol.49, p.360 at pp.370-373.

⁸⁸ See enclosures with Normanby to Gipps August 31 1839, file A 1280, ML. The legislation is considered in more detail above, pp. 52-55.

⁸⁹ R.C. Baker 1868 SAPD 148.

⁹⁰ Cooper to Attorney-General, 24 August 1861, file GRG-1/4, SAPRO.

⁹¹ Martin to Minister of Justice 19 April 1887; Martin to Acting Under-Secretary for Justice, 30 April 1887 and Martin to Minister of Justice, 3 May 1888, all in file COD 89A-90, GANSW.

⁹² Watkins to Secretary of Justice, 6 Oct 1892, Parliamentary Counsel's Letterbook, APCNSW.

⁹³ Dashwood to Attorney-General, 17 May 1865, file GRG-1/4, SAPRO.

In other colonies there were other officials who on occasion undertook the preparation of legislation - in Ontario in the 1850s and 1860s, a considerable amount of drafting was done by the law clerk of the Legislative Assembly⁹⁴.

In most colonies it became obvious that as the colony developed and its social and economic affairs grew more complex, the burden on the local legislature also increased. One consequence in many of the larger colonies was that arrangements for the preparation of legislation which might have sufficed during the Crown Colony period, or even during representative government, proved inadequate. Alternatives had to be found. These commonly were the appointment of specialist officials as draftsmen and the briefing out of the preparation of legislation. It is to their development and use that attention is now turned.

⁹⁴ Romney, Paul M. *Mr Attorney: The Attorney-General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Osgoode Society, Toronto, 1986), p.187.

Chapter 7

Practitioners, Parliamentary draftsmen and their contribution to colonial law.

As has been discussed in the previous chapter, it became obvious in most colonies that the preparation and drafting of legislation was too great a burden to be discharged solely by the government's law officers. The disparity between the government's legal resources and the demands of legislative programmes were such that the use of unofficial expedients could not provide a remedy. Not surprisingly those colonial governments who could afford to do so sought to alleviate their problems by acquiring further legal expertise. The simplest source was to commission practitioners to draft specific legislation. This became a widespread practice, though its frequency fluctuated over time - partly at least in response to fluctuations in governmental finances. In some colonies circumstances ultimately favoured a permanent official draftsman, in others the use of part-time draftsmen on an ad hoc basis continued. The collective efforts of these official draftsmen produced a significant proportion of Australasian statutes in the latter half of the century, and the way in which their tasks were allocated and performed gives a degree of insight into the formation of the large body of colonial statute law which developed in this period.

Commissioning of practitioners to draft statutes

Where the existing structures could not provide the drafting services required by the state of public affairs, the logical response was to place the preparation of at least some public bills in the hands of members of the legal profession - a "logical" response, because there had long been two spheres in which it seems to have been a matter of expectation for most, if not all, of the century that bills would be prepared at private expense.

The first such sphere is in the measures whereby an individual or a syndicate was seeking to have the colonial parliament grant some special favoured status. In the early years such legislation most commonly took the form of private acts which sought the benefits of incorporation, as with the statutes for the incorporation of various banks.¹ However similar statutes had been passed securing a right or privilege such as the right to charge tolls over a roadway or wharf² or, as was for much of the century the case, a statutory grant of patent rights. In any such case, it was apparently assumed that the parties seeking the statutory privilege were to be responsible for the drafting of the bill, though it would be subjected to review by the colonial Law Officers.³ The same seems to have been true for special interest legislation such as the legislation passed to regulate whale fisheries in Van Diemen's Land in 1837⁴ and South Australia in 1838⁵

The second, and perhaps more important second sphere was that of private member's bills. Nineteenth century parliaments accorded far greater importance to private member's bills than is now the case. In New South Wales it was the custom late in the century for there to be two days of Government business and two of private members business per week, although on occasion one of the latter could be used for Government business.⁶ The general rule in most colonies⁷ for such bills was that their preparation

¹ As late as 1848, the Savings Bank Act 1848 of Van Diemen's Land was privately drafted; Denison to Grey, 6 November 1848, CO 280/228.

² Eg the solicitations of the South Australia company for bills for a toll road to Port Adelaide and a toll wharf thereat in 1839, see file GRG 2/73, SAPRO.

³ See e.g. Minute of the Executive Council of South Australia, 26 March 1849, on negotiations with syndicates seeking railway concessions in South Australia, which led to the enactment of the Adelaide City and Port Railway Co. Act 1850, No.1 (private); file GRG40/1/3, SAPRO .

⁴ Franklin to Glenelg, 30 December 1837, CO 280/81.

⁵ Minutes of Exec. Co. of South Australia, 20 June 1839, file GRG/40/1/1, SAPRO.

⁶ Parsons, pp.231 and 256.

⁷ In Ontario, private member's bills were on occasion prepared by the law clerk to the Legislative Assembly: Romney, Paul M. *Mr Attorney: The Attorney-General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Osgoode Society, Toronto, 1986), p.187.

was a matter for the private member concerned, and he would either draft the measure himself or pay for its drafting by a lawyer.⁸

Because drafting costs could be high - £40 to £50 on occasion⁹ - many private members' bills were abandoned.¹⁰ There was a consequent and inevitable desire of members to obtain the assistance of Government funds, directly or through the services of a parliamentary draftsman, for the preparation of private members bills.¹¹ Where a Parliamentary Draftsman was appointed, politicians were usually eager to seek and to give assurances that his services would be available to all,¹² even though such promises may not always have been carried out.¹³ Where no draftsman was available, there may have been occasional cases where state funding was available. At some time in Victoria prior to 1863, a small sum appears to have been allocated for the drafting of bills introduced by opposition members.¹⁴ Another possibility was mooted in Queensland, where it was suggested by Griffith that the Government might pay for the drafting of particular bills initiated by members of the opposition (though not "frivolous proposals").¹⁵ Whether anything came of this is not known.

Once the decision was made that the preparation of legislation would need to go outside established governmental circles, the critical question was whether the work would be distributed among a circle of practitioners or be largely confined to one or two individuals. Here practices seem to have differed considerably. As is discussed below,

⁸ There was one measure, the Settled Estates Act 1886(NSW), where the Government of the day paid for the drafting of a private member's bill; Parsons, p.286. There were also some possible exceptions in other colonies, see below p.146.

⁹ See 1868 SAPD 148.

¹⁰ 1863 9 VH 321.

¹¹ See the sentiments variously expressed at 1868 SAPD 148; (1863) 9 VH 321, (1891) 4 WAPD 389 and (1891) 64 QPD (1st) 968-71.

¹² (1856) 1 VH 136-7; (1857) 2 VH 743; (1866) 2 VPD 84; cf Report of proceedings in NSW Legislative Assembly 5th Oct 1881, copy in Alexander Oliver papers, University of Sydney Library.

¹³ Cf Griffith's comment "I never heard of a Parliamentary Draftsman anywhere who is employed in drafting bills for private members" (1892) 67 QPD 376.

¹⁴ (1863) 9 VH 321

¹⁵ (1891) 64 QPD 971.

South Australia for almost the whole century distributed drafting work relatively widely without giving security of employment to any one draftsman. It may also be noted that on at least one occasion a measure was prepared by someone not in current legal practice, since Ulrich Hubbe¹⁶ appears to have drafted at least one bill on his own account, intended to establish uniformity of succession on intestacy.¹⁷

Commissioning individual lawyers to prepare legislation was not entirely satisfactory, for a number of reasons. Reliability may well have been a problem. Certainly there were occasions where the quality of legislative drafting gave rise to continuing political controversy. Perhaps the best known of these was in connection with the Land Act 1862(Vic), a statute which proved largely ineffective in curbing the squatter control of rural lands because conditions imposed on the purchaser of land from the Crown it were not, under the Act, binding on persons to whom the land was assigned. The Act was apparently drafted especially by W.E. Hearn,¹⁸ then Professor of Law at Melbourne University (who received £500 for his efforts). The Premier, Gavan Duffy was later to assign the blame for the failure of the Act not to its draftsman, Hearn, but to the failure of Richard Davies Ireland, the then Attorney-General, to ensure the assignee's position was covered. Ireland in 1867 made a speech which could be interpreted as meaning that he had realised the flaw in the drafting of the crucial sections while they were being prepared, but had not then disclosed the difficulty to his political colleagues.¹⁹ Whether or not this was the case,²⁰ it is certain that Ireland's political career was devastated.

¹⁶ For Hubbe's involvement in the Torrens title legislation, see chapter 11.

¹⁷ Hubbe to Attorney-General, 28 March 1865, file GRG-1/4, SAPRO.

¹⁸ The biography of Hearn by Copland, D.B. *W E Hearn, First Australian Economist* (Melbourne UP 1935), unfortunately almost completely ignores his activities in the law.

¹⁹ See Gavan Duffy, Sir Charles *My Life in Two Hemispheres* (2 vols, T. Fisher Unwin London 1898, facsimile edition Irish, U.P. 1969) vol.2, pp.227-234 and p.287.

²⁰ It has been argued that Ireland's 1867 statement meant no more than that there was a deliberate choice to omit mention of assigns in order to promote certainty of title, even though the risk of abuse of the Act was foreseen; see Ireland, John "Three Cheers for Mr Ireland" (B.A.Hons.Thesis, University of Melbourne, 1988, copy in La Trobe Library, Melbourne). Ireland's defence cannot be said to be not entirely convincing.

Cost was not the only ground on which the appointment of permanent draftsmen was advocated. Many proponents of the office appear to have been of the opinion that it would prevent the diversion of public funds for patronage or partisan ends. Arguments ranged from that of a South Australian conservative that the payment of drafting fees to a member of parliament was unconstitutional²¹ to the view expressed by Melbourne journals in 1858 that payment of legal fees to members of parliament allowed a hidden and corrupt method of political advantage to the Government.²² Similar allegations of the abuse of patronage powers were made in Queensland.²³ It is not surprising to find that Ministers would on occasion seek to show that their selection of lawyers for drafting work was not influenced by questions of party orientation.²⁴

In other cases the attack on the briefing out of drafting seems no more than a special case of the suspicion of lawyers which appears endemic in colonial circles of the time. Thus one politician could claim that the Victorian Government had been charged high fees for inferior work, including fees for bills never actually introduced.

"In fact it would appear that the proceeding had been adopted as a quiet way of pensioning off poor gentlemen of the legal profession"²⁵

This and similar accusations brought calls for measures to make draftsmen more accountable by showing on the face of the bill the fees paid for its drafting,²⁶ or that a fixed scale of fees should be established.²⁷ Neither suggestion was adopted.

²¹ R.C. Baker 1868 SAPD 777. A politician of different hue, J.P. Boucaut, during the same period suggested that a Parliamentary Draftsman would in effect instruct politicians on how to proceed, an equally unconstitutional proceeding, see 1868 SAPD 151.

²² *Argus* 11 November 1858; *Age*, 9 November 1858.

²³ (1882) 38 QPD (1st) 1325, concerning a large fee paid to F.A. Cooper for a consolidation and index to the Queensland statutes.

²⁴ e.g. (1879) 31 VPD 1501; 1889 SAPD 525.

²⁵ (1863) 9 VH 1229. See also (1863) 9 VH 1035.

²⁶ 1869 SAPD 813-4; 1890 SAPD 2250.

²⁷ (1858) 3 VH 317.

Parliamentary draftsmen

It was a logical response to the problem to consider the appointment of a government official who would be responsible for the preparation of legislation. New South Wales appears to have initiated the specific office of "Parliamentary Draftsman" in New South Wales in 1856, where the title was conferred on two barristers who were supposed, in some nebulous manner, to undertake a part-time obligation to appraise English legislation for reforms that should be adopted in New South Wales. These first office-holders were only expected to spend a part of their time on the drafting duties. It appears that this proved unsatisfactory and New South Wales moved to a permanent official in the 1870s. Victoria first created the post as a full-time one. There had been proposals, going so far as the placing of appropriate sums on the Estimates, of part-time appointments in 1856 and of a full-time appointment in 1866, although neither appear to have reached the stage of appointments being made.²⁸

These developments represent the greatest movement toward a professional drafting service. Developments in the other colonies are discussed below, but they can be summarised by saying that they all lagged behind New South Wales and Victoria. Queensland, despite an early start, appears to have only had part-time draftsmen until well into the twentieth century, and if South Australia ever appointed a specific official, it was for the briefest of periods. Tasmania appointed a draftsman only in the last years of the century, while Western Australia appears not to have had such an official at all in Victorian times.

It is clear that the Victorian decision to appoint a permanent and full-time parliamentary draftsman was largely motivated by a desire to cut the cost of statutory drafting, though this may not have been the sole reason. The debate on the Law Department Estimates in 1879, which contained provision for a sum of £610 for the annual salary of a permanent full-time Parliamentary Draftsman, is informative. The debate indicates a

²⁸ (1856) VH 136-7 and (1866) 2 VPD 84.

consensus that the change was a good one, though concern was expressed about the availability of the Parliamentary Draftsman's services for the preparation of private member's bills and Opposition measures. Indeed, the most frequent comments doubted that a single draftsman would be able to keep pace with the demands for his services, and a belief that the overall costs of legislative drafting would be diminished. On this point Sir Bryan O'Loghlen, the Colonial Secretary, indicated that some contracting out to persons with special expertise would still occur, but that it was expected that the overall cost of preparation of Bills would decline substantially from the £4,000 - £5,000 allegedly spent in some prior years.²⁹

By contrast, it is not clear exactly why New South Wales changed in 1877 from part-time parliamentary draftsmen to full-time officials. It seems a reasonable surmise that it was thought the government would receive better and more economical service from a single salaried, full-time Parliamentary Draftsman at a salary of £1100 p.a., the figure first settled on, compared to the sums then spent of £250 p.a. paid to the part-timers³⁰ and the (presumably sizeable) fees paid for other legislative materials briefed out to other members of the profession. It may also be that the case for a full-time draftsman was perceived to be stronger because the British Government had created the position of Parliamentary Counsel in 1869. If that factor was significant, some mention of the British office could be expected in the occasional public debates on the Australian offices. No such references appear in the available documents but since these are far from comprehensive the possibility that the inception of the British institution affected the colonial practice cannot be ruled out.

In later years the staff of the office expanded. Details are sketchy, but in the early 1890s the New South Wales Parliamentary Draftsman had both a senior and a junior assistant, although the former position was terminated in 1896. This termination was apparently

²⁹ 1879 VPD 1499-1510; copy in Carlile papers, LaTrobe Library.

³⁰ See ADB, vol.5, p.362.

designed as a cost-saving measure, since the senior assistant had received £700 per year, compared with the Draftsman's salary of £830 and the junior assistants of £350³¹

One of the first identifiable part-time salaried draftsmen in New South Wales was William Hattam Wilkins, who became Parliamentary Draftsman in 1864 and for some years combined this office with temporary commissions as a District Court Judge. As with parliamentary draftsmen in other colonies, Wilkins had the advantage of personal ties to persons in authority - in his case through his uncle, Frederick Wise, a judge of Supreme Court. Again as was the case in other colonies, Wilkins was neither very experienced nor very old - in 1864 he was 33, had been admitted to the bar in 1858 and had then spent some years as a clerk to his uncle.³² Another early draftsman was Alexander Oliver, who served in a part-time capacity from 1865 to 1874 when he resigned to become the Examiner of Titles.

On Oliver's resignation, one C.J. Manning was appointed to the post of Assistant Parliamentary Counsel to Attorney-General, at the less than munificent salary of £200 on the basis that:

"it was understood that a co-draftsman should receive £400 as Government Draftsman and that I should do the work for private members and assist the Government Draftsman only at times"³³

It is not apparent that in fact Manning did much work on private member's bills, but any practice of having an official concerned with such a separate function does not appear to have survived Manning's resignation in March 1875, which came when he was refused extra emoluments in return for the additional work required because the Parliamentary Draftsman's office was then vacant.

Some indication of the attractions of the part-time office can be gauged from the applicants for the (part-time) vacancy caused by the resignations of Oliver in 1874 and

³¹ Watkins to Carlile 21 June and 23 August 23 1899, Carlile Papers, LaTL.

³² For Wilkins's career, see Holt, H.T.E. *A Court Rises: The Lives and Times of the Judges of the District Court of New South Wales* (Law Foundation of New South Wales, 1976), pp.92-93

³³ Manning to Attorney-General, 25 January 1875, Miscellaneous documents file, APCNSW.

Manning a year later.³⁴ The applicants included George Milner Stephen, one C. Lansdell, the young Edmund Barton and a Pierce O'Keeffe who later withdrew. Of these, Stephen and Lansdell had considerable professional experience. Stephen's very chequered past³⁵ and unusual contemporary avocation of faith-healing appears not to have prevented him from arraying a formidable degree of political support - in 1875 he produced a supporting letter signed by about 30 members of the New South Wales legislature. His case was also supported by his brother, Alfred Stephen the former Chief Justice of New South Wales. Stephen received appointment as a part-time Draftsman in 1877, but had to relinquish the post when it became obvious that he could not reconcile the demands of that position with the calls made on him by seekers after his curative powers.³⁶ Lansdell's background is less clear, but he too apparently had relevant experience. Lansdell, was to claim in his application in 1874 that he had been frequently selected by the Governments of Queensland and Tasmania "to prepare Bills, rules and Regulations, reports and other parliamentary drafts of special and difficult character".³⁷

By contrast, Edmund Barton, then in the first stages of a career which would carry him to far greater things had then only been at the bar for a few years, having been admitted in 1871.³⁸

The first full-time appointment was of Alexander Oliver, formerly a part-time Parliamentary Draftsman 1865-74. It is notable that Oliver had at the time of his first appointment in 1865 been at the New South Wales bar for only a year, and perhaps his appointment owed something to the cachet of his having read for the English Bar (called 1862). Oliver took over the full-time office in 1878 and retained it until 1894.³⁹

³⁴ The following account is based on the documents in Miscellaneous documents file, APCNSW.

³⁵ For the circumstances which forced Stephen to resign office in 1844 in South Australia after a scandal involving allegations of fraud, see above, p.127 and see Hague, pp.167ff.

³⁶ See ADB, vol 2, 472-4.

³⁷ Lansdell to Minister of Justice, 10 July 1874, Miscellaneous documents file, APCNSW.

³⁸ See ADB vol.7, p.194.

³⁹ For Oliver's career, see ADB, vol.5, p.362.

Of the Parliamentary Draftsman at the end of the century less is known. John Leo Watkins was apparently born in Hobart, educated at Sydney Grammar and at Christ's College, Cambridge, where he graduated BA in 1871. He was later admitted to the New South Wales bar. He served as Parliamentary Draftsman from 1892 to 1918.⁴⁰

The creation of a permanent parliamentary counsel did not terminate the involvement of other draftsmen in New South Wales, and a very considerable amount of drafting was contracted out to members of the profession.⁴¹ However the Parliamentary Draftsman's office dominated the preparation of bills in the last years of the century. This is revealed in letters written by Watkins, the then Draftsman, to his counterpart in Victoria. Watkins described the staffing of his office, (then himself and only one assistant). Clerical assistance was furnished by the Attorney-General's department. He indicated that the Parliamentary Draftsman prepared most government bills - he personally had contracted out only one, but some government departments did brief out the preparation of legislation, instancing Land and Income Tax Bills, a Public Services Bill as well as one to reform the Upper House. The Parliamentary Draftsman was not directly involved in the consolidation of the statutes, which was done by a separate staff. The Parliamentary Draftsman also reported on all by-laws that required approval

⁴⁰ These details are drawn from the skeletal information in Gibbney, H.J. and Smith, A.G. *A Biographical Register 1788-1939* (ADB, Canberra, 1987), vol. 2, p.330.

⁴¹ For most of the 1880s and 1890s, the New South Wales Government Estimates had provided a sum initially of £600, from 1888 £300 each year for outside drafting work, principally of bills, though some commissions were for court rules and the like. In the decade 1883-1892, it seems the total such expenditure was around £2635 (£252-10-0 being on Rules). The amounts actually spent varied, in no apparent relationship to the amounts voted, from a low £21 in 1886, £40 in 1886 and £63 in 1889 to the much higher figures of £566-15-0 in 1887, £541-17-0 in 1890 and £648-10-0 in 1891. While seventeen different counsel appear to have received portions of this money for their drafting in the period, two recipients stand out. A.R. Butterworth received more in total than any other draftsman, £367-10-0 in 1887 and £521-17-0 in 1890, the latter for "water, sewerage and Drainage" bills. Even so Butterworth's receipts for 1890 were smaller than the £577-10-0 paid to A. de Lissa in 1891 for a "Banking Bill and Life Assurance Bill". All these figures are drawn from, or calculated from, two tables (one of 12 May 1891, one, not detailed, in 1892), appearing in Letter-book, APCNSW. The seventeen counsel mentioned were H. Parkinson and E.F. Barton(1883), Macnaughten (1884), B.R. Wise, J.W. Stephen, R.J. Browning (1885), W.P. Cullen (1885-6); A.R. Butterworth (1887 and 1890), C.G. Wade (1887); Hanbury Davies (1887-88); A.R. Canaway(1889); P.J. Healey (1889-91); A. de Lissa (1891-92); W.H. Manning (1891); H. Pollock, G.E. Rich and R.G. Ralston (all 1892).

of the Attorney-General or the Governor, and drafted regulations issued under the Governor's authority.⁴²

Much more information is available about the Victorian Parliamentary Counsel. The first and longest-serving officer was Edward Carlile, born in England in 1845 and coming to Victoria in 1854. He studied at Melbourne University and was then admitted to the bar. He held the office of Parliamentary Counsel from 1879⁴³ to 1882 and again from 1889 until 1906. In the intervening period, he was Clerk of the Legislative Council.⁴⁴ Carlile's long tenure of office was not untroubled - in 1899 a Classification Board considered all Civil Service positions. Among its recommendations was one that Carlile's salary be cut to £1,000 (from, it seems, an apparent £1,300) as his work did not justify the higher amount. Carlile reacted by seeking support for others to indicate that the reduction was unreasonable. There is no data to reveal whether his objections were successful.⁴⁵

One curious feature of Carlile's work is that, among the small sample of Victorian Bills of which the preparatory papers have been preserved,⁴⁶ there are three where he worked from a South Australian original. One was the Land Surveyors Bill. The second is the Architects Bill 1892. This again was originally a private measure which was adopted (over internal opposition from government departments) as a government measure. Carlile's draft does not work direct from the documents submitted by the Society of Architects but is an annotated copy of South Australian Architects Bill 1889.⁴⁷ The third is the Sale of Goods Act 1895-6(Vic), where the instructions to the Government printer supplied with the bill include a cut-and-paste version, with annotations, of the

⁴² Watkins to Carlile 21 June and 23 August 23 1899, Carlile Papers, LaTL.

⁴³ His comparative youth drew criticism from some quarters at the time of his appointment, though the appointment was defended by a range of politicians (1879) 31 VPD. 1500-02.

⁴⁴ See ADB, vol.7, p.561

⁴⁵ See Box to Carlile 29 August 1899; Harriman to Carlile 30 June 1899 and Watkins to Carlile 21 June and 23 August 1899, Carlile papers, LaTL.

⁴⁶ The Victorian Public Record Office, at Laverton, holds only thirteen files of bills prepared before 1900, though in some cases more than one draft bill is included.

⁴⁷ See documents in file VPRS.10265/3, VPRO.

South Australian Sale of Goods Bill 1894. This adaptation, with its consequential renumbering of sections from the English, is not mentioned in the draft Explanatory Note to the bill, which is the printed text of the House of Lords Explanatory Note to the United Kingdom Bill, with appropriate handwritten amendments as to re-ordering.⁴⁸

More is known about the personal, though less about the professional, life of the other Victorian parliamentary draftsman, John Augustus Gurner, since late in life he published his memoirs.⁴⁹ Gurner was the son of a wealthy and successful Melbourne lawyer, a sometime Crown Solicitor of Victoria. He was sent to England for his secondary education, then went to read law at Cambridge, where he graduated in 1877 (thus being the third Oxbridge graduate of the four permanent full-time Parliamentary draftsmen in pre-Federation Australia). He spent some time in a London solicitor's office pending his call to the English bar in 1877. He left England in 1879 for Melbourne and the Victorian Bar but tarried long enough en route in Sydney to be admitted to the New South Wales bar. He practised as a barrister in Melbourne from 1879 to 1882, when he took up the post of Parliamentary Draftsman for Victoria - initially as a temporary position, for duration of the parliamentary session. However, contrary to Gurner's expectations, the session lasted from 1 April to the end of year. A permanent appointment followed in January 1883, and Gurner held office until 1889, when he became a Crown prosecutor. It is likely however that relations between Gurner and the politicians of the day may well have been uneasy. Gurner appears to have acquired, either from his family circumstances or his experiences in England, a pseudo-aristocratic hauteur and a dislike of politicians as a class.⁵⁰ Nevertheless he appears to have had much to do with the final form of some significant pieces of legislation of the period, the Mining on Private Property Act 1884(Vic) and the legislation setting up independent Statutory Boards to control the Victorian Railways

⁴⁸ See documents in file VPRS.10265/152 VPRO.

⁴⁹ Gurner, J.A. *Life's Panorama* (Lothian Publishing Co, Melbourne, 1930). While the book is productive of some biographical details, it holds little of interest to anyone studying Gurner's professional role - indeed, since it is perhaps the most boring volume of reminiscences ever published by a lawyer, it holds little interest for anyone.

⁵⁰ *Ibid.*, esp. p.267.

and Victorian Public Service,⁵¹ an administrative mechanism apparently rarely used before this. Indeed Gurner claims that at the time he had to draft the measures, the only one precedent for it was a local government board in England.

Two other colonies had Parliamentary Draftsmen for lengthy periods in the nineteenth century. One was New Zealand, where John Curnin was appointed Law Draftsman in 1877.⁵² Unfortunately the ravages of time mean there appears to be no extant evidence of the nature and effects of his labours.

The other was Queensland where there was for some years following separation from New South Wales a part-time official with this title. The history and the origins of the Queensland office are alike obscure and have been largely neglected by previous writers.⁵³ Quite possibly its origins are simply a case of the government of the day assuming that as New South Wales had such an official before separation, Queensland should have one. The first incumbent appears to have been John Bramston, who held the office in the 1860s. Precision here is impossible - Bramston's brief biography in the *Australian Dictionary of Biography* does not even mention his tenure of the post.⁵⁴ In 1865, Bramston was offered the position of Attorney-General on the resignation of Ratcliffe Pring but resigned after serving but a few days. This appears to have been consequent on the failure of a plan to make the Attorney-Generalship non-political, as a result of which Bramston could not both be Attorney-General and retain his salaried offices as Parliamentary Draftsman and Master of Titles. He chose the security of the salaried offices.⁵⁵

⁵¹ Victorian Railway Commissioners Act 1883 (Vic) and Public Service Act 1883 (Vic).

⁵² See White, S. "The Making of the New Zealand Criminal Code Act of 1893: A Sketch" (1986) 16 VUWLR 353, 354.

⁵³ One of the few to mention it all is B.H. McPherson *A History of the Supreme Court of Queensland 1859-1961*, who only mentions it twice in passing (pp 117n and 333). There are no archival records of which I am aware.

⁵⁴ See ADB, vol.3 p. 219.

⁵⁵ See the debate at (1865) 2 QPD (1st ser.) 656-688; and the slightly different version in Bowen to Cardwell, 15 September 1865, CO 234/13, folios 243ff.

Such a part-time appointment raised a number of problems. In 1863, the then Attorney-General, Ratcliffe Pring forwarded to Bramston a copy of a minute by the Executive Council that:

"your private professional avocations cannot be allowed to interfere with the discharge of your public duties"

a minute provoked by Bramston's absence in Rockhampton for court circuit. Such criticism was not warranted in this particular instance, as Pring had in fact given Bramston leave to go on circuit (a fact not known to the Executive Council), but the incident does show the difficulties inherent in the use of part-time officials.⁵⁶ Nor were the difficulties limited to the practical. Bramston was also a member of the legislature.

In 1864 a member of the opposition raised the question of whether it was:

"contrary to strict Parliamentary uses for the Parliamentary Draftsman, a salaried officer of this Parliament, to vote at divisions".⁵⁷

The existence of the Parliamentary Draftsman did not mean that the Attorney-General ceased to draft bills - in 1862 Pring was contemplating preparing personally a bill to consolidate the law of insolvency in the colony⁵⁸ - but the Attorney-General's role may well have been minor. In 1865 Governor Bowen sought to describe the peculiar status of a colonial Attorney-General, but drafting of legislation finds no place in his lengthy catalogue of duties attaching to the office.⁵⁹ It seems that on Bramston's relinquishing the office, there was no official Parliamentary Draftsman until 1899, and instead drafting was done by Samuel Walker Griffith with some assistance from practitioners briefed to prepare specialist legislation.⁶⁰ Apart from that, archival sources reveal only that the Friendly Societies Amendment Bill 1894 was apparently prepared for the Registrar of Friendly Societies by an outside draftsman⁶¹ and that in 1898, 12 different

⁵⁶ Pring to Bramston, 7 May 1863 Attorney-General's letterbook 1861-4, 11/63, file JUS/G1, QSA.

⁵⁷ (1864) 1 QPD 30.

⁵⁸ Pring to McParlane 31 Dec 1862, Attorney-General's letterbook 1861-4, 62/309, file JUS/G1, QSA.

⁵⁹ Bowen to Cardwell, 15 September 1865, CO 234/13, folios 243ff.

⁶⁰ The 1890 estimates allowed £1000 for such outside drafting; in 1891 the figure was £800; (1891) 64 QPD (1st) 970.

⁶¹ An official in 1893 forwarded a draft bill "prepared by Mr Shand", Blakeney to Under Colonial Secretary, 1 July 1893, file JUS/W2, QSA. One curiosity of the Bill was that although it drew heavily on other Australian statutes *in pari materia*, the marginal notes to the Bill as printed referred solely to a United Kingdom Act.

draftsmen prepared government bills, although seven of these prepared only one bill.⁶² Of these one, J.L. Woolcock, was appointed Parliamentary Draftsman on a part-time basis in 1899, holding that office to 1927.⁶³

South Australia too relied principally on the Attorney-General and on briefing out of drafting work, with at most a fleeting appointment of a lawyer as a permanent parliamentary draftsman. The archival record gives some perspective on the total costs of legislative drafting in the other colonies, especially Victoria and New South Wales may be gained from the albeit fragmentary evidence from South Australia.⁶⁴ In the period 1857-1861 drafting fees were paid on 17 occasions, with annual costs ranging from £55 in 1858 to over £200 in 1861.⁶⁵ These figures are relatively small by later standards. In 1879, a total of 66 bills were apparently introduced into the legislature. Of these, eleven had been prepared by the Attorney-General, and nine were private member's bills in relation to which the government incurred no expenditure. The remaining 46 bills were prepared by 12 different lawyers, at an aggregate cost of £957-15-6. In 1880 there were 43 bills briefed out, to 13 lawyers, with a total cost of over £1,000. In later years the briefing out costs were lower, perhaps an indication of the more stringent financial climate.

With sums of this size being spent on drafting it is not surprising that there was some discussion at different times of the creation of at least a de facto Parliamentary Draftsman. The idea was twice suggested by would-be holders of the office. In 1865 Charles Mann junior had proposed an arrangement whereby he would draw all necessary "bills for Parliament" for £300. Mann's argument was that Mann personally had been paid £97 in 1864, and his firm of Wrigley & Mann the sum of £273 in the

⁶² List of bills for 1898 in File JUS/W22, QSA. The draftsmen involved and the number of bills drafted is given as Kingsbury (3); Woolcock (3); Blair (1); Shand (5); Chambers (1); King (1); "Crown" (1); "Under-secretary" (1); Sydes (1); Power (1); Leeper (4) and Rutledge (2).

⁶³ McPherson, *op. cit.* n.53, p.333.

⁶⁴ The following discussion is drawn from data in the Record of Bills introduced, File GRG 1/66, SAPRO

⁶⁵ 1862 SAPP no. 215.

same year. On that basis, the lump sum proposed would be a saving, as well as avoiding the difficulty of formulating appropriate charges for drafting. Mann contended also that there would be a benefit in the greater uniformity of style if all legislation was prepared by a single draftsman.⁶⁶ It seems nothing came of that proposal, but there are a number of other records indicating that Mann was given various bills to draft, including at least one, an 1867 Bill on the subject of licensed carriages, where it seems that the initiative came from him rather than from the Attorney-General.⁶⁷

The second suggestion came in 1866, when one Charles Lowe offered his services to work under the Attorney-General as "Government Parliamentary Draftsman and Assistant Crown Solicitor" for a total sum of £600 per year.⁶⁸ This offer was not taken up, but Lowe was engaged on occasion to draft bills of a relatively minor character dealing with, inter alia, the Supreme Court and immigration matters.⁶⁹ It seems likely that Lowe's conduct of affairs in this period did not entirely satisfy the government, as in 1868 he was soliciting occasional employment in the drafting of bills, and, somewhat plaintively, indicating that although he did not practice in Adelaide, he could easily travel there on a day's notice.⁷⁰

There is some fragmentary evidence that for a brief period there may have been someone recognised as the Parliamentary Draftsman. In 1885 a parliamentarian asked for a return of costs of bills prepared "during the Parliamentary Draftsman's term of office", a term which apparently came to an end in 1885.⁷¹ If such a return was made, it has not come to hand. However in that year a return of the general legal fees paid by the South Australian Government enumerates extensively various conveyancing and court fees, but notes that it *excludes* £800 paid to "Hon C. Mann" as "contractor for

⁶⁶ Mann to Attorney-General, 6 January 1865, file GRG 1/4, SAPRO.

⁶⁷ Mann to Attorney-General 4 March 1867, file GRG 1/4, SAPRO.

⁶⁸ Lowe to Attorney-General 1 November 1866, file GRG 1/4, SAPRO.

⁶⁹ Lowe to Attorney-General 7 and 23 April, 1, 4 and 28 May, 23 July, 15 and 18 August, 11 September and 1 November 1866. File GRG 1/4, SAPRO.

⁷⁰ C. Lowe to Attorney-General, 24 Nov 1868, file GRG 1/4, SAPRO.

⁷¹ 1885 SAPD 342.

legal business".⁷² It may be speculated therefore that Mann, for a time at least, enjoyed the status, either de facto or de jure, of a Parliamentary Draftsman.

⁷² 1885 SAPP No. 146.

Parliamentary Draftsmen and the development of the law

The development of permanent parliamentary draftsmen enabled colonial governments to depart from their traditional sources of legal expertise for drafting of legislative material. What is not known is exactly what effect the creation of the new officers had on the pattern of development of the law. The meagre archival materials extant give little information about the functioning of the office of Parliamentary Draftsman in Victoria or Queensland. By contrast there are fuller archival sources for New South Wales, and it is from these that most can be learned about actual operations of the draftsman's office. The New South Wales data indicates that the inauguration of the new office did little to alter a pattern of colonial law making which frequently drew on precedents from other colonies.

In any colony legislation can be traced to one or more of three broad sources - local initiative, English legislative models and the innovations of other colonies⁷³. Without entering into the necessarily contentious enquiry of which of these was dominant in any one colony at any one time, it may be noted that it appears that the various persons charged with the preparation of legislation were well aware of the value of both the latter sources. The correspondence of the New South Wales Parliamentary Counsel gives some indication of the range of comparative materials which that office sought. In 1878 Alexander Oliver, the then Parliamentary Counsel, requested a number of law books, the Law Reports of New South Wales and Victoria and the "statutes of the other Australasian colonies (to be supplied as issued)".⁷⁴ Soon Oliver increased his requests - in 1880 he asked not only that copies of Victorian, Queensland, South Australian and New Zealand statutes be ordered direct from the various colonies, as they were not regularly available in New South Wales, but also that:

"I would at the same time invite attention to a serious want in my Series of Colonial and other Acts of Parliament; viz, of the Canadian and the American Acts of Congress".⁷⁵

⁷³ Cf. Russell, p. 41.

⁷⁴ Oliver to Secretary to Attorney-General, 9 August 1878, Letter-book, APCNSW.

⁷⁵ Oliver to Attorney-General, 20 Sept 1880, Letter-book, APCNSW.

In later years further resources were requested, as in 1893 when the Parliamentary Counsel asked the Attorney-General if he could arrange for the supply of the text of Government Bills introduced into the British Parliament, as these were necessary if the debates on bills were to be understood:

"and the measures which fail to become law, owing to press of more important business, are often as valuable to the draftsman as measures which have passed the Legislature".⁷⁶

Whatever arrangements were made for the supply of statutes from other colonies, they cannot have been uniformly effective. It was only in 1887, for example, that Oliver received the Victorian and New Zealand statutes dating back to 1881, as well as those of Tasmania since 1877, Queensland from 1878 and South Australian statutes since 1879.⁷⁷ Nor does it seem that his successor, J.L. Watkins, fared much better, since in 1894 he was requesting the supply of statutes from the various colonies to remedy deficiencies in his official library. His requests included the New Zealand statutes since 1881, as well as those of Queensland since 1888 and South Australia from 1887. The holdings of Victorian statutes were apparently better, since only those since 1892 were requested.⁷⁸ Special requests for the collection to be kept up to date still recur in later years.⁷⁹ Given this welter of comparative material, it is perhaps surprising that it is not until 1896 that the Counsel's office attempted to secure a complete collection of bills introduced into the New South Wales Parliament.⁸⁰

On some occasions officials or proponents of legislation appear to have supplemented the resources of the Parliamentary Counsel by supplying copies of comparable legislation from other jurisdictions on subjects as diverse as the regulation of licensed victuallers, local government and married women's property legislation.⁸¹

⁷⁶ Watkins to Secretary to Attorney-General, 11 April 1893, Letter-book, APCNSW.

⁷⁷ Oliver to Government Printer, 26 August 1887 and 30 August 1887, Letter-book, APCNSW.

⁷⁸ Watkins to Secretary to Attorney-General, 17 May 1894, Letter-book, APCNSW.

⁷⁹ Watkins to Secretary to Attorney-General, 23 August 1895, Letter-book, APCNSW.

⁸⁰ Watkins to Government Printer, 18 April 1896, Letter-book, APCNSW.

⁸¹ See Oliver to Principal Under-secretary; Chief Secretary's Department, 10 Sept 1880 and Oliver to Government Printer, 15 July 1885, Letter-book, APCNSW.

In New South Wales the duties of the Parliamentary Draftsman were defined by a Cabinet Minute at the time of the appointment of Alexander Oliver in July 1878.⁸² The duties of the Parliamentary Draftsman were stated to be to draft Bills for Ministers, as directed, to peruse and report on the effect of alterations in Bills during their passage through the Legislature as well as reading and reporting on all Bills introduced by private members, to make himself "acquainted with the alterations from time to time in Imperial Statutes law and reporting thereupon when any seem adapted to the requirements of this Colony". In addition to this work on parliamentary matters, the Parliamentary Counsel was to peruse and report on Bylaws, rules and Regulations submitted to Attorney-General and to prepare regulations "for carrying out the intentions of any statute", as requested.

By contrast, in 1881 the New South Wales House of Assembly was told that the Parliamentary Draftsman would draw private member's bills (and had drawn four in that session) if the member had leave to introduce the measure, unless the pressure of Government business made this impossible. It appears that in that session the Parliamentary Draftsman had prepared 15 bills for Ministers and four for private members.⁸³ This may well have somewhat misrepresented the position by indicating a greater degree of willingness to draft private members bills than was in fact the case. Throughout the 1890s, the then Parliamentary Counsel, J.L. Watkins regularly sought, with varying degrees of success, to fend off requests or instructions to draft bills for private members. In some cases it seems that Watkins was able to insist his conditions of appointment did not require him to draft such measures.⁸⁴ In other cases it appears that the Attorney-General was persuaded to order the Parliamentary Counsel to assist with the drafting of private measures;⁸⁵ in still others it seems that Watkins freely co-

⁸² Copy in Miscellaneous documents file, APCNSW.

⁸³ Report of proceedings in NSW Legislative Assembly 5th Oct 1881, copy in Oliver Papers, USL.

⁸⁴ See Watkins to Critchell Walker, August 9, 1893; Critchell Walker to Watkins 4 August 1894 and Watkins to Critchell Walker 9 August 1894, Miscellaneous documents file, APCNSW.

⁸⁵ See Addison to White and Critchell Walker to Watkins, 28 Sept 1894, Miscellaneous documents file, APCNSW.

operated with the proposer of a private measure.⁸⁶ Some instances where the Parliamentary Draftsman was involved in the drafting of private member's bills are considered below.⁸⁷

On rare occasions Watkins ventured to comment on the policy aspects of bills in preparation, as when he suggested in 1893, apropos of a new Stamp Duties Bill, that financial considerations might indicate a need to repeal provisions of the Stamp Duties Act 1890(NSW) which had exempted from duty mining share transfers (apparently in an attempt to encourage mining companies in other colonies to change their base of operations to Sydney).⁸⁸

On occasion the instructions to Oliver seem to have been rather lacking in detail, though a lack of precision appears most commonly where the proponent of legislation intended to imitate legislation in force in other colonies. Thus when T.W. Garnett instructed Oliver to prepare a bill for the payment of members of the Legislative Assembly, he set out the scale of payments he had in mind, continuing :

"some other provisions excepting Ministers, Speaker and Chairman of Committees will be required but these you'll readily obtain from the Victorian Act, which I have not at hand".⁸⁹

Similarly when Parkes directed the preparation of a new Electoral Bill in 1879, he simply stated

"You will get details of self-registration from the Victorian Act where the system is in force".⁹⁰

In some cases the involvement of the Parliamentary Draftsman in major measures during this early period appears to have been a matter of chance. One curious case is that of the various amendments proposed to the Real Property Act 1862(NSW). Although in 1863 Oliver was involved in proposals to reform the New South Wales

⁸⁶ e.g. see Watkins to McGowrie, MLA, 20 Nov 1893 and Watkins to Waddell, 20 Nov 1893, Letter-book, APCNSW.

⁸⁷ See below, pp.185-88.

⁸⁸ Watkins to Under-Secretary of Finance and Trade, Jan 6 1893, Letter-book, APCNSW.

⁸⁹ Garnett to Oliver, 7 June 1887, Oliver Papers, USL.

⁹⁰ Parkes to Oliver, 19 December 1879, Oliver Papers, USL.

statute, inter alia by the adoption of Victorian amendments, this was in his capacity as one of the Examiners of Titles under the 1862 Act. Indeed it seems the principal legislative architect of later changes was his coadjutor as examiner, G.K. Holden, who made extensive proposals for change in 1865.⁹¹

It is difficult to determine how well the Parliamentary Draftsman performed his work. In some cases he bore the brunt of criticism directed at him, unfairly, for bills on which he had no say.⁹² However Griffith expressed the view that:
 "the bills presented to the New South Wales Parliament are notoriously the worst drawn in any Australian colony".⁹³

It is clear that the holders of the office found it difficult at times to perform all of the tasks expected of them. A letter written in 1888 by Alexander Oliver, the then Parliamentary Draftsman, to the Premier of New South Wales gives us a glimpse into the workings of the office.⁹⁴ Alexander Oliver, apparently in reply to a request from the Premier, reported the work on hand in his department as including the revision of the District Court Bill, a Petty Sessions Bill, and other bills concerning the Wollongong Harbour Trust and an amendment to the quarantine laws, as well as a
 "very voluminous measure for Mines Department, dealing with Mines, and also Irrigation, Diseases in Stock; Impounding, Dogs, Noxious Animals and Plants and the protection of animals (260 clauses as it stood)".

However Oliver had made no progress on drafting of taxation Bills, having been "interrupted" by the Attorney-General referring to him matters requiring the perusal or preparation of bylaws and regulations, a task which he considered took half of his time. Indeed Oliver considered that he spent "9/10ths" of his time on matters referred to him from the departments of the Premier and the Chief Secretary or the Works and Finance Department, a matter apparently of relevance to suggestions that the Parliamentary

⁹¹ Holden and Oliver to Cowper (n.d. but August 1863) and Holden to Cowper 27 June 1865, in Colonial Secretary's Papers file 4/742.2, GANSW.

⁹² As to criticism of the drafting of the Crown Rents Bill 1890, see Oliver's manuscript notes on extract from *Daily Telegraph* 2 August 1890, Oliver Papers, USL.

⁹³ (1891) 64 QPD 970-1.

⁹⁴ Oliver to Parkes, 29 August 1888, Miscellaneous documents file, APCNSW.

Draftsman should be separated from its then administrative connection with the Attorney-General's office.

Parliamentary Counsel did not always find the connection with the Attorney-General's Department satisfactory. In 1894, the Attorney-General's Department sought to ensure that requests by other Ministers for the drafting of Bills be routed through the Attorney-General, and it appears that only reference to an earlier ruling by the Premier produced the concession that drafting instructions should go direct to the Parliamentary Counsel.⁹⁵

This statement of work in hand in 1884 may be compared with others for July 1882 and November 1894. In 1882, the New South Wales Parliamentary Counsel had as tasks in progress seven general statutes, on subjects ranging from local government to registration of land titles by way of a bill on forests and one for the consolidation of the criminal law, as well as two local acts.⁹⁶ By contrast in 1894, the Parliamentary Counsel had in hand ten draft bills, having completed 28 others in the previous three months as well making 60 reports on bylaws, rules and regulations as well as 35 more reports on other matters including private members' bills.⁹⁷

Inevitably many bills were significantly amended or redrafted during their progress through the colonial parliament.⁹⁸ It seems that in New South Wales the parliamentary counsel was rarely involved at this state of the bill's proceedings.⁹⁹ This both made clear the need for politicians of skill in drafting and also gave scope to such politicians. Sir Frederick Darley, according to Bennett, "often ... acted as 'standing counsel' of Parliament, being called upon to draft or revise legislation".¹⁰⁰ This may have been

⁹⁵ Memoranda by Secretary to Attorney-General 21 August 1894, by Watkins, not dated, and by Dibbs, 12 March 1894, all in Miscellaneous documents file, APCNSW.

⁹⁶ Alexander Oliver to Critchell Walker, 3 July 1882, Letter-book, APCNSW.

⁹⁷ Watkins to Secretary to Attorney-General, 8 November 1894, Letter-book, APCNSW.

⁹⁸ See (1883) 1 NSWPD (1st Series) 119 and (1883) 3 NSWPD (1st Series) 2914-16.

⁹⁹ See Oliver's manuscript notes on extract from *Daily Telegraph* 2 August 1890, Oliver Papers, USL.

¹⁰⁰ Bennett, J.M. *Portraits of the Chief Justices of New South Wales* (John Fergusson Pty Ltd, Sydney 1977), p.32.

because it was thought that it would be asking too much of the Draftsman to appreciate the full scope of every significant debate on the Bill.¹⁰¹ The difficulties of drafting bills or amendments during the legislative process must have been increased by the omission of punctuation from New South Wales statutes for many years after 1861. Although there was a suggestion in 1883 that the colony should revert to its earlier practice of at least publishing its statutes in punctuated form, the proposal foundered in the conservatism of the Legislative Assembly.

¹⁰¹ Cf Griffith's views to this effect in (1891) 64 QPD 377.

Consolidations

One feature of the legislative history of the settlement colonies was the attempts made in some jurisdictions to consolidate the statute law applicable to the colony. The most significant attempts to achieve consolidation appear to have been in the North American colonies, but there were also significant exercises in revision and consolidation in Victoria and in Queensland.

The various North American consolidations and revisions have been extensively described by Larsen.¹⁰² Various consolidating statutes had been passed from as early as 1767 (Nova Scotia), and every self-governing Canadian jurisdiction enacted some consolidating measures during the nineteenth century. The most comprehensive and careful of the consolidations were probably those of Upper Canada in 1859, a revision which Larsen sees as establishing the administrative procedures and the conceptual framework for all future efforts to render the statute law more accessible.¹⁰³ A subsequent consolidation, that undertaken in 1874-77 and enacted as the revised Statutes of Ontario in 1877 took perhaps more time and was technically more difficult because of the need to ensure that statutes re-enacted were within the legislative competence of the legislature following Confederation.¹⁰⁴

The Australian experience shows a much less significant scale of consolidation. In Victoria there were two consolidations, both carried out under the supervision of George Higinbotham, in 1864-5 and 1888-90. These consolidations proceeded on the basis that the consolidating statute would make no substantial changes to the law, although some variation of the language used was allowed if the act to be consolidated was not copied from an English one still in force. However changes could be made if a Law Officer thought fit, or to introduce English amendments to Acts already in

¹⁰² Larsen, N "Statute Revision and Consolidation: History, Process and Problems" (1987) 19 Ottawa LR 321, to whose account I am indebted for much of what follows.

¹⁰³ *Ibid*, p.324.

¹⁰⁴ Romney, Paul M. *Mr Attorney: The Attorney-General for Ontario in Court, Cabinet, and legislature, 1791-1899* (Osgoode Society, Toronto, 1986), pp. 284-85.

operation in Victoria or already adopted in Victoria. The first consolidation resulted in a mere 20 statutes, the later one in 106 acts.¹⁰⁵ In Queensland a Royal Commission was set up to enquire into codification, but the commissioners (Cockle CJ, Lutwyche J and Charles Lilley, then Attorney-General) reported more in favour of consolidation. Such a result is the less surprising since Lilley had earlier, when in opposition, introduced a private member's Bill seeking consolidation of the Queensland statutes.¹⁰⁶ In the event thirty consolidating statutes were passed in 1867;¹⁰⁷ little more happened later - in part perhaps because of allegations that the task of carrying out a revision of the statutes in 1882 had been given to a supporter of the Government in Parliament to ensure his continued support.¹⁰⁸ In Western Australia the colonial statutes in force were consolidated into two volumes by a commission headed by their labours in 1881. The task was completed in late 1882 and the result published the following year. What exactly impelled the colonial authorities to undertake the task is, unfortunately, not known.¹⁰⁹

In New Zealand too there were suggestions for codification - as early as 1876 Waterhouse moved for a Codification Commission, for which the Ontario practice was urged as a precedent,¹¹⁰ and in 1878 a commission was appointed under the reprint of the Statutes Act 1878(NZ) to prepare a new edition of the statutes of the colony. It quickly became obvious that more was needed, and at the commissioners' suggestion their powers were broadened to allow them to suggest revisions and consolidations of the statutes.¹¹¹ No general revision or consolidation did in fact take place until 1908.

¹⁰⁵ See Morris, E.E. *A Memoir of George Higinbotham* (Macmillan & Co, London, 1895) pp.292-3.

¹⁰⁶ Murphy, D.J. and Joyce, R.B.(eds) *Queensland Political Portraits 1859-1952*, (U Queensland Press, 1978) p.75.

¹⁰⁷ Bernays, C.A. *Queensland Politics during 60 Years* (Government Printer, Brisbane, 1921).

¹⁰⁸ See 1882 38 QPD (1st) 1325 ff.

¹⁰⁹ Russell, pp.202-03 gives an account of the process, but not the motive.

¹¹⁰ (1876) 1 NZ Jurist 81.

¹¹¹ White, S. "The Making of the New Zealand Criminal Code Act of 1893: A Sketch" (1986) 16 VUWLR 353, 354-5.

Rarely did colonial lawyers or legislators give serious consideration to going one step beyond consolidation to a process of codification of the law. There were cases where codification of isolated areas did occur - the widespread adoption of the Sale of Goods Act 1893(Imp) provides one example, as does the adoption of the Stephen Code or of its local variants in a number of colonies. The history of the Stephen Code falls largely outside the scope of this study, but it illustrates the willingness of colonial authorities late in the century to question English precedents and to try to improve upon them. The Colonial Office had commissioned Robert Wright¹¹² in 1870 to draft a criminal code which was published in 1877 after scrutiny by Sir James Stephen, an English judge and author and circulated to the colonies. In addition the colonies were recipients of the proposals of the Commission headed by Stephen¹¹³ which had produced a somewhat different code for introduction to the British parliament, a code which overtook the Wright code as a foundation for discussion. The final version proposed by the English reformers was never enacted there but was taken up in a number of the colonies.¹¹⁴ In New Zealand the Government appointed Alexander Johnston, a judge of the Supreme Court, and Walter Reid,¹¹⁵ the then Solicitor-General, as Criminal Code Commissioners in 1879.¹¹⁶ These two laboured for some years to adapt the code to New Zealand conditions. After some considerable delays, principally because it was hoped that New Zealand would follow, rather than lead, Britain on codification, the Criminal Code Act was passed in 1893.¹¹⁷

However no discussion of consolidation or codification in this period is complete without reference to the most comprehensive project for codification, the proposal of

¹¹² Friedland, M. "R. S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" (1981) 1 *Oxford Journal of Legal Studies* 307.

¹¹³ See Manchester, A.H. "Simplifying the Sources of the Law: An essay in law reform. Part II - J.F. Stephen and the codification of the Criminal law in England and Wales" (1973) 2 *Anglo-American L.R.* 527.

¹¹⁴ As to Canada, see Criminal Code Act 1892 (Can) and Friedland, M.L. *A Century of Criminal Justice* (Carswell & Co, Toronto, 1984) ch. 1. For Queensland, see Criminal Code Act 1897(Qld).

¹¹⁵ For details of Reid's life, see *Dictionary of New Zealand Biography* (1940), vol. 2, p.221.

¹¹⁶ Their report is reproduced in the 1908-131 Reprint of the New Zealand Statutes, vol.2, pp.176-181.

¹¹⁷ The course of proceedings is considered extensively by White, S. "The Making of the New Zealand Criminal Code Act of 1893: A Sketch" (1986) 16 *VUWLR* 353.

W.E. Hearn in Victoria to codify the statute and common law of general application, that is the law other than that "applicable to particular persons or classes of persons".¹¹⁸ Hearn laboured over a draft code, drawn in part from the Victorian consolidations, and also from English statutes and the Indian Contracts Act and Indian Succession Act, for more than a decade, assisted for the last two years by seven Government-funded lawyers. The resulting Substantive General Law Consolidation Bill 1884 was sent to a Select Committee rather than being debated in the Victorian parliament, but as the Select Committee made many amendments the first Bill was discharged; a motion to introduce a new version was lost because of opposition both to the principle and to the detail of the new measure.¹¹⁹ Although there were occasional attempts to resuscitate the proposal, none got to the point of the re-introduction of a bill.¹²⁰

The collective contribution of the law officers, of judges, Parliamentary Draftsmen and practitioners briefed to prepare bills was enormous. Unfortunately not enough is known of the degree to which originality was sought from such draftsmen to determine whether any special characteristics of colonial law develop from their work. It may be surmised that range of persons involved and the pressures on them to produce drafts tended to discourage originality and to increase reliance on legislative precedents from other jurisdictions. Certainly there is some archival evidence for this view, but there is insufficient data for a conclusive answer. By contrast when the efforts of private legislators and the promoters of private members' bills are examined, there can be little doubt of their collective effect in shaping a corpus of similar colonial legislation which, in some aspects, was significantly distinct from English law.

¹¹⁸ W.E. Hearn, 1884 46 VPD 1311.

¹¹⁹ Higinbotham, for example, while supporting the principle of the Code, disagreed with the particular classificatory system adopted: Morris, E.E. *A Memoir of George Higinbotham* (Macmillan & Co, London, 1895) p.293.

¹²⁰ For the above, see Hearn's preface to the published version of the Draft Code for Victoria 1885 (Government Printer, Melbourne, 1885), and the debates at 1884 46 VPD 1311, 1884 47 VPD 2098; 1885 50 VPD 1976 and 1887 54 VPD 1733.

chapter 8

Private legislation and private member's bills.

"History showed that in past ages the lawyer who posed as a Law Reformer was a marked man among his own profession".¹

In addition to the large numbers of bills prepared under official sanction by government funded draftsmen of one kind or another, many other pieces of legislation were the result of initiatives by private citizens or bodies outside the legislature, or by the labours of legislators who brought measures forward as private member's bills. While the two kinds of legislation are generally significantly different, they share the common elements that they were usually drafted at the expense of the proponents of the legislation² and frequently revealed they had been modelled after measures passed in other colonies.

On some occasions, however, it is difficult to determine whether a measure should be classed as a private bill or a private member's bill. One of George Reid's first acts after election to the New South Wales Legislative Assembly in 1880 was to take charge of a private bill needed to alter the charter of the firm owned by his brother-in-law.³ (To be fair to Reid, in the same session he introduced a private member's bill, later taken over by the Government, to ensure a minimum width of streets so as to ensure better access, and better light and air, in newly developed areas).⁴ On other occasions private Acts were promoted by individuals who wished to prod the legislature into action to provide for novel situations, as with the first statute regulating motor vehicles in New Zealand the McLean Motor-Car Act 1898(NZ). This was a private Act which had been promoted by one William McLean, the first person to import internal-combustion motor vehicles into the colony, to resolve doubts as to the legality of such vehicles.⁵

¹ W. O. Archibald, 1895 SAPD 2170.

² See above, p.142.

³ McMinn, W G "The Making of a Politician: The Early Career of George Reid" JRAHS, 1981, Vol.67, p.1, at p.15.

⁴ Reid, Sir George *My Reminiscences* (Cassell, London, 1917) pp.36-37.

⁵ Anon (1903) 5 JCL&IL (2nd series) 374.

There are also cases where legislation apparently of a general character in fact was designed to promote the cause of some individual or of a economic or social special interest group. Such legislation has elements of both private and public character - and may also have reached the legislature through a private member's, rather than as a Government, bill. Thus a statute passed in Canada in 1843, ostensibly was a general act granting to female proprietors of interests in land a greater ability to dispose of such interests, while in reality the Act was primarily intended for the benefit of the relations of Lord James Townshend.⁶ It seems highly possible that the use of a general statute to advance private ends was suggested by Robert Baldwin Sullivan, a lawyer and member of the Executive Council of Canada at the time.⁷ The converse occurred on occasion, as with the Law Practitioners Amendment Act 1866(NZ), an apparently general statute prohibiting any person who had been convicted of forgery, perjury or subornation of perjury from admission or practice as a barrister or solicitor, which was aimed squarely at forcing from the profession one Henry Smythies, a practitioner admitted, to the dissatisfaction of the profession, despite a conviction in England for forgery.⁸

A somewhat different but equally controversial attempt at such special interest legislation came with clause 153 of the South Australian Equitable Procedure Bill 1866, introduced by James Penn Boucaut, the lawyer Premier of the colony. The clause would have conferred on the Supreme Court power to make orders for the equitable remedy of *scire facias*, an apparently innocuous enough change. However the proposal recalled a recent cause celebre, *R v Hughes* (1865) 1 LR(PC) 81, the famous Moonta Mine case where the Privy Council had upheld mining leases which the South Australian Supreme Court had set aside, by *scire facias* as being both excessive in area and procured by fraud. The Privy Council's decision turned on a determination that the Supreme Court lacked jurisdiction to order *scire facias*, so the proposed amendment could be seen as an indication of support for the defeated respondents in *R v*

⁶ Stephen to Stanley 6 November 1843, pp 61-65, CO 323/58, PRO.

⁷ Read, David B. *The Lives of the Judges of Upper Canada and Ontario; from 1791 to the Present Time* (Rowsell and Hutchison, Toronto, 1888), pp.248-9.

⁸ See Cooke, R.B. (ed) *Portrait of a Profession* (A.H. and A.W. Reed, Wellington, 1969) pp. 143-4, and see *In re Henry Smythies* (1869) Mac. 702.

Hughes, persons whom Boucaut had represented in the South Australian proceedings.⁹ The clause was defeated, though little could be urged against it on strictly legal grounds.

Special interests of a different kind were served by other acts. Legislation was enacted in both Van Diemens Land in 1837¹⁰ and South Australia in 1838¹¹ to regulate whale fisheries, both acts being largely the work of the whaling interests. In similar vein, the New South Wales Master and Servant legislation of 1832 was significantly influenced by the Sydney Chamber of Commerce.¹²

In the later decades of the century such quasi-private legislation was sought on occasion by associations seeking legislation to control a trade or profession. On occasion this involved attempts by the private organisation to procure uniform laws in a number of colonies. Perhaps the paradigm example of this is the legislation regulating the profession of land surveyors. An Intercolonial Conference of Surveyors was held in Melbourne in 1892, which determined to seek legislation on common lines in each colony. A bill was prepared in line with the conference recommendations in South Australia, later to be adapted for Victoria by Edward Carlile¹³ on Government instructions as the Cabinet had given their backing to the Bill. The result was enacted in Victoria as the Land Surveyors Act 1895-6(Vic). Curiously, even though Carlile himself attributed the first draft to South Australia, the Institute thanked Carlile for drafting the measure. This may, of course, simply have been a matter of courtesy outrunning truth. The upshot appears to have been that legislation was quickly passed in South Australia (Land Surveyors Act 1896), Western Australia (Licensed Surveyors Act 1895) and Victoria (Land Surveyors Act 1895-6) but apparently nothing was done in the other colonies for more than a decade. Less self-serving was the plea by the Royal Humane Society of Australasia in

⁹ See Edgar, P.L. "Sir James Penn Boucaut: His Political Life 1861-75" (B.A. Hons. Thesis University of Adelaide 1961), *passim*.

¹⁰ Franklin to Glenelg, 30 December 1837, CO 280/81.

¹¹ Minutes of Exec. Co. of South Australia, 20 June 1839, file GRG/40/1/1, SAPRO.

¹² Attorney-General to Colonial Secretary, 7 May 1832, file 9/2677, GANSW.

¹³ See "Draftsman's Memorandum" by Carlile, in file VPRS 10265/395, VPRO and Institute of Surveyors to Carlile 16 December 1895, Carlile Papers, LaTL.

1884 for amendments to the laws of each Australian colony to make more stringent the requirements for the carriage of life-saving equipment on ships.¹⁴

¹⁴ e.g. see Wilks to Musgrave 31 December 1884, file GOV/N1, QSA.

Private legislation.

Many acts or ordinances were passed in the various colonies which can conveniently be described as private legislation - usually these were acts to incorporate and regulate banks, insurance companies or some other large businesses. The Colonial Office disapproved of the incorporation of trading (as distinct from banking or insurance) companies by statute unless "the purposes are such as require necessarily a large capital and a numerous Association of persons".¹⁵ Such an attitude meant that there were few colonial attempts to enact a general law for the benefit of multi-owner businesses. The only colony to attempt a general statute at this time appears to have been Van Diemen's Land, with the Co-Partnership Act 1841(VDL). This act was primarily intended to consolidate all the existing local laws on companies and co-partnerships of more than six members. It went further by conferring on such bodies the right to sue and be sued in name of any one of the members, as well as allowing the firm to prosecute one of its members for forgery or theft. The Colonial Office viewed this as too great a departure from English law, and as conferring powers which were too general, for the law to be allowed to stand. However, rather than disallow it and thereby invalidate any transactions made in reliance on the Act, the Governor was to seek its repeal.¹⁶

As the Van Diemen's Land provisions would indicate, one of the commonest privileges sought in such legislation was the right of the business to sue and be sued in the name of an official, rather than through the then cumbersome procedures necessary for corporate bodies.¹⁷ The convenience afforded by such a right to sue a company by using the name of a representative in the colony could also be sought, as with the New Zealand Company, by the clients of the company.¹⁸ There were cases where the reasons were more unusual - a Van Diemen's Land statute of 1837 was sought by the local banks because of a belief that an English court case had suggested that any contract made by a bank was void!¹⁹

¹⁵ Stanley to Gipps, 22 May 1843, HRA ser. 1, vol.22, p.748.

¹⁶ Franklin to Russell, 31 December 1841, and attached Colonial Office memoranda, CO 280/135.

¹⁷ e.g. see Arthur to Stanley, 8 January 1834, CO280/46; compare Union Bank of Australia Ordinance 1844 (NZ)

¹⁸ Grey to Sinclair, 19 June 1846, NZNA(W), file G/36/2/95

¹⁹ Franklin to Glenelg, 30 December 1837, CO 280/81

Although these acts would generally appear to have been drafted by counsel employed by the promoters of the business,²⁰ it seems clear that there must have been considerable reliance by such counsel on precedents of their own or other colonies. The first incorporation act in Australasia appears to have been the Bank of Australia Act 1827(NSW). This act was largely copied in subsequent acts in New South Wales itself,²¹ in Van Diemen's Land,²² New Zealand²³ and South Australia.²⁴ Only in Western Australia is there no indication of any borrowing; there the Legislative Council adopted a different approach by passing a general statute, the Banks and Banking Companies Act 1837(WA), to empower the creation of banks. Later, and apparently independently, New Zealand passed a similar law, the Bank Charters Ordinance 1851(NZ), but its defective drafting caused the Colonial Office to require amendments, which were made by the Bank Charters Amendment Ordinance 1853(NZ).²⁵ The Colonial Office had much to say about a number of these private acts, in attempts to ensure that the colonial government was not inadvertently representing a state guarantee of deposits²⁶ while still ensuring appropriate and adequate protection for customers.

While private legislation other than that concerned with banks and other businesses was not particularly common in the Australasian colonies in the first half of the nineteenth century, it did occur. Perhaps the most common cause of it was the desire to secure a right or privilege such as the right to charge tolls over a roadway or wharf.²⁷ Another privilege occasionally sought was a grant of patent rights,²⁸ which could at this time only be granted in the colonies by statute. In either case, it was apparently the normal practice that the parties seeking the

²⁰ As late as 1848, the Savings Bank Act 1848(VDL) was privately drafted; Denison to Grey, 6 November 1848, CO 280/228.

²¹ e.g. Bank of New South Wales Act 1828(NSW).

²² Derwent Bank Act 1830(VDL).

²³ New Zealand Banking Co. Ordinance 1841(NZ).

²⁴ South Australia Bank Co. Ordinance 1843(SA).

²⁵ Grey to Pakington, 19 February 1853, CO 209/114.

²⁶ Stanley to Gipps 14 July 1842, discussing the Savings Bank Extension Act 1841(NSW) and the earlier Savings Bank Act 1840(NSW); HRA ser.1 vol.22, pp 142-4.

²⁷ e.g. the solicitations of the South Australia company for bills for a toll road to Port Adelaide and a toll wharf thereat in 1839, see file GRG 2/73, SAPRO.

²⁸ See below, pp.292-3.

statutory privilege were to be responsible for the drafting of the bill, though it would be subjected to review by the colonial Law Officers.²⁹

Commercial concerns were alive to the advantages that could be conferred by statutory authority. It is clear that on occasion supplicants for an empowering statute sought to enhance their prospects by the employment of the colonial Attorney-General to draft the proposed bill or, perhaps more commonly, to "settle" its final wording. Not surprisingly this gave rise on occasion to some difficulties in determining the role the Attorney-General played in relation to private legislation, since in his official capacity he had to scrutinise and report on bills which in his private capacity he might have prepared. In 1844 Governor Fitzroy of New Zealand was moved to minute that:

"The Governor does not think any fee can be payable to the Attorney-General on account of any Private Ordinance examined by him - at the desire of the Government - previous to their being laid before the Council.

If he draws up or settles the Bill beforehand - he acts privately not as a public officer and may of course then expect a fee".³⁰

Nor was the actual procedure for the consideration of private bills much more developed. Again it seems that one concern of colonial governors was to ensure that the law Officers did not manipulate their office to ensure greater fees. When the first Attorney-General of New Zealand proposed that :

"...the best course to be pursued with reference to the introduction of 'Private Bills' will be as follows: When the bill is sent in to the Clerk of the Council as now required he should immediately submit it to the Governor; should the Governor deem it desirable to allow the introduction of the Bill, the permission of the Governor to the Bill being introduced should then be intimated to the party charged with the cost of the Bill accompanied by an intimation that it should be submitted to the Attorney-General to revise"

Fitzroy was quick to ensure that any consideration of the bill by the Attorney-General would be in his official capacity:

"I do not agree to this course altogether.

"The Bill should be, in the first instance, given to the Clerk of the Council and by him to the Governor - but the next step should be that of the Governor obtaining the opinion of the Law Officers of the Crown on the measure in order to assist him (the Gov.) in forming his own decision.

²⁹ See e.g. Minute of 26 March 1849 of the Executive Council of South Australia on negotiations with syndicates seeking railway concessions in South Australia, which led to the enactment of the Adelaide City and Port Railway Co. Act 1850(SA); GRG40/1/3, SAPRO.

³⁰ Fitzroy to Coates, 1 April 1844, James Coates papers, file MSQ.656, DL. Emphasis in original.

"Upon the Governor's decision either to bring in (introduce) the Bill or to decline doing so - the parties interested in the matter will proceed so as to forward their interest best. If the Governor declines to bring in their Bill, he will state his reasons for doing so which will probably lead to an alteration of the measure - so as to make it unobjectionable".³¹

³¹ Swainson to Fitzroy 20 April 1844, and Fitzroy to Swainson, 20 April 1844; James Coates papers, file MSQ.656, DL.

Private member's bills

The contribution made by private member's bills to colonial law last century is hard to determine. A simplistic indication of it can be derived from a consideration of the ratio between government and private bills. In Western Australia in 1880, at a time when the colony had a representative parliament but not responsible government, there was a total of 286 bills introduced, a quarter of which were private member's bills. Such bills were significantly less likely to pass, but even so about four-fifths of bills introduced by private members passed, a total of around sixty statutes of the 250-odd enacted.³²

Parsons has calculated that in New South Wales, over the period 1870-1890, 554 statutes were passed, of which 117 were private member's bills. In the same period there were 251 Government Bills which failed to become law and 549 unsuccessful private member's bills.³³ However there is a significant difference between the governmental failures, which were mostly as a result of the closure of a session and were likely to be reintroduced in later sessions, and the private member's bills for whom failure on one occasion was often fatal. The contribution of private members was most marked in what Parsons describes as "professional interest" legislation - that dealing with matters of technical law or law reform. Over the two decades of her study, Parsons calculates that there were 100 statutes coming within the professional interest category. Of these, only 39 were Government measures, 61 being private member's bills. Of the 61 successful private member's bills, 55 had been initiated by lawyer members of the legislature.³⁴ This state of affairs is attributed by Parsons to a desire by successive colonial governments to leave professional interest legislation to the lawyers, allowing the Government to devote their energies to more politically appealing matters.

Comparable figures as to the frequency of private member's bills for the other colonies are difficult to obtain, but one study of the New Zealand Legislative Council suggests that in the

³² Boyce, P.J. "The Governors of Western Australia under Representative Government, 1870-1890" *University Studies in History*, 1961, vol. 4. p.126.

³³ Parsons, pp 11-12.

³⁴ *Ibid*, p.21.

New Zealand Parliament private member's bills were often almost as numerous as government measures.³⁵ It is not, however, easy to determine the relative rates of success of such bills.

For the most part the debates surrounding private member's bills reveal that many received a remarkably non-partisan hearing. Parsons notes that there were many occasions on which the New South Wales government either tolerated or actively supported "professional interest" legislation moved by opposition members.³⁶ One measure of this is the fact that Sir George Reid, of New South Wales, could write of his activities in 1891 that he :

"...introduced two useful Bills to enact valuable English codifications of the laws relating to arbitration and the laws of partnership. They were passed without difficulty."³⁷

without making mention of the fact he was then among the principal figures in the parliamentary Opposition.

This is not to say that private member's bills never dealt with contentious subjects nor generated significant political tension. Examples of divisive measures may be found in most colonies, but perhaps the most surprising and spectacular occurred in New Brunswick in the 1850s when the then Provincial Secretary, S.L. Tilley, brought in a private members bill to prevent the importation, manufacture or sale of alcoholic liquor. The bill narrowly passed the legislature. The Lieutenant-Governor dissolved the parliament (without consulting his Council) thus forcing an election. The existing Liberal government was trounced - Tilley himself losing his seat - but the Conservatives proved incapable of forming a lasting government and a second election in the same year saw the Liberals return to power - without Tilley or prohibition legislation.³⁸ Some private member's bills were on even more contentious matters - in 1852 a private member's bill to cut shipping duties passed the Tasmanian legislature, only to be reserved by the Governor.³⁹

³⁵ Jackson W.K. *The Failure and Abolition of the New Zealand Legislative Council* (Otago UP, Dunedin, 1972), p.90, Table P.

³⁶ *Ibid.*, p.333.

³⁷ Reid, Sir George *My Reminiscences* (Cassell, London, 1917), p.94.

³⁸ See Stockton, A.A. *The Judges of New Brunswick and their Times*, from the manuscript of the late Joseph Wilson Lawrence, edited and annotated by A.A. Stockton. (published by Acadiensis Magazine, St. John, New Brunswick, 1907), pp.512-3.

³⁹ Denison to Grey, 9 April 1852, CO 280/291.

One of the earliest instances in Australasia of significant legislation being enacted as the result of initiatives by a private member comes from the New South Wales Legislative Council of the 1840s. One of the leading members of the Council, and on occasion a strong opponent of the Government, was the barrister Richard Windeyer. English-born and educated, Windeyer came to Australia in 1835, prospered and was elected to the Council in 1843. Amongst other achievements, he was responsible for the passage of two significant acts, the Libel Act 1847(NSW) and the Jury Laws Amendment Act 1844(NSW). The first of these was largely based on Lord Campbell's Act of 1843⁴⁰ but also included four recommendations of the House of Lords Select Committee of 1843 which the Commons had refused to accept. Thus the New South Wales law came to diverge from the law of England, not least in assimilating the law of libel and that of slander, and in providing that truth was a defence to civil actions for libel only where publication was for the public benefit. The second statute was more controversial, in that it introduced into New South Wales a system of majority verdicts in civil jury trials, over the strong opposition of the then Attorney-General. The concept of majority verdicts was not new - similar legislation had been in force in Van Diemen's Land for some time⁴¹ but its implementation indicates that Windeyer was no mere slave to English ideas.⁴²

Legislators seeking suitable precedents for private member's bills - or indeed and perhaps as importantly the inspiration for such bills - could often find what they sought in the bills considered in the colonial or Imperial parliaments as well as in the statutes actually passed in those legislatures. The Law of Slander Act 1865(SA), a private member's bill moved by James Penn Boucaut, was designed to confer on women an action for words imputing unchastity. Boucaut said that such a reform had been recommended "by a House of Lords Committee on Lord Campbell's Bill in 1843 or 1844".⁴³ A few years earlier a Tasmanian politician had

⁴⁰ Libel Act 1843(Imp).

⁴¹ Juries Act 1834(VDL), and see Windeyer, J.B. "Richard Windeyer: Aspects of his work in New South Wales 1835-1847" JRAHS, 1964, vol.50 p.81 at p.92.

⁴² The foregoing account is based heavily on Windeyer, J.B. *op. cit.*, n.41.

⁴³ 1865 SAPD 185-6.

introduced a Bankers Frauds Bill, then said to be based on a bill introduced in House of Commons by Bethell, a leading English lawyer and politician.⁴⁴

Cases might also occur where a back-bencher sought to bring in legislation which he saw as desirable, basing his drafts on legislation in another colony. An example is the Tasmanian Law of Evidence Amendment Bill 1889, intended to provide greater protection for witnesses at the hands of bullying counsel, which was introduced into the Tasmanian Parliament by one Rooke, as a private member's bill. Although Rooke had tried to model his measure on a Victorian bill, the Attorney-General felt it necessary to move extensive amendments to make the measure achieve Rooke's objects, commenting also that the Government were not opposing the bill "as it had been found necessary to introduce it in the other colonies, and as they liked their laws to be uniform".⁴⁵

Most of the colonies had areas in which the dominant impulse to reform was provided by private members. Many of the most significant family law statutes in New Zealand, and in other colonies, arose from the activities of private individuals such as John McGregor.⁴⁶ But the influence of private members went well beyond family law. A number of examples appear in the accounts of particular areas of law canvassed below, but for the present it is sufficient to instance the efforts of Thomas Bannatyne Gillies, a Dunedin lawyer and later a Supreme Court judge, who was responsible in 1871 for private member's bills for both the abolition of imprisonment for debt and the introduction of a right to sue the Crown in contract or tort.⁴⁷ In moving the latter, though not the former, Gillies was acting in the hope, which was fulfilled, that Government support would be forthcoming.⁴⁸

On some occasions the private member's bills show considerable knowledge of both the law of the particular colony and that of England or other colonies. Thus J.V. O'Loughlin in speaking

⁴⁴ *Hobart Town Mercury* 16 February 1858.

⁴⁵ *Hobart Town Mercury* 3 October and 16 October 1889; the quotation is from the latter date.

⁴⁶ For McGregor's career, see Downie Stewart, W. *Life and Times of Sir Francis Bell*, (Butterworths, Wellington, 1937) pp.161-66.

⁴⁷ See below, p.267.

⁴⁸ For Gillies's career, see *Dictionary of New Zealand Biography*, vol. 1, p.149. For the Imprisonment for Debt Abolition Bill, see 1871 10 NZPD 84ff.

to his Lapsed Bills Continuance Bill 1893 (to prevent the automatic lapsing of public bills by the termination of a session) referred to an English bill of 1869 and a New South Wales statute of 1891 law, as well as to South Australian private Bill procedure.⁴⁹ However those who appealed too enthusiastically to precedents in other colonies found on occasion that a sneer directed at the exemplar might prejudice the bill put forward. When King O'Malley, during his brief sojourn in the South Australian parliament, moved, as a private member's bill, the Seating in Shops Bill 1896 to ensure employers provided seats for pregnant shop assistants, he made great play of the fact that New Zealand had legislated on the same lines, only to have a conservative opponent jeer that New Zealand "had passed 5,000 acts and repealed 4,500 of them"; the measure failed, as it did again the following year.⁵⁰

There were also occasions where the efforts of a private member were sufficient to ensure that a measure was significantly altered during passage through the colonial parliament, even though no original contribution was made by the intervenor. One example of this occurred with the Oaths Act 1889(Tas). The bill was an apparently uncontroversial government measure, introduced by the premier, to adopt a recent English act which, inter alia, allowed witnesses in judicial proceedings to affirm rather than take a religious oath on various grounds, including a lack of religious belief. A backbencher, Gellibrand, objected to this provision, on the basis that:

"the principle of allowing anyone to openly state that he had no religious belief should not be allowed by Act of Parliament".⁵¹

Gellibrand had support for this view, with the result that the provision was struck from the bill. Later the Attorney-General re-drafted the bill so that a witness did not need to give the ground on which he or she declined to take an oath,⁵² thus both getting around Gellibrand's objection and causing the Tasmanian law to depart to some extent from the English original on which it had been modelled.

⁴⁹ See 1893 SAPD 2674 and 2764

⁵⁰ Hoyle, R.R. *King O'Malley* (Macmillan of Australia, 1981), p.44.

⁵¹ *Hobart Town Mercury* 14 August 1889.

⁵² *Hobart Town Mercury* 25 September 1889.

The relatively high cost of having a measure drafted *ab initio* must have encouraged reliance on precedents from other jurisdictions. It would also seem to have been behind the constant attempts by back-benchers to obtain, without charge, the services of the salaried Parliamentary Draftsman where such officials existed. When Alexander Oliver was first appointed as a part-time Parliamentary Draftsman in New South Wales, he was expected to draft private member's Bills on request, if his commitments to official matters permitted, and indeed he was concerned with the drafting of some substantial pieces of legislation on this basis.⁵³ This does not seem to have endured, and toward the end of the century the various official draftsmen appear to have been more concerned with reviewing bills prepared by others than with original drafting.

There were still occasions where the official draftsmen were responsible for the final form of measures that began as private member's bills. A convenient example is provided by bills which attempted to prohibit "indecent" medical advertisements - those that dealt with, in drawings, pictures or print, "venereal or contagious diseases affecting the generative organs". A prohibition of these was first suggested in Victoria in 1897, as a part of a private members bill on indecent publications generally. This Bill had in fact been drafted for its mover by the Parliamentary Draftsman, Edward Carlile because the then Premier had agreed in principle to support the bill. The bill originally provided for personal liability of printers and publishers of indecent publications where the owner of the publication was a company, and also prohibited the reporting of indecent material which was given in evidence in any court case. These two elements were later discarded and only the prohibition on indecent advertisements of, that is advertisements which dealt with, in drawings, pictures or print, "venereal or contagious diseases affecting the generative organs". This became the Indecent Medical Advertisements Act 1899-1900(Vic). The Parliamentary Draftsman's file includes a differently drafted New South Wales bill, introduced earlier in 1897, on the same subject. The file then has a redrafting of the advertisement provisions, which are later taken up again in New South Wales in September 1898 in a bill which discarded the earlier New South Wales draft in favour of the

⁵³ e.g. see Watkins to McGowrie, MLA, 20 November 1893 and Watkins to Waddell 20 November 1893, Letter-book, APCNSW.

revised Victorian wording.⁵⁴ However the different wording may well have been derived from the Indecent Publications Act 1892(NZ), since s.5 of that Act is very similar to the wording eventually used in Victoria, and there is some evidence that the New Zealand Postal Department had specifically called the attention of the Victorian Government to the New Zealand section.⁵⁵

There were also cases where a draftsman acted in a private capacity even though the Government had refused to provide assistance for a private measure. In 1893 Oliver, as a former Registrar of Friendly Societies, offered to draft a new Friendly Societies Bill though the Government had refused its backing for the measure.⁵⁶ Even after relinquishing the post of Parliamentary Draftsman, Oliver was on occasion still involved in the preparation of legislation. It seems in 1897 he prepared a new bill dealing with rabbit and, around the same time, made suggestions for amendments to bills on land allocation and fisheries.⁵⁷

The cumulative efforts of private members, parliamentary draftsmen and other officials was to create a substantial corpus of law more or less adapted to colonial needs. Some insights into the processes through which their combined efforts could transform particular areas of law can be gained from looking at discrete aspects of the law and considering developments in that area of law in different settlement colonies. It is to that investigation that attention is now turned.

⁵⁴ Indecent Medical Advertisements Bill file, VPRS 10265.265, VPRO.

⁵⁵ *Melbourne Age*, 1 May 1899.

⁵⁶ Extract from *Star* newspaper, 16 November 1893, in Oliver papers, USL.

⁵⁷ Carruthers to Oliver, 11 March 1897 (Rabbit Bill); Carruthers to Oliver, 19 September 1894 (Land Bill) and Brunker to Oliver, n.d. but 1896, (Fisheries Bill) Oliver Papers, USL.

Chapter 9

The creation of colonial law in practice 1:

family law and related matters

"The question of divorce is as remote as almost any other, from the Province of one who writes as a professional lawyer"¹

The history of the colonial statutes covering that field of law which modern lawyers would consider as coming under the broad rubric "family law" - that is to say the law of marriage² and divorce, of legitimation, adoption and custody of children and liability for maintenance of spouses and children,³ the owning of property by women and the rights of wives and children to enforce claims against the estates of husbands and fathers is cast in a somewhat different pattern from some other areas of law. Two particular features stand out as causative of at least some of these differences. Firstly there is the highly pertinent, though often overlooked, fact that the whole area of family law was one in which public interest was high and reformers were likely to receive public and political support for their proposals. Secondly there was a countervailing factor tending to hinder change in that the British Government attempted to restrict colonial innovation, most especially in divorce legislation, in the claimed interests of imperial uniformity. Curiously enough the attempts to rein in colonial reformers seem to have been directed almost entirely at the Australasian colonies⁴ in the period after the British Parliament had, at long last, passed the Matrimonial Causes Act 1857(Imp). Long before that the North American colonies had managed to make considerable changes to their own law, a process viewed, as will be seen, with relative equanimity by the Colonial Office. The process whereby the law in the colonies came to be significantly different from that of England - to say in advance of England would be tendentious but

¹ Stephen to Spring-Rice 5 November 1834, CO 323/50, PRO.

² The development of the marriage laws in early nineteenth century Australasia is considered above, pp. 37-39.

³ As to maintenance for de facto spouses and illegitimate children see above, pp.43-4.

⁴ The position in the South African colonies is obscure, but the inherited Romano-Dutch law was not dissimilar to Scots law; Hahlo, H.R. "A Hundred Years of Marriage Law in South Africa" [1959] *Acta Juridica* 47.

defensible - reveals many different aspects of the processes that interacted to produce the common elements of statute laws of the colonies. As is discussed below, in many cases domestic support for and/or British acceptance of proposed legislation was solicited on the basis that other colonies (or Britain) had already adopted such a law. There is also the often-encountered phenomenon of private members stepping in to promote legislation when a colonial government would not or did not do so. The ease with which legal issues could involve constitutional principles also becomes apparent, as does the degree to which private influence and information supplemented or overtook governmental channels. Not least in importance is that the field is one in which the difficulties of the British government in trying to maintain a degree of harmony between the various laws of the Empire became apparent.

Marriage law

One feature of colonial marriage laws was the persistent practice of the colonists to enlarge the number of religious sects which were given some form of recognition, particularly in statutes which permitted ministers of minority religious groups to perform lawful marriages. The English law in the late eighteenth century considered that a valid marriage could only be contracted in a public ceremony performed according to the requirements of the Anglican church (Scots law was considerably more flexible). Thus, apart from a tacit recognition of Jewish and Quaker marriages, all persons bound by English law who wished to marry had to at least nominally submit to the Anglican church. Not until the Marriage Act 1836(Imp) did English law recognise as valid a purely civil ceremony or a marriage in the religious buildings of other registered (and therefore recognised) denominations.

These restrictive rules caused little practical difficulty in Australia, since many inherited the English law and in the others little time elapsed between the acquisition of legislative powers and the passage of the English Act which could then be used as a basis for more generous colonial laws. The position was different in the North American colonies where a broad range of non-conformist religious sects, mostly of the dissenting Protestant sort, commanded substantial followings and confronted an Anglican church which enjoyed less of an entrenched position than was the case in England itself.⁵

The first North American colonial legislation on marriage appears to have been a New Brunswick Act of 1787, but this was more concerned with divorce and with extra-marital relationships. Certainly it did not significantly alter the extant law of marriage. The next acts were two passed in Upper Canada in 1793⁶ and 1798, but unfortunately

⁵ There is a general treatment of this issue in its historical context in Knaplund, Paul *James Stephen and the Colonial System 1813-1847* (Univ. Wisconsin Press, 1953) pp. 160-164. The transmission of ecclesiastical law to the North American colonies is discussed by Davison, J. F. "Marriage and Divorce" (1927) 5 Can Bar Rev 654.

⁶ This appears to have been a locally drafted measure : Colgate, W. "William Osgoode, Chief Justice" (1953) 31 Can Bar Rev 270.

the text of these statutes is not known.⁷ It seems probable that they provided for a form of recognition of reputed marriages - that is, of non-Anglican marriages which the parties considered to be valid and later so declared to a Justice of the Peace.⁸ In 1795 Lower Canada passed the first statute to authorise some non-Anglican Protestant clergymen to perform marriages, though only a very limited class were so recognised. This reform may well have been more motivated by a desire to attract support for the main thrust of the bill which was to recognise Roman Catholic religious services as valid.⁹ As such the legislation was more directed against the Anglican church than it was specifically intended to benefit the other Protestant denominations. That measure was accepted by the Colonial Office, but in view of the dominance of the Roman Catholic church in Lower Canada the colony must be seen as a special case. In the same year a Nova Scotia statute permitted a form of civil marriage in that the Governor could empower Justices of the Peace to perform marriages where no Anglican clergyman was available in the particular locality. Again, the difficulty of providing ministers for a widely dispersed colonial population made such a departure acceptable, if not palatable.

Some years later Nova Scotia mounted a direct challenge to the privileged position of the Anglican church by the Marriage Act 1819(NS).¹⁰ Under this Act the Governor could authorise any Dissenting minister to perform marriages without the use of the Anglican form. The Colonial Office recommended, successfully, that the Act be disallowed. The grounds for opposition expressed were that the Act amounted to an unwarranted elevation of Dissenters to parity with the Anglican Church, that there was no means of checking on the quality of these Dissenting ministers or on the nature of their teachings. Perhaps more significant was the view that this Act would deprive the

⁷ The statutes are not printed in any of the collections of printed Canadian legislation, nor is the text available in the Colonial Office files. It may be that copies exist in archival form in Toronto, but I have not had access to them.

⁸ This is derived by inference from the terms of the continuation statute of 1818, see Stephen to Bathurst 3 August 1819, CO 323/41, PRO.

⁹ Stephen to Hay 29 August 1829, CO 323/46, PRO.

¹⁰ Marriage Act 1819(NS).

Anglican ministers of their customary emoluments (in the way of a monopoly on marriage fees) without compensation. Lastly the fear, perhaps justified, was expressed that the Act could facilitate surreptitious marriages.¹¹

This pro-Anglican and sectarian view also affected the reception given to several Lower Canada acts of the 1820s. Two statutes which confirmed as valid certain past marriages by Dissenting ministers in parts of Lower Canada were, reluctantly, approved.¹² However when in 1826 Lower Canada passed a statute which would have licensed Dissenting ministers and placed them on essentially the same legal footing as Anglicans, the statute was again disallowed. The Colonial Office might have progressed so far as to recognise the "churches of England, Scotland & Rome",¹³ but it was not then prepared to concede that any thirty-member congregation of colonial dissenters might set its own rules for marriage.

In the same period two Prince Edward Island statutes were also disallowed. The first, in 1825¹⁴ would have allowed very wide powers to non-Anglican ministers to celebrate marriages. The major objections appear to have been that no necessity for any relaxation of the general rule that marriages should be in Anglican form had been shown and, more particularly, that the door was opened too wide to minor sects - under the Act any "Teacher" of any congregation could perform marriages.¹⁵ A second Prince Edward Island Marriage Act passed in 1829 was apparently also disallowed, though the reasons for this are not clear. Certainly the legal adviser to the Colonial Office saw no objection.¹⁶

¹¹ Stephen to Bathurst, 18 August 1819, CO 323/41, PRO.

¹² Gaspe Marriages Confirmation Act 1821(LC), see Stephen to Bathurst 4 December 1821, CO 323/41, PRO, and St Francis Marriages Confirmation Act 1825(LC), and see Stephen to Bathurst 2 February 1827, CO 323/44, PRO.

¹³ cf J.F. Stephen to Bathurst, 2 September 1826, CO 323/43, PRO. Methodists were permitted to perform marriages by the Methodist Registry Act 1829(LC); see J.F. Stephen to Hay, 29 August 1829, CO 323/43, PRO.

¹⁴ Marriage Act 1825(PEI).

¹⁵ Stephen to Bathurst 19 April 1826 CO 323/43, PRO.

¹⁶ Stephen to Murray, 22 July 1829, concerning Marriage Act 1829(PEI), CO 323/46, PRO.

However by the early 1830s it seems the Colonial Office had largely given up the battle and were prepared to accept the validity of legislation widening the opportunity for non-Anglican marriages, providing there was adequate provision for publicity of the occasion and for ensuring parental consent where needed¹⁷. Even so occasional minor legislation was needed - the in 1844 New Brunswick had to seek legislative authority for an American-born Methodist preacher to perform marriages, since the general acts required ministers to be born British subjects.¹⁸

In the later acquired Australasian and South African colonies a rather different pattern of legislation emerges. In the Cape Colony it seems that the marriage laws were drafted in England and promulgated by Order-in-Council in 1838. These provisions were then adopted in Natal in 1846. Unlike the other colonial legislation discussed so far, these laws allowed for Moslem marriages.¹⁹

By contrast, as has been discussed elsewhere,²⁰ the Australasian colonies in the late 1830s and early 1840s all passed broadly similar locally drafted laws allowing for marriages in a variety of religious settings or (in some but not all) by a civil ceremony before a Registrar. However before that legislative recognition had been extended in New South Wales to marriages solemnised by Presbyterian or Roman Catholic clergymen, a measure drawn apparently from British legislation recognising such marriages by Britons in India.²¹ Similar measures were passed in Van Diemen's Land²² and Western Australia.²³

¹⁷ Stephen to Stanley, 31 August 1833, concerning the New Brunswick Marriage Act 1832(NB), and cf. Marriage Act 1834(NB), CO 323/49, PRO.

¹⁸ Rev. Samuel D. Rice Relief Act 1844(NB)

¹⁹ Matthews, E.L. "South African Legislation relating to Marriage or Sexual Intercourse between Europeans and Natives or Coloured Persons." (1920) 2 JCL&IL (3rd series) 117.

²⁰ Above, pp. 37-39.

²¹ Roman Catholic and Presbyterian Marriages Act 1834(NSW). Bourke to Spring-Rice 28 Dec 1834, Despatch no. 129, HRA ser.1, vol. 17, pp.618ff.

²² Marriage Regulation Act 1838(VDL), and see Franklin to Glenelg, 30 December 1838, CO 280/81.

²³ Marriage Act 1841(WA), and see Hutt to Russell, 20 September 1841, CO 18/28.

The statutes of the 1830s and 1840s were significantly amended in later years in some colonies, generally to broaden the range of religious sects whose ministers would be licensed to officiate and to confirm non-Anglican religious marriages that had already taken place. Legislation of this kind is to be found in Victoria, New South Wales, South Australia and Tasmania, usually as a result of the initiatives of private members rather than as a government measure.²⁴ It is clear that for many colonists the question was one of equality between the different sects, and thus an insistence that there be no distinctions between the sects recognised by law.²⁵ The question of recognition was not always easily solved - in New Zealand it was found that the Marriage Act 1858(NZ) had excluded from the list of approved denominations the Reformed Church of Germany, because the framers of the bill had thought that church was identical with the Lutheran Church which was listed.²⁶

Late in the century at least one colony found that its tolerance of a wide range of churches had opened the door to abuse. In the 1890s in Victoria it was alleged that there were a few religious leaders of small religious sects, sects essentially personal to the founder and preacher, who were abusing their position and performing marriages without adequate regard to their legal obligations. In particular some such churches had formed arrangements with marriage bureaux which had promoted marriages without proper concerns for safeguards as to parental consent and the like. The existing law did provide for ministers to be prosecuted in cases of grossly negligent failure to comply with the Act,²⁷ but this had not proved an adequate safeguard. The upshot was the

²⁴ See Marriage Amendment Act 1852(SA); Marriage Act 1855 (NSW). For Victoria see Marriage Amendment Act 1858(Vic), and Barkly to Lytton March 15 1859, Files A2346 & A2347, ML. For Tasmania see Marriage Amendment Act 1859 (Tas) and Young to Newcastle, 4 October 1859, CO 280/344.

²⁵ See the correspondence between the Governor of Tasmania and the Colonial Office on the 1859 Tasmanian Act; Young to Newcastle, 4 October 1859, CO 280/344. Newcastle to Young, 15 February 1860, CO 280/344; Young to Newcastle, 1 September 1860, CO 280/344 and Minutes of Rogers and Newcastle, n.d., thereon.

²⁶ Rev. J. Whiteley to C.W. Richmond, 19 July 1858, printed in Scholefield, G.H.(ed) *The Richmond - Atkinson Papers* (Government Printer, Wellington, 1960), vol. 1. pp.415-416.

²⁷ The Melbourne *Argus* 23 June 1890 reported a case where a Mr Hood was fined £100 in Supreme Court for carrying out ceremony of marriage where wife a minor of 16; clipping in VPRS.10265/27, VPRO. In Canada it seems such negligent failure to perform statutory obligations laid the minister open to a civil action in tort: *Perry v Taylor* (1868) 4 Lower Canada Law Journal 58.

Marriage Law Amendment Act 1898(Vic), which gave power to the Governor to remove from the register any clergyman convicted of a felony or a misdemeanour, or to prohibit marriages from taking place in particular places. These provisions appear to have been drafted after considerable discussion with the more established sects²⁸

²⁸ As to this see file VPRS.10265/27, VPRO.

Marriage with deceased wife's sister

There was a related issue on which the less entrenched position of the Anglican church in the colonies permitted reform ahead of attempts to bring change in England. This related to the vexed question of whether it was possible for a widower to make a valid marriage with the sister of his deceased wife. It would seem that although ecclesiastical law did not accept such a marriage as valid, the common law had done so until the passage of Lord Lyndhurst's Act in 1835. Given that, at all levels of Victorian society, it was common that where a wife had a dependent sister the sister would live with the wife's family, it was perhaps inevitable that there would be many cases where widowers and their sisters-in-law formed attachments which they wished to have recognised as valid marriages. Bills for this purpose were regularly introduced into the British Parliament, eventually commanding substantial majorities in the House of Commons but perishing in the House of Lords where the ecclesiastical lords marshalled opposition to any change.

In the Australasian colonies reforms succeeded, eventually, well before any change was made to English law. The first proposals appear to have been made by private member's bills moved in the South Australian Parliament²⁹ in 1856 and 1857 by a lawyer MP, one Bagot.³⁰ The 1857 bill provoked considerable discussion, with the members of the Legislative Assembly being divided between those defenders of the status quo who wished the law of marriage to be the equivalent of Anglican doctrine and two groups of reformers. The moderates pointed out that several other Protestant denominations made no objections to such marriages and, since South Australia was a secular colony, there was no need for the law to follow the views of one particular church. The minority of more extreme advocates of the bill claimed that marriage should be regarded as a civil contract, and no religious objections should be given

²⁹ On the South Australian reforms see Parsons, Angas and Campbell A.L. "The South Australian Centenary of Legislation" (1936) 17 JCL&IL (3rd series) 21.

³⁰ See 1857 SAPD 67 and 132.

weight. The Bill passed the Legislative Council in the following year but was disallowed by the Colonial Office on the basis that the marriage laws of the colonies had to be the same as those of England.³¹

The South Australian reformers however returned to the issue several times over the next few years, and bills were passed in 1860, 1863 and 1870 only to be reserved and assent denied. By this stage opposition in the colony had switched from any question of principle to one of utility - whether it was worth spending time on the bill if assent would not be forthcoming. Renewed impetus was given to the debate by appeals from the English proponents of reform who requested further action in the colony to aid them in a fresh bill in the British Parliament.³² Although the English bill failed and the first South Australian Bill was disallowed, the South Australian Parliament was not deterred. The disallowed bill was reintroduced again in 1870 and passed, under suspension of Standing Orders. Assent was finally given to the bill in 1871.

Nor was South Australia alone in the struggle. By this time there had been similar bills put forward in Queensland in 1861 and 1863 (both passed the lower house but failed in the Legislative Council)³³ and a bill had passed in Victoria in 1870, only to be disallowed. As had been the case in South Australia, and was to be the case elsewhere in all colonies save Tasmania, the bills were all private member's bills. In New Zealand, too, a private member's bill was introduced in 1871, modelled on the South Australian bills. This is perhaps the less surprising because the mover was G.M. Waterhouse, a remarkable colonial politician who had been Premier of South Australia and was to hold the same position in New Zealand. The bill passed the House of Representatives narrowly, though in part the opposition was based on misapprehensions

³¹ As to this see Swinfen, D.B. pp.61-63.

³² 1870 SAPD 1657.

³³ See 1877 XXII QPD 28.

as to the extent to which other colonies would recognise such marriages even if a bill passed.³⁴

Once assent was given to the South Australian law in 1871, pressure for reform in the other colonies was renewed. The next to succeed was Victoria, which passed in 1872 a bill which was exactly the same as that disallowed in 1870, but on this occasion it received assent. It is noteworthy that on this occasion too the English reformers had sought a renewal of colonial activity.³⁵ Tasmania followed soon after, passing the Deceased Wife's Sister Marriage Bill 1873 by very large majorities.³⁶ Unusually the Bill appears to have been a Government measure, and the ministers made clear their view that royal assent should not be withheld in the light of the degree of support for the Bill and the precedent in the other colonies.³⁷

Despite these laws being approved, the Colonial Office had not yet surrendered completely. A Queensland Bill of 1875 was disallowed, though with an indication that a future bill drawn exactly on the lines of the Victorian Act would receive assent. That invitation was accepted in 1877 after, surprisingly, a bill failed in 1876.³⁸ That meant that Queensland was the last Australian colony to enact a law - New South Wales had passed a bill which received assent in 1875.³⁹ Western Australia only just preceded Queensland, since although a Bill was passed in 1876, it was reconsidered in 1877 to conform with the Victorian law to ensure assent.⁴⁰ The New Zealand reformers succeeded in 1880.⁴¹

³⁴ (1871) 10 NZPD 156.

³⁵ (1872) 15 VPD 1968.

³⁶ *Hobart Town Mercury* 4 and 10 July 1873.

³⁷ Giblin to Du Cane, n.d., enclosed with Du Cane to Kimberley, 8 August 1873, CO 280/382.

³⁸ (1877) XXII QPD 28.

³⁹ Deceased Wife's Sister Legalizing Act 1875(NSW)

⁴⁰ (1877) 2 WAPD 80.

⁴¹ Christie, James "The Statute Law of New Zealand specially applicable to Women and Children" (1929) 11 JCL&IL (3rd series) 209, gives the date, apparently in error, as 1876. See also the informative debates on the point at (1871) 10 NZPD 156 and (1895) 87 NZPD 408.

Divorce

The most controversial, and the best documented, area of law reform concerned divorce. The common law as such did not regulate the law of marriage - that was the province of the Church and, after the Reformation, of the ecclesiastical courts. The Court of Matrimony, or as it was more commonly known the Divorce Court, did not have the power to grant a divorce in the modern sense of the term, an order bringing a marriage to an end, until the passing of the Matrimonial Causes Act 1857(Imp). However it did have power to grant a decree of a divorce "a mensa et thoro" ("from bed and board"), which ended the matrimonial obligation of cohabitation. Until 1857 termination of the marriage itself could only be done by a private act of Parliament (the first of which was passed in 1670); it came to be parliamentary practice that such Act would normally only be passed after a decree had been obtained from the Divorce Court with, in appropriate cases, a further action at common law for damages for adultery. In some cases, normally those where the petitioner was of limited means, the common law action was not required.⁴² The court also had the power to determine whether a marriage was void or was voidable. The procedure was intrusive (since all the proceedings would be fully reported in the press) as well as being extremely expensive. Divorces were therefore very rare. The details of the jurisdiction are not relevant for present purposes. What is highly important is that since the matrimonial jurisdiction enjoyed by these courts was not a part of the true "common law" of England, it was not necessarily exported to colonies acquired by Britain. It seems clear that colonial courts did not acquire matrimonial jurisdiction as of right - it had to specially conferred by legislation. In the pre-revolutionary American colonies this had on occasion caused difficulties, with colonial legislatures attempting to pass private divorce bills only to have them disallowed.⁴³

⁴² There is an illuminating study of the mechanics of parliamentary divorce in Anderson, Stuart *"Legislative Divorce: Law for the Aristocracy?"*, in Rubin, G.R. & Sugarman, David (eds) *Law, Economy & Society: Essays in the History of English Law 1750 - 1914* (Professional Books, Abingdon, 1984).

⁴³ Friedman, Lawrence M. *A History of American Law* (Simon & Schuster, New York, 1985), pp.204-05.

This lack of jurisdiction may not have mattered a great deal in the early days of the British Empire when colonial populations were relatively small and the moneyed classes who could perhaps have afforded the lengthy procedures needed for divorce were likely to return to Britain at frequent intervals. As the number of colonists grew, the difficulties became more acute.

The first instance of a colonial body attempting to declare a marriage over appears to have occurred in 1750, when the Council of Nova Scotia granted a divorce to a military officer serving in the colony. The British authorities overruled that determination.⁴⁴ The colonial authorities responded by passing the first colonial divorce law in 1758, a statute which permitted the court to grant a divorce for adultery or for desertion without maintenance for three years. Three years later another act dropped the desertion ground but made cruelty an alternative ground.⁴⁵ It is not clear whether these statutes were intended to allow the court to terminate the marriage or merely to issue the equivalent of the ecclesiastical divorce *a mensa et thoro*. The wording of the sections was ambiguous but a later statute in 1816 made it clear that divorce meant only a divorce *a mensa et thoro*.⁴⁶ That statute also drew hostile comment from the Colonial Office since it purported to allow any divorce granted to have effect retrospectively from the time of the adultery or cruelty.⁴⁷

Once Nova Scotia had established the precedent, other North American colonies followed. New Brunswick in 1787 passed a statute allowing divorce or annulment of marriage for frigidity, impotence, adultery or consanguinity within the prohibited degrees. Perhaps surprisingly, given the Nova Scotia law, neither cruelty nor desertion was a ground for divorce.⁴⁸ The 1787 Act was repealed and largely re-enacted in

⁴⁴ Backhouse, C.B. "Pure Patriarchy: Nineteenth Century Canadian Marriage" (1985) 31 McGill LJ 265, 267.

⁴⁵ The statutes are Marriage and Divorce Act 1758(NS) and Marriage and Divorce Act 1761(NS). See Davies, C. (ed.) *Power on Divorce and other Matrimonial Causes*, (Carswell and Co., Toronto, 1976), vol.1, p.3.

⁴⁶ Marriage Act 1816(NS), s.2.

⁴⁷ Stephen to Bathurst, 11 September 1816, CO 323/40, PRO.

⁴⁸ Davies, C., *op.cit.* n.45, p. 3.

1791.⁴⁹ Prince Edward Island acted also with two divorce acts in the 1830s,⁵⁰ empowering the court to grant divorces on the grounds of impotency, adultery and consanguinity. However the statutes were largely dead letters since there were no adequate rules of procedure.⁵¹

Of the other North American colonies of the period, British Columbia had inherited British law as at the 19th of November 1858 and therefore possessed a divorce jurisdiction by inheritance.⁵² In Manitoba, Alberta, Saskatchewan and the Yukon and Northwest Territories divorce jurisdiction according to the English law was conferred by Canadian federal statute in the 1880s. Ontario, Quebec and Newfoundland had no provision for divorce jurisdiction in their courts until the twentieth century.⁵³ The Quebec position is not surprising given the Roman Catholic dominance of the province - indeed the Quebec Civil Code of 1866 declared marriages to be indissoluble.

It is interesting in the light of later directives from the Colonial Office to the Australasian colonies to see that in the first half of the nineteenth century the Colonial Office apparently considered the reform of divorce law, at least as far as it dealt only with divorce a mensa et thoro, to be perfectly acceptable and even praiseworthy. The

Prince Edward Island Act of 1835 was described as :

" not only an unobjectionable, but a very salutary measure".⁵⁴

Some years later J.F. Stephen referred to a Nova Scotia divorce statute thus:

⁴⁹ Divorce Act 1787(NB). The Act drew no comment from the then legal adviser to the Colonial Office, William Selwyn. See Selwyn to Sydney, 17 January 1788, CO 323/34, PRO. Backhouse, op. cit. n.44 omits reference to the 1788 statute, instead erroneously treating the 1791 statute as the first in the field. The mistake is understandable since Berton's compilation of New Brunswick statutes, compiled in 1838, does not list the Act. Its existence is made clear by the repeal provision, s.11.

⁵⁰ Divorce Court Act 1833(PEI) and Divorce Court Act 1835(PEI).

⁵¹ See Davies, C.(ed) *Power on Divorce and other Matrimonial Causes*, (Carswell and Co., Toronto, 1976), vol.1 p.2.

⁵² Ibid and see *Watts v Watts* [1908] AC 573 and *Walker v Walker* [1919] AC 947. For the inheritance of ecclesiastical jurisdiction in some parts of Canada see Davison, J. F. "Marriage and Divorce " (1927) 5 Can Bar Rev 654.

⁵³ Davies, C., loc. cit. n.51. Jordan, F.J.E. "The Federal Divorce Act (1968) and the Constitution " (1968) 14 McGill LJ 209 gives a useful summary of the debate whether jurisdiction over matrimonial matters was to be a federal or a provincial matter.

⁵⁴ Stephen to Glenelg 8 February 1836, CO 323/52, PRO.

"According to the best of my judgment, it is a wise innovation on the Law of England".⁵⁵

Lord Stanley, the then Secretary of State for the Colonies, sent the bill for comment to the Queen's Advocate, the Attorney-General and the Solicitor-General, though making it clear that only the changes made to existing Nova Scotia law were in question: "let it appear that the principle is recognised and acted on by the original acts".⁵⁶

However the jurisdiction of these colonial courts was territorially limited which meant that where one party had left the colony petitioners could not receive the relief sought. Normally in such cases little could be done, but in 1834 the Nova Scotia legislature was persuaded to pass what appears to have been the first ever personal colonial divorce Act, the Kidstone Divorce Act.⁵⁷ This Act contained a preamble stating that the husband had married the wife in 1811, and had for eight years to 1819 treated her with cruelty and had in 1819 deserted her and left her without support and then had left colony. His whereabouts being unknown, he could not be cited and compelled to answer in any proceeding in a divorce court. The legislature had been persuaded that since a state of affairs which would have sufficed for a judicial divorce existed, it should declare the marriage over. This Act was allowed to operate by the Colonial Office, although the British authorities considered that it would probably not be effective if either party established a domicile in Britain. It appears that this act prompted the standard caution in all future Governor's Instructions that the Governor should not assent to "Divorce Bills" but reserve them for the British authorities.⁵⁸ The private bill method of proceeding was also attempted in colonies where no divorce court. In 1839 the Stuart Divorce Act was passed by the Legislative Council of Upper Canada and was confirmed by the British authorities,⁵⁹ as apparently was the Harris Divorce Act

⁵⁵ Stephen to Stanley 7 October 1841, CO 323/56, PRO.

⁵⁶ Stanley, pencilled note on text of Stephen to Stanley 7 October 1841, CO 323/56, PRO.

⁵⁷ Kidstone Marriage Act 1834(NS) (private).

⁵⁸ See Stephen to Spring-Rice 5 November 1834, and pencil notes on the text of the statute, in CO 323/50, PRO.

⁵⁹ Stephen to Russell 11 May 1840, CO 323/55, PRO.

1845(Can), a bill was passed by the Parliament of the new enlarged province of Canada.⁶⁰

When the Australian colonies first received adequate court systems in the 1820s the courts did not possess divorce jurisdiction. This was a result of a deliberate decision, rather than oversight. In 1820 Barron Field, then a Judge of the Supreme Court of New South Wales had suggested that matrimonial jurisdiction was necessary:
 not for the purposes of pronouncing divorces in a society like that of New South Wales, but for the sake of decreeing alimony to maltreated or discarded wives".⁶¹

However nothing came of that suggestion or from proposals by an early Attorney-General, Saxe Bannister, in 1825.⁶² The Colonial Office apparently took the view that legislation in Britain would be needed to allow such a jurisdiction.

Nor did any of the later colonies receive a divorce jurisdiction at the time of the creation of their respective legal systems. It has been suggested that in New Zealand this omission was because the first Chief Justice, Sir William Martin, a staunch Anglican, did not believe in divorce,⁶³ but it is more probable that the reasons for the lack of a matrimonial jurisdiction lie more with the Colonial Office than with the judge.

Nor, in the case of the Australian colonies at least, was the Colonial Office happy to concede to colonial legislatures the right to pass statutes for legislative divorces.
 "In general, Colonial Legislatures are restrained from passing Acts for divorces. The danger of the power being abused if it were once granted has, I presume, been the reason for withholding it; otherwise it might seem difficult to assign any good reason why the parties should be indissolubly united, notwithstanding the most aggravating case of adultery which can be supposed - merely because they reside in a distant colony".⁶⁴

⁶⁰ Stephen to Stanley 23 June 1845, CO 323/60, PRO.

⁶¹ Quoted by Brown, M. in Toose, P., Watson R., and Benjafield, D., *Australian Divorce Law and Practice* (Law Book Company of Australia, 1968), p.xciii.

⁶² HRA, ser.1, vol.11, p.497.

⁶³ McGregor, Sir George "The Development of Divorce Law in New Zealand" in Inglis, B.D. and Mercer, A.G. (eds) *Family Law Centenary Essays* (Sweet & Maxwell, Wellington, 1967), p.21.

⁶⁴ Minute by J.F.Stephen, printed in HRA, ser.4, vol.1, p.596.

Until the 1850s there appears to have been no attempt to remedy the omission of divorce powers. This may well have been simply a reflection of the relative small non-convict population and the frequency of de facto marriages where separation did not require legal proceedings. This view is, admittedly, speculative, but it is perhaps significant that the colonies were quick to enact provisions concerning the maintenance of de facto spouses.⁶⁵

The first attempt at a divorce in any Australian colony appears to have been the unsuccessful attempt at a legislative divorce in the case of the marriage of Emmeline Emma Blake and Patrick Mehan. A private Bill was passed through the New South Wales legislature in 1857 to declare void a marriage between Blake, the 14 year old daughter of a well-to-do publican who had fallen in love with Mehan, an apparently attractive fortune-hunter and had been married to him by a Presbyterian minister who had been deceived by Mehan's accomplices as to the age of the girl and had been assured parental consent had been given. The Bill appears to have been passed after an attempt to conform with English procedure on such bills and was also sent to the judges for the expression of their views (the judges were of opinion that the marriage was probably valid at common law in the colony, and therefore an Act should not declare it to be invalid, but they were content if the Bill made the marriage invalid). The Bill was reserved for Royal assent, in accordance with the standing instructions to the Governor, but apparently such assent was not forthcoming.⁶⁶

The passing of the Matrimonial Causes Act 1857 in Britain was the catalyst for change in the Australasian colonies. That Act created a new statutory court and conferred upon it jurisdiction to grant a judicial separation (the equivalent of the old divorce a mensa et thoro) on the grounds of adultery, cruelty, desertion without cause for two years or failure to comply with an order for the restitution of conjugal rights. The court could

⁶⁵ See above, pp. 37-9.

⁶⁶ See Colonial Secretary's files, file 4/714.4, GANSW; Brown, M. in Toose, P., Watson R., and Benjafield, D., *Australian Divorce Law and Practice* (Law Book Company of Australia, 1968), p.1c and Currey, C.H. "The Law of Marriage and Divorce in New South Wales 1788-1858" *JRAHS*, 1955, vol. 41, p.97.

grant to a husband a divorce, terminating the marriage, on proof of adultery by the wife. A wife had to establish not only adultery but some aggravating circumstances such as incest, bigamy, bestiality or cruelty.

At first the colonists believed that the British Parliament intended to extend the British Act to Australia,⁶⁷ but once it was clear this was not the case there were proposals for colonial legislation.⁶⁸ Although an inconclusive report on the subject was made by the Victorian Legislative Council in 1857, it seems the first proposals for reform to reach the legislative agenda were in Victoria, where John Pascoe Fawkner⁶⁹ sought leave to introduce a bill "grounded on the English Bill" in 1858. Fawkner sought to defuse any anticipated criticism by stressing the fact he was following the English legislation as well as by, rather curiously and erroneously, claiming that legislation similar to his proposed bill had already been passed in New South Wales and in South Australia.⁷⁰ That bill then went to a Select Committee stage where for the first time the future confrontations over the issue of principle as to whether colonies were free to depart from the English model or whether they were obliged to conform to it were foreshadowed. At the Select Committee stage, the Committee recommended amending the bill by adding provision for divorce based on four years separation.⁷¹ No legislation resulted in 1858, though the clergy of Victoria were prompted to get up a petition against the proposals for change.

By this time the Colonial Office had expressed a very clear view. In a despatch which the Governor, Barkly, was instructed to make public, Lord Stanley had informed Barkly that any Victorian Bill should be similar to the British Act. Stanley's view was that

⁶⁷ Barkly to Labouchere 7 December 1857, file VPRS.1084/4, VPRO.

⁶⁸ A succinct summary with some interesting discussion is that by Bennett and Forbes, who emphasise the constitutional aspect of the reform debate: Bennett, J.M. and Forbes, J.R. "Tradition and Experiment: Some Australian Legal Attitudes in The Nineteenth Century" (1971) 7 U Qld LJ 172, 178-181.

⁶⁹ For Fawkner's life, see Billot, C.P. *The Life and Times of John Pascoe Fawkner* (Hyland House, Melbourne, 1985).

⁷⁰ (1858) 1 VPD 311.

⁷¹ (1858) 1 VPD 354.

while divorce was essentially a matter "in the general class of internal affairs" for self-governing colonies, special considerations applied to it. Because serious consequences could flow from divergent laws, especially as to legitimacy and inheritance, uniformity between the different jurisdictions of the Empire was highly desirable. Stanley took the unusual step of instructing Barkly to raise with his Ministers the advisability of a Divorce Act which largely copied the English Act, though it could diverge on the less significant details.⁷² Nothing seems to have come of that suggestion in Victoria, probably because the Ministry of the day had a significant Irish Catholic element.

In 1859 Fawcner again introduced a Divorce Bill and debate recommenced. When the new Bill came up for serious discussion in 1860, attention was therefore focussed on the renewed proposal to depart from the British Act by allowing divorce on the grounds of desertion. This was a ground not to be found in the English Act, but, as was pointed out by many Victorians, it was in accord with the law of Scotland⁷³

"It was argued with some show of reason that a wide difference existed between the Marriage Law of England and Scotland, and that there was no greater danger in departing from the one than from the other in this colony".⁷⁴

There were some differences between the Legislative Assembly (the elected lower house) and the Legislative Council on the grounds to be included in the bill - the Upper House had restricted desertion (along with drunkenness and cruelty) to a ground for separation; the Legislative Assembly insisted on desertion being a ground for divorce proper. The Bill eventually passed despite opposition from the Catholic members and from those who opposed departing from the English Act for fear the English courts would not recognise colonial divorces.⁷⁵ Barkly reserved the Bill on its passage in 1860, and forwarded to Britain for its consideration, pointing out that, at least in his

⁷² Stanley to Barkly 17 April 1858, VPRS 1087/11, VPRO. The despatch is printed in (1858) 1 VPD 354.

⁷³ Barkly to Newcastle 1 September 1860, VPRS.1084/4, VPRO.

⁷⁴ Ibid.

⁷⁵ There are many instances of debate on aspects of the bill but the records are inadequate. Two debates substantially reported are at (1860) 1 VPD 671 and (1860) 788-792.

view, the churches were all against the inclusion of desertion, save that the Presbyterians would allow it as a ground for judicial separation.⁷⁶

The Victorian Bill was disallowed by Lord Newcastle who had succeeded Stanley as the Secretary of State for the Colonies. Newcastle expressed the view that the provision allowing divorce on the basis of four years' desertion without just cause was wrong:

"... It appears that many persons in the Colony whose opinions are entitled to respect anticipate from this enactment consequences very injurious to the public morals. I participate in these apprehensions ..."

However Newcastle went on to say that he would have hesitated to disallow solely on that basis. He considered however that the law of marriage was now an Imperial matter. While in his view divergences in colonial rules as to the entering of a valid marriage did not matter much, since marriage in one colony, or in the United Kingdom, was effective everywhere in the Empire. However he took the view that no colonial divorce act could legislate to make divorce valid in other colonies or in Britain. On that basis uniformity was essential.⁷⁷ On this occasion the colony capitulated and another divorce statute was passed in 1861, without the desertion provision.

Newcastle's restrictive views which led to the disallowance of the first Bill sowed the seeds of future conflict. Not only was his policy more restrictive of colonial freedom of action than was Stanley's of a few years earlier, it was founded on a logical contradiction which colonial lawyers were quick to expose. The critical question was not whether colonial divorces were to be granted on the same grounds as in the United Kingdom and other colonies but whether colonial divorces were to be considered valid outside the colony. If colonial marriages were valid and recognised outside the colony despite differences in the law - and Newcastle had conceded that this was the case - colonial divorces should also be valid when granted on whatever grounds the colonial legislature saw fit to permit. Newcastle's approach could easily be taken to be an attempt to infringe on the hard-won powers of colonial legislatures. While it might be

⁷⁶ Barkly to Newcastle, 1 September 1860, file A2347, ML.

⁷⁷ Newcastle to Barkly, 19 February 1861, file VPRS.1087/14, VPRO.

argued in the 1850s that Britain could control colonial legislation to avoid repugnancy, this argument evaporated in 1865 with the passing of the Colonial Laws Validity Act(Imp).⁷⁸ In the latter years of the century divorce law became, as is discussed below, in part a matter of constitutional debate.

Victoria had by this time been overtaken by other colonies in the creation of a statutory regime for divorce. The other colonial governors had also received Stanley's instructions of 1858 to recommend legislation based on the English statute. These instructions first bore fruit in South Australia in 1858, where a bill was put forward based on the English Act. It passed though only by a narrow majority and with the significant change that condonation of adultery became a discretionary, not an absolute, bar to a decree.⁷⁹ It is not clear where this change originated, but it had the support of Richard Hanson, the Attorney-General and perhaps the leading lawyer-politician of the day in the colony.⁸⁰ The Colonial Office apparently considered that the change was not desirable but neither was it sufficient to require disallowance.⁸¹

The two smallest colonies (in population at least) also took their cue from the Colonial Office directive. Tasmania passed a Divorce Bill in 1861. Although this statute purported to reproduce the English law,⁸² by design or inadvertence there was in fact a very significant difference in that the court was empowered to grant decrees of divorce effective immediately, instead of the English system of a decree nisi later made absolute on a separate application to the court. The Colonial Office again confirmed the Bill, but on this occasion specifically requested the Governor to procure amending legislation to bring the procedure into line with England. A statute to that effect was passed in 1864.⁸³ In Western Australia, the Divorce and Matrimonial Causes Act 1863(WA) was

⁷⁸ See above pp.69-70.

⁷⁹ Hague, p.948.

⁸⁰ Hanson to Governor, "Report on Bills 1857-58", n.d. but late 1858, file GRG 2/54, SAPRO.

⁸¹ For the Colonial Office attitude, see Swinfen, pp.69-72.

⁸² Young to Newcastle, 6 October 1860, CO 280/348.

⁸³ Newcastle to Gore Browne, 1 May 1861, referred to in Gore Browne to Cardwell, 14 Oct 1864, CO 280/364.

essentially modelled on the English statute. It appears to have had governmental support, as did an 1871 amendment to allow orders for maintenance and to vary the period of time before a decree nisi became absolute, an amendment was introduced by F.P. Barlee, the Colonial Secretary.⁸⁴

In the two remaining Australasian colonies divorce law reform took a little longer. The matter did not come before the New Zealand Parliament until 1867. It seems highly probable that at least in part the delay was due to the efforts of Frederick Weld, a former premier and a leading Cabinet Minister in the 1860s, who used his prominent place in New Zealand politics on more than one occasion to prevent the introduction of any legislation on divorce.⁸⁵ Despite the Secretary of State for the Colonies's prompting, the New Zealand Government remained inactive, using as a pretext a doubt as to the powers of the New Zealand legislature to pass a law on the subject.⁸⁶

In the absence of government action, a bill was introduced by a private member, the Hon. Mr Harris MLC. Although the Bill he introduced was a private initiative, there is some evidence that he obtained (whether privately or not cannot be known) the services of the then permanent and non-political Attorney-General to draft the measure.⁸⁷ Curiously enough the bill as first introduced was aimed at a number of family law matters, including the relief of "destitute and deserted widows and children" and the "protection of the earnings of wives deserted by their husbands",⁸⁸ with the institution of a divorce jurisdiction in the Supreme Court as only a part of a larger measure. Harris made much of the point that the divorce bill reproduced the law as it stood in England and Victoria. In the normally conservative atmosphere of the Legislative Council the Bill received a surprisingly warm reception, where at least one member saw it as necessary in the interest of fairness:

⁸⁴ Minutes and Votes and Proceedings of Leg.Co. of Western Australia, Table of Bills 1870-71.

⁸⁵ Graham, Jeanine *Frederick Weld* (Auckland UP, 1983), p.111.

⁸⁶ Christie, James "The Divorce Law of New Zealand" (1927) 9 JCL&IL (3rd series) 95.

⁸⁷ 1867 NZPD 1095.

⁸⁸ 1867 NZPD 685.

"The wealthy could always procure a divorce by going home, but the poor could not ...".⁸⁹

Other members were critical of elements of the Bill, particularly that it permitted the "guilty party" to remarry, but since this was the law of England they did not carry their objections so far as to move any amendment. The Bill in the end passed comfortably. In the House of Representatives the Bill had a more difficult time, passing only 22-17.

In New South Wales too it appears that domestic politics was the primary element in persuading governments not to introduce any measure to permit divorce.⁹⁰ As in New Zealand the failure of successive governments to initiate a bill brought about private member's bills.⁹¹ The first, in 1862 by a Mr Holroyd, failed at the first reading, as did one by David Buchanan, a Sydney lawyer, the following year. Thereafter private measures by Buchanan became a regular feature and in 1870 one such bill was passed by the Legislative Assembly only to fail in the Legislative Council. Finally Buchanan's seventh bill passed into law as the Matrimonial Causes Act 1873(NSW).⁹²

While this statute was essentially identical to the existing law in England and Victoria, the debate on it revealed a very strong body of opinion in favour of reform of the law so as to remove the discriminatory provisions which made more difficult the task of a petitioning wife. The New South Wales Legislative Assembly in 1873 had resolved that it should adopt the divorce law of England and the other colonies "except that part of English law which denies to the woman equal rights to those of the man".⁹³ Reformers were to seek two goals: to amend the law to make it more equal and to widen the grounds on which divorces were available. Certainly the number of divorces in the 1870s was not large - one historian estimates that there was only one divorce or judicial

⁸⁹ Ibid.

⁹⁰ Parsons, pp.130-1.

⁹¹ In the light of the events surrounding divorce law reform in Victoria, New South Wales and New Zealand, the statement of Holden (Holden, A.C. "Divorce in the Commonwealth : A Comparative Study " (1971) 20 ICLQ 58, 59) that divorce law reform was not a matter inspired by back-benchers seems to be erroneous.

⁹² Bennett, J.M. "The Establishment of Divorce Laws in New South Wales" (1963) 4 Sydney LR 241, 247.

⁹³ Ibid, at 244.

separation per fortnight in the whole of Australia in that decade.⁹⁴ This was very probably due less to public unwillingness to face the publicity and public reaction surrounding even the innocent party to a divorce than to the narrow nature of the grounds for relief. In Tasmania where the law remained unreformed there were but 33 divorces in the ten years 1884-1893.⁹⁵ By contrast in New South Wales and Victoria, where prior to 1890 more liberal laws had been passed, divorces rose spectacularly. In New South Wales there were 55 divorces in 1890, 66 in 1891, 102 in 1892, 394 in 1893 and 369 in 1894. The Victorian figures are not so spectacular - for the same years the figures are 40, 99, 91, 85 and 81. In unreformed South Australia, divorces reached double figures in none of those years.⁹⁶

The first attempts at further reform came, as might be expected given the ethos generated by Buchanan's attempts, in New South Wales where in both 1873 and 1874 bills to widen the grounds for divorce passed the Legislative Assembly but failed in the upper house. In 1875 the bill passed both houses but royal assent was refused. The other aim of the reformers, to equalise the law as between the sexes, underlay the Matrimonial Causes Act 1878(NSW) which would have made adultery alone a ground for divorce in which either spouse could obtain a decree. That enactment too was disallowed by a British Government determined to try to enforce uniformity in imperial matrimonial law.⁹⁷ It appears that the pretext for the disallowance of the latter statute was the failure to specifically provide that a petitioner had to prove the husband's domicile in the colony, although this had always been required by the courts.⁹⁸ In 1881 a reform bill with that object but stipulating for proof of domicile was passed. The motives for this reform are not clear - it may be doubted whether it can be adequately explained by the mere fact of a "colonial setting" as one Canadian writer has

⁹⁴ Blainey, G. *A Land Half Won* (Macmillan of Australia, 1980) p.281-2.

⁹⁵ Gormanston to Ripon, 7 December 1894, CO 280/397.

⁹⁶ These figures are drawn from 1897 SAPD 401.

⁹⁷ Bennett, J.M. "The Establishment of Divorce Laws in New South Wales" (1963) 4 Sydney LR 241.

⁹⁸ Treat, F.B., St. John, E.H. and Mahoney, D.L. *McKenzie's Practice in Divorce* (Law Book Company of Australia, Sydney, 1952), p. xl.

suggested.⁹⁹ It seems probable that at least to some extent the mood favouring reform reflected the social and political importance of women's views in the latter decades of the nineteenth century. This phenomenon is considered in more detail elsewhere in connection with testator's family maintenance legislation¹⁰⁰ but it may well have been very significant in moulding the opinion of both the public and of the politicians in many other fields.

Thenceforth the debate shifted in large part to the extension of the available grounds for divorce, in particular to include such things as desertion, cruelty and habitual drunkenness. It is at this point that a new and apparently effective propagandist and advocate for reform emerged. Alfred Stephen, the former Chief Justice of New South Wales, both publicly and privately advocated the extension of the grounds for divorce throughout the latter part of the 1880s. His advocacy of such reform is perhaps the more surprising since he had been opposed to the granting to a wife of the right to seek a divorce on the grounds of adultery alone.¹⁰¹ Stephen's principal concerns were with desertion and drunkenness, both of which he considered should be grounds for divorce rather than merely for judicial separation. Indeed it seems he considered that judicial separations were merely productive of immorality and unhappiness.¹⁰² Stephen conducted his campaigns in the Legislative Council, of which he had become a member after his retirement from the bench and through the publication of pamphlets on the issue.¹⁰³ However to the historian one of the most interesting aspects of his campaigns was the degree to which he attempted to promote the cause by correspondence with like-minded persons in other colonies. The consequent voluminous correspondence is to be found in collections all over Australia and is highly illuminative of the extent to which

⁹⁹Backhouse, C.B. "Pure Patriarchy: Nineteenth Century Canadian Marriage" (1985) 31 McGill LJ 265, p.284, n.67.

¹⁰⁰ See above pp.209ff.

¹⁰¹ Alfred Stephen to A. Michie, 10 August 1887, Miscellaneous letters file, LaTL.

¹⁰² cf Way to Sir Alfred Stephen, file PRG 30/8, Mortlock Library.

¹⁰³ See Stephen, Alfred *Speeches of Alfred Stephen in the Legislative Council on the Second Reading of the Divorce Extension Bill* (printed by Robert Bone, Sydney, 1886) and *Australian Divorce Bills: The Objections raised to them, religious and social, considered* (Robert Bone, Sydney 1888).

there was a unofficial but effective interchange of ideas and opinions between influential personages. Stephen corresponded with two Chief Justices, S.W. Griffith of Queensland¹⁰⁴ and Samuel Way of South Australia,¹⁰⁵ as well as with two prominent proponents of reform in Victoria, Archibald Michie and William Shiels¹⁰⁶ in addition to soliciting action from politicians in his own colony, such as Sir Henry Parkes.¹⁰⁷ The correspondence with Michie is interesting because Michie was the most active of the Victorian reformers, and conducted a substantial correspondence of his own on the subject of divorce with William Windeyer, at that time probably the most influential judge of the New South Wales Supreme Court.¹⁰⁸

The next stage of the reform debate took place when first New South Wales and later Victoria (using a bill apparently based on the New South Wales Bill)¹⁰⁹ acted to widen the grounds for divorce. The New South Wales Divorce Extension Bill of 1887 provided a petitioner could advance as grounds for divorce any one or more of desertion for three years or more, habitual drunkenness for three years together with cruelty or (for wives) non-support, cruelty in the form of assault or beatings or imprisonment for certain crimes including the attempted murder of the petitioner.¹¹⁰ This bill was disallowed by the British Government on two grounds. First there was a familiar concern over jurisdictional matters. The bill had deliberately used "residence", rather than "domicile", as the requisite element for jurisdiction to avoid the difficulties inherent in dealing with immigrant colonists who retained an intention at some long distant future time to return to Britain if this were to become possible!¹¹¹ This

¹⁰⁴ See letters in Griffith Papers, file MS.Q.186, DL.

¹⁰⁵ The correspondence is in the Way papers, file PRG 30/8, Mordock Library.

¹⁰⁶ See Stephen to Shiels, 14 Dec 1889, file MS 8730/945/2(i)(b), LaTL and Stephen to Michie, 10 August 1887, Miscellaneous letters file, LaTL.

¹⁰⁷ Parkes Correspondence, CYA 904, Vol.34, ML.

¹⁰⁸ Papers of (Sir) William Charles Windeyer; Correspondence 1886-90, ML MSS 186/9, film CY2489, ML.

¹⁰⁹ Dean, Sir Arthur *A Multitude of Counsellors* (F.W. Cheshire Pty Ltd. for the Bar Council of Victoria, Melbourne, 1968), p.254.

¹¹⁰ See Bennett, J.M. "The Establishment of Divorce Laws in New South Wales" (1963) 4 Sydney LR 241.

¹¹¹ Stephen to Parkes, 12 June 1888, Vol.35, CYA 905, p.145, DL.

difficulty was one on which colonial compromise proved to be possible, and in a later version of the bill the jurisdiction provisions were amended to Britain's satisfaction. Much more controversially, the British Government indicated it would not assent to one colony making significant changes to the divorce laws unless all did.¹¹²

This decision and the substantially contemporaneous agitation which followed the passage of the Victorian reform bill in 1888 focussed attention squarely on the ability of the colonies to determine for themselves the nature of their legislation. On the one hand there were efforts to bring pressure to bear behind the scenes from other colonial governments and from senior colonial judges on the British government to confirm the Victorian Bill and to reverse their stand on the New South Wales law.¹¹³ On the other, there were influential figures who wished the colonial governments to make a stand on the constitutional issue and insist that Britain had no right to intervene in a matter which was purely for determination by the colony. Perhaps the most blunt and forceful exponent of this view was George Higinbotham, the Chief Justice of Victoria. Higinbotham may have well have been the nearest to a colonial nationalist of any of the Australian judiciary¹¹⁴ but his comments on this issue would have gained wide support. They also illustrate well the competing nationalist and imperial viewpoints which leading colonials had often to reconcile. Writing to Shiels apropos Shiels's 1888

Victorian Bill, Higinbotham supported the Bill:¹¹⁵

"It's provisions are, in my opinion, reasonable and just, and in view of some of the conditions of social life in these Australian communities, specially urgently required for the protection of a large number of married women".

¹¹² See Bennett, J.M. "The Establishment of Divorce Laws in New South Wales" (1963) 4 Sydney LR 241, 247.

¹¹³ Shiels to William Windeyer, 10 Dec 1889, Windeyer papers, ML MSS 186/9, film CY2489, ML; Way to Stephen 1 May 1888, file PRG 30/8, Mortlock Library; Stephen to Shiels, Miscellaneous documents file, MS 8730/945/2(i)(b), LaTL.

¹¹⁴ For Higinbotham's life see Macintyre, S. *Colonial Liberalism: The Lost World of Three Victorian Visionaries* (OUP of Australia, Melbourne, 1991), esp. pp.3-16; also see Morris, E.E. *A Memoir of George Higinbotham* (Macmillan & Co, London, 1895).

¹¹⁵ This and the following quotations are from Higinbotham to Shiels, 16 December 1889, Miscellaneous letters file, LaTL.

However Higinbotham was of the view that the only concern the United Kingdom Government should have in the matter was to ensure that jurisdiction was based on domicile in Victoria.

"...a bill like that passed in N.S.Wales which provided that residence in N.S.Wales for a certain period, without domicile, should suffice to give jurisdiction might properly be objected to as tending to introduce confusion and uncertainty with regard to the status of persons and rights to property arising from decrees not certain of obtaining full recognition in the Courts of Great Britain and of foreign countries".

Where an element of a bill was defective, as Higinbotham thought the New South Wales jurisdictional point to be, the colony should not try to force it through the 'weak grip' of British Government, and the colonial statesmen ought to strengthen British control of the Empire:

"by teaching their own people that while they remain part of the British Empire they ought cheerfully to forego their own inclinations and view in deference to the higher needs of this larger policy of the whole Empire".

However, as the Victorian bill was not open to the same objections, the constitutional issue of principle was most important. There were

"two other objections to the N.S.Wales Bill that are raised by the Secretary of State for the Colonies in his despatch of Jan. 27 1888, which stand on a wholly different ground. They are not concerned in any way with the preservation of any of the royal prerogatives and do not depend for consideration for any Imperial Interest. The first, which requires that a Bill of this kind should be passed by another Parliament after the occurrence of a General Election, is a direct affront to the Colonial Legislature, and a distinct denial, unsupported by facts alleged or real, of its right to claim for all its measures that they represent the views and wishes of the people. This should be met, in my opinion, by a formal public protest, not by informing the Secretary of State that there has been a General Election in Victoria in 1889. The second objection, which seems to insist that no single Australian legislature shall have the power to pass laws upon the subject of marriage and divorce until the other Australian legislatures are prepared to adopt similar legislation, is an unconstitutional interference with the right of each Australian legislature to make laws for the community it represents".

On that basis "open resistance" was the only appropriate way to vindicate these rights, and the matter should not be left to be shuffled away by Britain being persuaded, or persuading itself, to withdraw its objections.

Whatever the reason, the British Government did approve the Victorian Act and also the virtually identical New South Wales Act of 1891. A few years later New Zealand took

advantage of the New South Wales initiatives by the passage of the Divorce Act 1898(NZ), which adopted the New South Wales changes.¹¹⁶ It is notable that once again the initiative for the particular bill came from a private member, John McGregor, a Dunedin lawyer.¹¹⁷

¹¹⁶ Cameron, B.J. "Law Reform in New Zealand" (1956) 32 NZLJ 88, 89; Holden, A.C. "Divorce in the Commonwealth: A Comparative Study" (1971) 20 ICLQ 58, 59.

¹¹⁷ See Stewart, W. Downie *Life and Times of Sir Francis Bell* (Butterworths, Wellington, 1937), pp.161-66.

Adoption

An interesting example of the slow pace at which some legal initiatives diffused through the colonies is furnished by the law of adoption. Widespread interest in creating or reforming the unsatisfactory common law of adoption is only to be found late in the nineteenth century. Customary adoptions had of course been a part of the law of many indigenous people.¹¹⁸ There is also one curious earlier statute providing something akin to adoption. In 1849 the Parliament of New South Wales passed a unusual law, the Infant Convicts Adoption Act 1849(NSW) which allowed a court to make orders by which "infant" convicts (those under 19 years of age) were placed in the custody of persons promising to maintain them. The courts could place appropriate conditions on the custody order and had to be satisfied that the custody order was for the benefit of the child, having regard, inter alia, to the nature of the parents. However this provision differed from the law of adoption in its more modern sense in that the custody order did not affect any questions relating to the legal descent or inheritance rights of the infant convict. Adoption in its modern guise is first pioneered in the United States of America, where Connecticut and Mississippi allowed adoption by the execution of a deed from 1846 on. A different procedure, that of making adoptions effective only through a judicial process, begins with Massachusetts in 1851. This initiative was widely copied elsewhere in the United States.¹¹⁹

From these American roots the statutory modification of adoption law flows into the British settlement colonies. The first to enact similar legislation was New Brunswick in 1873.¹²⁰ New Zealand was second in the field in 1881, to be followed by Western Australia and Nova Scotia in 1896, and many other jurisdictions in the twentieth

¹¹⁸ Acheson, F.O.V. "Adoption among the Maoris of New Zealand" (1922) 4 JCL&IL (3rd series) 60.

¹¹⁹ Campbell, I.D. *Law of Adoption in New Zealand* (2nd ed, Butterworths of Australia, Sydney, 1957), p.6; Oppel, W. "Step-parent Adoptions in Nova Scotia and British Columbia"(1981) 6 Dalhousie LJ 631, 632.

¹²⁰ The claim by Campbell, op. cit. n.119, p.6 that New Zealand was the first "British" jurisdiction to so legislate is erroneous; see Kennedy, G.D. "The Legal Effects of Adoption" (1955) 33 Can Bar Rev 751 and Castles A.C. "Discretionary Power in Adoption Statutes"(1957) 7 Res Judicata 307.

century.¹²¹ The Adoption of Children Act 1881(NZ) was introduced as a private member's bill by G.M. Waterhouse, then a member of the Legislative Council. The bill, apparently largely taken from the Massachusetts legislation of 1851 and 1871, allowed District Court judges to make adoption orders for children under 12 (raised to 15 in 1895), but the measure was flawed by attempts to ensure there was no prejudice to the rights of the natural parents. The bill also placed restrictions on the eligibility of adoptive parents, in that an unmarried adoptive parent of the same gender as the child had to be at least 18 years older than the prospective child; where the child was of the opposite gender the age gap had to be 40 years or more:

"These restrictions are in the nature of moral safeguards. They were suggested partly by the provisions of the Code Napoleon relating to the adoption of Children and partly by the provisions of the adoption laws of the States of New York and Massachusetts although they are not identical with any such".¹²²

The Western Australian act of 1896 is virtually a replication of the New Zealand Act, a fact which supports the inference drawn by commentators that it must have been taken from that source.¹²³ Curiously enough the actual debate on the Bill in the Western Australian Parliament contained not a single reference to the New Zealand Act. As had been the case in New Zealand, the Western Australian bill is introduced as a private member's bill. It received a favourable hearing and the only amendment of note was a change to the required age differential to permit a male thirty years older than the child to adopt a female infant.¹²⁴

Given that many adopted children had been born as a result of ex-nuptial affairs, it was common for mothers who were giving the child up for adoption to seek recompense for the costs of childbirth expenses from the father of the child, something not covered by

¹²¹ Alberta 1913; Tasmania 1920; British Columbia 1920; Ontario 1921; Manitoba and Saskatchewan 1922; New South Wales 1923; Quebec 1924; South Australia 1925; England 1926; Victoria 1928; Scotland 1930 and Prince Edward Island 1930, Queensland 1935. See Campbell, *op.cit.* n.119, p.6.

¹²² Smith, D. Stanley "Adoption of Children in New Zealand" (1921) 3 JCL&IL(3rd series) 165, 168.

¹²³ See Campbell, *op.cit.* n.119, p.8; Castles, *op.cit.* n.121, and Renton, A.W. & Phillimore, G.G. (eds) *Burge's Commentaries on Colonial and Foreign Laws Generally and in their Conflict with each other and with the Law of England* (2nd ed, London, 1907, 5 vols), vol. 2, p.424.

¹²⁴ The debates are reported at (1896) X WAPD (NS) 107 and 334.

the normal law as to maintenance. This problem was tackled in at least two colonies by statutes which placed the burden on the father. The Marriage Act 1900(Vic) made a husband, or the father of an illegitimate child, liable for any confinement expenses. The marginal note to the draft of this bill refers to "(S.A. Act No.702)",¹²⁵ though the original has not been traced. Certainly the provision as it was enacted in Victoria was almost certainly significantly more favourable to wives than the law in other colonies. In New Zealand, for example, where the Destitute Persons Act 1910 reformed much of the law, confinement expenses were recoverable by mothers of illegitimate children, but a separated wife had no such claim (though the court could, in its discretion, allow a sum representing past maintenance of the child).

¹²⁵ File VPRS.10265/27. It is a measure of Victorian euphemism affecting drafting that the statute refers to a woman who "is enceinte", rather than "is pregnant".

Legitimation

Perhaps the most notable of all progressive reforms is the gradual improvement of the legal position of children born out of wedlock.¹²⁶ At common law a child whose parents were not lawfully married at the time of the child's birth was illegitimate, a status which prevented the child from inheriting property from either parent and placed the child under various other disabilities. The status of the child was fixed at birth and was not affected by the later marriage of the parents. In that respect the common law had departed from the ecclesiastical law, but it did so emphatically. Indeed what is sometimes called the first English statute, the so-called Statute of Merton of 1235, is in fact the verdict of an assembly of barons that the common law rule would not be altered to reflect the ecclesiastical law.

The harshness of the law had a number of effects. One was to prompt colonial concern over "marriages" which had been believed by the parties to be valid but whose legal effect was doubtful because the person officiating was not an authorised minister of a religion recognised by the law. There were three statutes passed in the early nineteenth century in Lower Canada which sought to confirm the effects of putative marriages.¹²⁷ All met a hostile reception from the legal adviser to the Colonial Office because the statutes might allow the legitimation of children illegitimate under the extant law, to the prejudice of those who would inherit if the child was illegitimate. In 1804 it was recommended that there should be a savings clause to prevent accrued interest in property from being lost by such "legitimation".¹²⁸ More extreme views were expressed in relation to the 1825 Act, where J.F. Stephen considered no sufficient case for the statute had been shown:

¹²⁶ See Cameron, B.J. and Webb, P.M. *"Illegitimacy"* in Inglis, B.D. and Mercer, A.G. (eds) *Family Law Centenary Essays* (Sweet & Maxwell Ltd., Wellington, 1967).

¹²⁷ Marriages Confirmation Act 1804(LC), Gaspe Marriages Confirmation Act 1821(LC) and St Francis Marriages Confirmation Act 1825(LC).

¹²⁸ Baldwin to Cambden 16 November 1804, CO 323/37, PRO.

"... if persons of full age have, without necessity, contravened the law on this subject, the general interest seems to require that they should suffer the consequences of their own folly or criminality".¹²⁹

He also considered such statutes were wrong in principle because legitimate heirs could lose their rights to property, but reluctantly recommended that the statute be left to operate because of the confusion that otherwise might ensure. He did however recommend that any future colonial marriage confirmation statutes be reserved for His Majesty's pleasure, that is for the decision of the British officials.

While the first steps to ameliorate the position of illegitimate children are to be found in statutes enabling maintenance to be claimed from the father for the child's upkeep,¹³⁰ in some colonies there were other reforms as well. As far as can be ascertained the first colony to effect significant changes was New Zealand, although British Columbia might have been the first to enact a general act legitimating children on the subsequent marriage of the parents had not the provincial statute of 1871 been disallowed by the federal government.¹³¹

In New Zealand the first statute to affect the right to inherit property was the Half-caste Disability Removal Act 1860(NZ), which permitted the offspring of a Maori customary marriage between a Maori and a European to inherit from either parent. This statute was probably motivated more by a desire to secure the position of certain leading Anglo-Maoris than by any idea of liberal reform. Of more general application was the Destitute Persons Act 1877(NZ), s.10 of which provided that the court could order maintenance to be paid from a deceased's estate to his illegitimate children under the age of 14, provided that no legitimate child, or wife, existed and would be largely deprived of means of support by such an order. This appears to have been intended to deal with those cases where the parents had been unaware that their "marriage" was invalid, so that any children were illegitimate and neither the mother nor the children

¹²⁹ Stephen to Bathurst, 2 February 1827, CO 323/44, PRO.

¹³⁰ See above, pp.42-44.

¹³¹ Williams, David R. *"The Man for a New Country" : Sir Matthew Baillie Begbie* (Gray's Publishing Co, Sidney, British Columbia, 1977), pp.106-7.

had any interest in the estate. This was followed by the Administration Amendment Act 1879(NZ), which gave a limited right to an illegitimate child to inherit property from the mother.¹³² Major reform did not occur until the Legitimation Act 1894(NZ), which permitted an illegitimate child's status to be altered to one of legitimacy if the birth was re-registered by the father if the parents married after the birth.¹³³ This change came about through a private member's bill put forward by John McGregor,¹³⁴ a member of the Legislative Council from Dunedin. McGregor adduced as support for his proposal that it would bring the law into line with Scots law (which had always recognised legitimation by subsequent marriage) as well as with that of France and other European countries and some parts of the United States. In this development, as in other instances, the influence of Massachusetts seems to have been strong.¹³⁵

The New Zealand Act of 1894 was soon followed by other colonies. The Legitimation Act 1899(Qld) was virtually a copy of the New Zealand Act,¹³⁶ and it was highly influential in the passage of the South Australian statute, the Legitimation Act 1898(SA).¹³⁷ However the South Australian law was slightly different in requiring both parents to register the child as subsequently legitimated; in New Zealand and Queensland this was for the father alone.¹³⁸

Colonial initiatives in this difficult area were diverse and not all followed the Scots law model. In British Columbia, for reasons which are not clear but may have been concerned with the inability of Indian women to sue European partners for support of themselves or their offspring, the colonial legislature in 1877 amended the local

¹³² See Cameron, B.L. "Illegitimacy" in Inglis, B.D. and Mercer, A.G. (eds) *Family Law Centenary Essays* (1967), p.137.

¹³³ Fitzpatrick, Sir Denis "Legitimation by Subsequent Marriage" (1905) 6 JCL&IL(second series) 22.

¹³⁴ *Dictionary of New Zealand Biography* vol.2, p.287 and Stewart, W. Downie *Life and Times of Sir Francis Bell*, (Butterworths, Wellington, 1937), pp.161-66.

¹³⁵ See above, p.202.

¹³⁶ Fitzpatrick, Sir Denis "Legitimation by Subsequent Marriage" (1905) 6 JCL&IL (2nd series) 22, 40.

¹³⁷ See 1897 SAPD 593, where King O'Malley, the mover, explicitly stated that his Bill was based on the New Zealand Act.

¹³⁸ Fitzpatrick, *op.cit.* n.136, p.42.

Intestate's Estate Act to allow the court to order payments to de facto spouses and illegitimate children to a maximum of \$500 or 10% of the estate, whichever was the larger.¹³⁹

¹³⁹ Williams, David R. *"The Man for a New Country": Sir Matthew Baillie Begbie* (Gray's Publishing Co, Sidney, British Columbia, 1977), p.107.

Custody

Even where there was a strong element of adoption of English law the rather disparate state of colonial law continued because some colonies merely took the English law, others went beyond it and still others did nothing at all. This variety of responses is shown in the changes to the laws relating to custody of children of a marriage. There were several significant British acts in the latter decades of the nineteenth century which were directed at remedying at least the worst of the inequalities of the position of mothers of children in comparison with the much greater legal rights of the father. The colonial response to these statutes was far from uniform.

Tasmania appears to have been the first to adopt the Infants Act 1873(Imp), which allowed the court to intervene if the father willed the custody of the children away from their mother, with the passage of the Infants Custody Act 1874(Tas)¹⁴⁰ and New South Wales followed a year later.¹⁴¹ A slightly more innovative approach was taken in South Australia. While the Infants Custody Act 1883(SA) largely followed the English law, the South Australia law also allowed the court to order the vesting in the mother of any moneys left by will to another for the benefit and up-bringing of the children.¹⁴² The debate on the Bill is also notable for the deletion of a clause, inserted by the local Attorney-General, which would have required petitions for custody by a mother to be made by a next friend. It was a commonly expressed view that if a wife could initiate divorce proceedings in her own right, the same rule should apply to custody cases.¹⁴³ An even more striking change was made in Victoria. Although the Marriage and Matrimonial Causes Act 1883(Vic) largely followed the contemporary English law, it did contain a section which permitted the court, on a petition by a next friend of an infant which alleged cruelty, ill-treatment or gross abuse of parental authority towards

¹⁴⁰ The copying was deliberate: Giblin to Du Cane, n.d., enclosed with Du Cane to Carnarvon, 25 September 1874, CO 280/383.

¹⁴¹ Custody of Infants Act 1875(NSW).

¹⁴² 1883 SAPD 1827.

¹⁴³ 1883 SAPD 1474.

the infant by the father, mother or guardian, the Supreme Court could order that the child be removed from the custody of the parent or guardian. The custody of the child could then be granted by court order to someone else and the parent or former guardian ordered to payment maintenance to the new custodian. This provision appears to have had no parallel in English or Australian law at the time.¹⁴⁴

Some years later many colonies took up the Guardianship and Custody of Infants Act 1886(Imp). That statute, *inter alia*, permitted a mother to have custody of a child and also permitted a mother, as well as a father, to nominate by will a guardian for infant children and these colonies moved quickly to adopt these changes. In Tasmania this was done by the Guardianship and Custody of Infants Act 1887(Tas), which was substantially a transcript of the English Act and was intended to assimilate Tasmanian law to that of England.¹⁴⁵ The same is true of the South Australian Guardianship of Infants Act 1887(SA). In New Zealand the Infants Guardianship and Contracts Act 1887 largely copied the British Act, but it did also incorporate provisions¹⁴⁶ which declared that minors' contracts were void and that any contract by a minor entered into after the end of his or her minority to repay to a parent or guardian the expenses of the minor's upbringing would be invalid. These are not part of the British Act of 1886 but come from an earlier statute, the Infants Relief Act 1874(Imp).¹⁴⁷ Curiously only Tasmania among the other Australian colonies appears to have moved to adopt that particular reform.¹⁴⁸ Queensland did also adopt a version of the British Act of 1886 in the Infants Guardianship and Custody Act 1891(Qld) - indeed the mover of the Bill placed emphasis on its similarity to English law.¹⁴⁹ The Queensland Bill in turn became the basis for the Custody of Children and Children's Settlements Act 1894(NSW).

¹⁴⁴ Coppel, E.G., "The Control of the Custody of Children by the Supreme Court of Victoria" (1939) 2 Res Judicata 33, 40.

¹⁴⁵ Inglis Clark to Governor 17 April 1888, File TA315/GO 50/1, AOT.

¹⁴⁶ Sections 11 and 12.

¹⁴⁷ As to the effect of that Act on the common law of contract, see Treitel (1957) 73 LQR 194.

¹⁴⁸ Infants Relief Act 1875(Tas).

¹⁴⁹ (1891) LXIV QPD 485-9.

In contrast to these legislative changes in the other colonies, the Western Australian legislature apparently passed no statutes on custody of children until well into the twentieth century.

Married women's property legislation

One of the classic cases of a social problem which required legislative reform was the hardship caused to many women by the unreasonable common law rules which declared that on marriage all property, however acquired, of the wife vested in the husband. The victims of this rule were not primarily young heiresses beguiled into marriage by fortune hunters, though there were enough of these to give inspiration to both contemporary and modern authors of fiction. The rule bore most harshly on women who had been forced by the absence, consensual or otherwise, of their husbands, to seek to support themselves in whatever fashion they could. In all too many of these cases the husband not only ceased to support his spouse and family, but insisted on taking the proceeds of the wife's earnings for his own purposes. As the common law stood until the passage (at the third attempt) of the Married Women's Property Act 1870(Imp), this was the husband's right. That Act was a measure of a very tentative nature but was significant in its effect. It did not go so far as to give married women the right to own property, but did secure to them the use and benefit of property acquired during marriage to the exclusion of their husbands. In 1882 this was extended to secure to married women the use and benefit of any property whether acquired before or after marriage.

A distinguished Australian historian has suggested that the subject of married women's property (along with a number of other reforms aimed at enhancing the position of women) was, in New South Wales, one of a number of developments which:
 "reflected growing willingness on the part of the state to interfere with society and the economy for purposes acceptable to men of property Some developments amounted to perfecting the individualism of the liberal state. In these instances the Colony usually began by following the lead of the Mother Country at a rather respectful distance and then, so soon as the original inertia had been removed, plunged ahead"¹⁵⁰

Such a view has much to commend it in general, but it is unsafe to apply it generally to colonial societies and their treatment of married women's property. The North

¹⁵⁰ Ward, J M "Colonial Liberalism and its Aftermath: New South Wales 1867-1917" JRAHS, 1981, vol.67, p.81 at pp.86-87.

American colonies were the first to reform the law. Early North American legislation concerning married women's property had primarily been concerned with making alienation of such property more simple. An act for this purpose had been passed in Upper Canada in 1803 and another was passed in Canada in 1843, though the latter, as noted earlier, was more of a private act in public form.¹⁵¹

A very different tack was taken with the New Brunswick Married Women's Property Act 1851(NB) which provided that a wife's property during cohabitation could not be taken to satisfy liability created by a debt due to another by her husband and the husband could not convey or encumber the property without her consent. The protection did not extend to property acquired from her husband during coverture.¹⁵² This Act had apparently been derived from an American state law, though the exact source is unknown.¹⁵³ It appears that statutes of similar tenor were then enacted in other North American jurisdictions - reference to them was apparently made by a House of Commons Select Committee on the British Bill¹⁵⁴ and in 1881 the Married Women's Property Act in Manitoba was attributed to an earlier Ontario statute.¹⁵⁵

Nor had Australasian reformers been inactive. The first steps in reform in New Zealand were taken in 1860, with the Married Women's Property Protection Act, which allowed a deserted wife to obtain an order in the Resident Magistrate's Court securing her own earnings from any claim by her husband. A more radical alternative was proposed a decade later in the same jurisdiction when J.C. Richmond put forward a Married Women's Property Bill, based on American and Canadian reforms, to remedy some of the disadvantages under which married women suffered by granting them much the same rights in handling property as were enjoyed by unmarried women.¹⁵⁶ Richmond's

¹⁵¹ See above, p.173.

¹⁵² Hoyt, W.L. "Some Aspects of Married Women's Property" (1961) 13 UNBLJ 32, 33.

¹⁵³ Wood to Merivale 21 January 1851, CO 323/71, PRO.

¹⁵⁴ See comments in 1880 SAPD 171.

¹⁵⁵ See (1884) 1 Manitoba LJ 4.

¹⁵⁶ (1870) 7 NZPD 72.

inspiration for this bill was the indignation that he and his wife felt "at the prevalence of wife desertion during the flush of the goldfields".¹⁵⁷ However the conservative elements in Parliament were not prepared for such a radical step and approved only the extension of the earlier Married Women's Property Protection Act provision to cases where the wife had been subjected to cruelty entitling judicial separation, or the husband was living in open adultery or was a habitual drunkard. Richmond accepted this, *faute de mieux*,¹⁵⁸ but later returned to the topic when he promoted the Married Women's Property Act 1884(NZ).

Concern for the particular plight of women whose husbands had effectively deserted them to go to the goldfields also appears to have prompted the first proposals for reform in New South Wales, where William Windeyer had proposed a Married Women's Property bill unsuccessfully in 1871. A later effort by Windeyer in 1879¹⁵⁹ was successful. These measures were much less radical than had been proposed in New Zealand and amounted to effectively a transcript of the English Act of 1870, since Windeyer had an explicit preference for precise imitation so that colonial courts could make use of English decisions on the legislation.¹⁶⁰ It may be noted also that the at times elastic nature of colonial politics could result in these measures being introduced by the Solicitor-General as private member's bills because a cabinet colleague opposed them and indeed voted against them.¹⁶¹

Reform had been attempted in Victoria too, where George Higinbotham had proposed a measure in 1869 based on the British Bill of 1868. In 1870 Higinbotham returned to the issue, this time modelling his measure in part on the 1870 British Act. That measure passed through the Victorian Parliament as the Married Women's Property Act

¹⁵⁷ Scholefield, G.H.(ed) *The Richmond - Atkinson Papers* (Government Printer, Wellington, 1960), vol.2, p.518.

¹⁵⁸ (1870) 9 NZPD 42.

¹⁵⁹ Married Women's Property Act 1879(NSW).

¹⁶⁰ Parsons, p.148.

¹⁶¹ Parsons, p.296.

1871(Vic).¹⁶² The Victorian and English statutes were both used as models for a South Australian bill in 1872, which failed, and for a further and successful bill in 1880. That bill went well beyond the British statute, though there was significant criticism of the drafting of some of the clauses which were drawn from Victorian provisions which differed from the British Act.¹⁶³ By contrast the Married Women's Property Act 1883-4(SA) did little more than re-enact the 1882 British Act, save that the South Australian Act did away with the common law rule that recognised a wife's implied agency of necessity.¹⁶⁴

While Western Australia does not appear to have legislated on the matter at all, Tasmania passed several Acts as a result of over-readiness to follow a British precedent. The Married Women's Property Act 1882(Tas) had been an adaptation of the Married Women's Property Bill moved in the House of Lords by Lord Cairns early in 1882. Since the British Act of 1882 enacted instead the somewhat different House of Commons bill, the Tasmanian Parliament decided to repeal its year-old statute and replace it with the Married Women's Property Amendment Act 1883(Tas).¹⁶⁵

As this account reveals the colonies were all well aware of the British statutes, and there is some evidence that they sought to make themselves familiar with the law in other colonies so as to keep themselves informed of developments elsewhere. In New South Wales the Parliamentary Draftsman received copies of the Married Women's Property Acts and Local Government Acts of Victoria, South Australia, Queensland, Tasmania and New Zealand¹⁶⁶ and in turn later transmitted to Canada, at the request of the Deputy Attorney-General of Canada, the text of the Married Women's Property Amendment Act 1886(NSW).¹⁶⁷

¹⁶² File VPRS 1095/15, VPRO and see the account in 1880 SAPD 171.

¹⁶³ 1880 SAPD 416.

¹⁶⁴ Parsons, Angas and Campbell A.L. "The South Australian Centenary of Legislation" (1936) 17 JCL&IL(3rd series) 21.

¹⁶⁵ Giblin to Strahan, enclosed with Strahan to Derby, 3 December 1883, CO 280/390.

¹⁶⁶ Oliver to Government Printer, 15 July 1885; Parliamentary Counsel's Office, Letter-book 1878-1896, APCNSW.

¹⁶⁷ Watkins to Secretary to Attorney-General, 9 May 1893, Letter-book 1878-1896, APCNSW.

Maintenance

While in theory the payment of maintenance to a deserted spouse for her upkeep and that of the children of the marriage was a separate issue from that of a married woman's ownership of property, in practice the two tended to be significantly entwined.¹⁶⁸ The English law provided that Justices of the Peace could order any assets of a man who failed to support his family to be taken and used for that purpose.¹⁶⁹ Such a remedy was of course useless in the large, probably overwhelming, majority of cases where there were no assets of real value and the only effective maintenance would have had to be related to the husband's earnings. To deal with the cases where the husband had some such means but refused to pay, the English law employed the procedures of the criminal law, making it an offence for a husband to refuse, while able to do so, to maintain a wife and family.¹⁷⁰ These laws proved to be inadequate and the colonial governments were forced to take further steps. First Van Diemen's Land passed the Deserted Wives and Children Act 1837(VDL),¹⁷¹ an act largely copied, although only in relation to legal wives and legitimate children in New South Wales in 1840.¹⁷² These statutes effected two major changes to the prior law.¹⁷³ Firstly a married woman who had been deserted or left without proper means of support could seek an order for maintenance from the Justices of the Peace who could order "such moderate sum or allowance as they shall consider proper." Secondly the law extended the liability to contribute to the upkeep of a child to any parent or grandparent who was in a position to do so. The New South Wales legislation was later copied in Western Australia in 1845.¹⁷⁴

¹⁶⁸ The question of support for de facto wives and children born out of wedlock is considered above, pp.42-44.

¹⁶⁹ Poor Relief (Deserted Wives and Children) Act 1718(Imp).

¹⁷⁰ Vagrancy Act 1824 (Imp).

¹⁷¹ Also see Craig, W.H. and Scott, M.F.C. "The Maintenance of Concubines " (1963) 1 U Tas LR 685.

¹⁷² Deserted Wives and Children Act 1840 (4 Vic no.5)(NSW), and see Gipps to Russell, 1 January 1841, HRA, ser.1, vol.21, p.147.

¹⁷³ Fogarty, J.F. *Bourke and Fogarty's Maintenance, Custody and Adoption Law* (3rd ed, Butterworths Australia Ltd, Melbourne, 1972), p.1.

¹⁷⁴ Destitute Persons Act 1845(WA); see Russell, p. 52.

A slightly different approach was taken in the Destitute Persons Ordinance 1846(NZ) which permitted a limited form of order for maintenance to married women for their own support. Under the ordinance the courts (either a Magistrate or Justices of the Peace) could order a husband who had been convicted of deserting his wife or any children under 14 and leaving them without support (there was no need to prove destitution of those deserted) to pay up to 20/- per week. This device of making matrimonial maintenance an adjunct of a criminal prosecution of the defaulting husband was continued in later New Zealand statutes.¹⁷⁵

¹⁷⁵ Inglis, B.D. "The Hearing of Matrimonial and Custody Cases" in Inglis, B.D. and Mercer, A.G. (eds) *Family Law Centenary Essays* (Sweet & Maxwell, Wellington, 1967), pp.37-38.

Testator's family maintenance

It must always be borne in mind that there were occasions on which the development of the law in the different colonies diverged greatly. In some cases this might be because of differences in the particular circumstances of the colonies (laws relating to indigenous persons perhaps being the prime example). In others the reasons might well be less obvious. On occasion the explanation for divergence was that in relation to a single matter there were different and mutually exclusive philosophies. If some colonies based their laws on one principle and others on another, very disparate bodies of law were created. An interesting example, perhaps the paradigm case, of this phenomenon is provided by the divergent colonial laws affecting the ability of a testator to leave property as he or she¹⁷⁶ chose.

At common law the abolition of dower had largely removed any independent method of ensuring a widow was adequately supported on the death of her husband. Unless a widow was fortunate enough to be the beneficiary of a family trust, she was generally dependent for her support in her widowhood on property transmitted to her by her husband's will.¹⁷⁷ This might serve well enough in England where it was commonplace for those of even relatively modest means to arrange the transmission of assets through marriage settlements and other similar devices, but in the more socially and economically turbulent society of the colonies there was neither the custom of using such devices nor the experienced practitioners to design or adapt suitable precedents for colonial conditions.¹⁷⁸

By contrast those areas of the Empire which had laws descended from the Roman or civil law had a quite different regime whereby a testator was required to make provision

¹⁷⁶ Given that for the most part men controlled the finances of the family and any significant assets would normally be in the name of a male owner, the ability of women to make wills as they chose tended to become a rather barren side-issue.

¹⁷⁷ See Atherton, Rosalind "New Zealand's Testator's Family Maintenance Act of 1900 - The Stouts, the Women's Movement and Political Compromise" (1990) 7 *Otago L.R.* 202, 203. There is a useful discussion of the English position in Bale, G, "Limitation on Testamentary Disposition in Canada" (1964) 42 *Can Bar Rev* 367.

¹⁷⁸ Cf Lee, W.A. *Manual of Queensland Succession Law* (3rd ed., Law Book Co., Brisbane, 1991), pp. 2-3.

for a widow and children. This rule took different forms in different jurisdictions, but typically provided that one third of the estate went to a surviving spouse, one third to any children and the remainder could be disposed as the testator thought fit.

The whole question of the position of the widow and her claims to support from the estate of her husband came to be influenced in different colonies by two antithetical philosophies. On the one hand there were those who took the view that the issue was one which had to be considered as revolving around the property rights of the owner of property. In the eyes of many pundits of the early nineteenth century the rights of property were virtually sacrosanct. The owner of property was entitled to do with his property whatever he liked, saving only the obligation to remain within the law. Viewed from this perspective the owner of property could and should be free to make whatever disposition of the property he chose in death as he could in life. To the claims of property could be added a strand of moral justification - that freedom of testation allowed a testator to avoid passing property to those whose moral shortcomings could be said to disentitle them.¹⁷⁹ Unfortunately this philosophy manifested itself in a substantial number of cases where a testator left his estate to a child or children of a first marriage to the exclusion of later dependents. This often meant the consignment to poverty of the testator's second wife and their children. Countervailing philosophies did develop which emphasised the need for the law to intervene in cases of real injustice, and therefore sought to limit the absolute rights of the testator in favour of some regime which would protect the interests of the testator's widow and children.

Changes to the law in the colonies reflect this dichotomy, with the perhaps anomalous result that freedom of testation replace the civil law limitations in some colonies, yet in others there was a move to ensure testamentary freedom was limited in some manner. In the South African colonies, both the Romano-Dutch law of Cape Colony and the

¹⁷⁹ As to these issues see Atherton, Rosalind "New Zealand's Testator's Family Maintenance Act of 1900 - The Stouts, the Women's Movement and Political Compromise" (1990) 7 Otago LR 202, 203-4 and the material there cited.

more British law of Natal were amended by statutes which guaranteed an absolute freedom to the testator to leave his property as he chose.¹⁸⁰

In other colonies the reverse happened. The first attempts at reform in the English-descent colonies were proposals to limit testamentary freedom by requiring a fixed proportion of the testator's property to be passed to the widow and children - in Sir Robert Stout's unsuccessful proposals in New Zealand in 1896 and 1897 this proportion was successively two-thirds and a half. A similar kind of measure appears to have been proposed in South Australia in 1896 and 1897, though with much less support. Indeed King O'Malley's Testamentary Dispositions Bill 1897 failed to attract a seconder, though this may reflect more on the political isolation of O'Malley than on the merits of his bill. Interestingly there is no reference to the New Zealand bill of 1896 - a matter which comes as a surprise since O'Malley on several other occasions showed great familiarity with New Zealand developments - but another speaker did refer to the Cape Colony law of 1874 which allowed complete testamentary freedom.¹⁸¹

Women's organisations had long criticised the common law rules and had campaigned long and, for many years, unsuccessfully for change.¹⁸² Success did not attend the reformers until Robert McNab, a Dunedin lawyer, took up the cause from Stout. In 1898 McNab proposed a discretionary regime whereby the Supreme Court was to be given the power to override the provisions of a will where, and only where, the will failed to provide properly for persons for whom the testator had a moral duty to provide properly. This proposal permitted support to be gathered from those who did not favour an absolute limit on testamentary freedom lest it cause property to devolve to those not morally worthy and, on the third attempt, McNab's proposals passed into law

¹⁸⁰ Mackintosh, James "Limitations on Free Testamentary Disposition in the British Empire" (1930) 12 JCL&IL (third series) 13 and Beinart, B., "Liability of a Deceased Estate for Maintenance" [1958] Acta Juridica 92. Regrettably the authors are not in total agreement about the exact date of the change in Natal, a difference which current access to sources must leave unresolved.

¹⁸¹ 1897 SAPD 723-5.

¹⁸² These are well described in Atherton, Rosalind "New Zealand's Testator's Family Maintenance Act of 1900 - The Stouts, the Women's Movement and Political Compromise" (1990) 7 Otago LR 202, on which this account is largely based.

as the Testator's Family Maintenance Act 1900(NZ). This Act was widely adopted in other jurisdictions, though outside the period of the current study.¹⁸³

There appears to be one highly relevant matter which has been largely ignored by writers concerned with the issues of freedom of testamentary disposition and the attempts to ensure appropriate provision for the members of the family of a deceased property owner. It is important to understand the legal and philosophical context in which the debate operated. One vitally important aspect of this is the changes made in many colonies to the law relating to the passing of property on intestacy. This is a matter largely ignored by historians¹⁸⁴ but it must be borne in mind if the attitude of colonial reformers and legislators to the sanctity or otherwise of testamentary provisions is to be understood.

Where a person died possessed of property but made no will, English law provided clear rules for the devolution of the property. Real property went to the heir at law, however distant, and to the exclusion of the rights of a widow (save as to any rights of dower) or of female children or near kin. Personal property descended according to the rules provided by the Statute of Distribution 1670. Under this Act the widow and any children of the deceased received the bulk of the personalty of the deceased husband. If there were children of the deceased, they shared two-thirds of the personalty; the widow received the rest. If there were no children, the widow received half the property and the rest went to the next nearest relatives of the deceased.

It is notable that in many of the colonies there were successful moves in the 1860s and 1870s to reform the law of intestacy. Most of these were aimed at assimilating the laws governing transmission of real property with those of personalty so that all descended

¹⁸³ For its adoption in Canada, see Laskin, Bora "Dependants' Relief Legislation" (1939) 17 Can Bar Rev 181 and Gray, V.E. "Dependants' Relief Legislation" (1939) 17 Can Bar Rev 233.

¹⁸⁴ One historian, Rosalind Atherton has considered challenges made to wills which disinherited widows and children on the basis that a lack of adequate provision indicated a lack of testamentary capacity. She does not consider the wider implications of the law of intestacy. See Atherton, Rosalind "Expectation without Right: Testamentary Freedom and the Position of Women in 19th Century New South Wales" (1988) 11 UNSWLJ 133.

by the same laws. The effect of these was, of course, to ensure that where a man died intestate but possessed of real property, a widow and/or any female children (or sometimes other close female relatives) benefited rather than an heir at law who might be some more distant relative. The motives of the proponents of legislation of this kind are not clear. In part there may have been a desire to simplify the law relating to the administration of deceased estates - the drafters of the first major colonial statute, the Real Estate of Intestates Distribution Act of 1862(NSW) were both lawyers.¹⁸⁵ This Act was soon copied in other jurisdictions. In 1864 Victoria enacted an essentially imitative law, the Intestates Real Estate Act 1864(Vic). South Australia followed in 1867 (Intestate Estates Distribution Act 1867(SA)), Queensland in 1872 (Real Estate of Intestate Estates Distribution Act 1872(Qld)). Tasmania (Intestate's Real Estate Act 1874(Tas))¹⁸⁶ and New Zealand followed suit in 1874 (Real Estate Descent Act 1874(NZ)). All of these colonies tinkered with their law later,¹⁸⁷ but the essential principle that on intestacy primacy went to the widow and/or children of the deceased was secure. The New South Wales Act also found its place in the law of Canada - Ontario adopted it as the Devolution of Estates Act 1886.¹⁸⁸

Curiously enough the New South Wales statute of 1862 does not appear to have been the first proposed measure of reform, although it was the first enacted. It appears that reforms had been proposed in South Australia as early as 1852, when one George Daly had proposed a bill to partition intestate estates. Daly was then a government official but had in times past practised law in Montreal and had modelled his bill on a law in force in Upper Canada. That bill, which certainly was less effective in protecting the interests of the family of the deceased, was unsuccessful, as it was again in 1858. Instead reform did not come until 1867, though a Select Committee of the Legislative Council had

¹⁸⁵ See discussion at 1872 QPD 823.

¹⁸⁶ Giblin to Du Cane, enclosed with Du Cane to Carnarvon, 25 Sept 1874, CO 280/383.

¹⁸⁷ e.g. see Probate Amendment Act 1893 (NSW) which gave the surviving spouse of an intestate £500 and half residue if there was no issue of the marriage, or a third of the estate if there was issue.

¹⁸⁸ Denison, J.R. "Conveyancing under the Ontario Devolution of Estates Act" 1937 15 Can Bar Rev 516 and *Re Wagner* [1903] OLR 680.

recommended reform in 1863¹⁸⁹ - preferring the New South Wales model. It is noteworthy that Hansen CJ had supported the widow's claim to a share of the realty on intestacy - a fact which must have increased the likelihood of success. It also seems probable that the climate of opinion which came to favour limitation of testamentary freedom was influenced by the remarkably divergent rules on intestacy and under a will.

Family law reform, then, reveals a pattern of inter-colonial influences which ultimately shaped the colonial statutes into a coherent and reasonably consistent body of rules, whose development, though owing much to English law, also went beyond the efforts of English legislators or touched on fields not yet considered in England.

Much the same is true for other areas of colonial law where over a range of diverse subjects a similar pattern of development can be found.

¹⁸⁹ Report of Legislative Council Select Committee on the Real Estate Descent Bill 1863, 1863 SAPP No.53.

Chapter 10

The creation of colonial law in practice 2 :

laws developed as a reaction to colonial problems

It was inherent in the nature of the new colonial societies and economies that there would be cases where the inherited English law could not provide satisfactory rules for the very different colonial environment. In such circumstances it was only natural that colonists would create their own new laws to deal with problems which were to them acute but not insoluble. Where one colony found a satisfactory manner of dealing with a new problem, the new legal regime was sure to be studied by officials or legislators in other colonies, and not infrequently there would be a more or less swift pattern of adoption of the new measure in several colonies.

The process can be readily demonstrated in a number of fields, but it is logical to turn first to those areas where the colonial environment was sufficiently different from that of England that economic and social activities had to be differently regulated. The differences in conditions called forth interesting and often innovative colonial legislation. Some, such as the protection of newspaper copyright in telegraphed news, may be seen as a direct response to the imperatives of distance. Others sought to regulate essentially agrarian matters such as the control of water for irrigation and of substances sold as artificial fertilisers. There were also more widely applicable laws to do with securities for moneys borrowed for farming purposes, the protection of workmen by a lien over chattels or property on which they worked and the protection of a family home from creditors. More specialised areas of law dealt with such problems as the control of rabbits, vine diseases and even the issue of banknotes, as well as the more mundane regulation of weights and measures. Those topics reveal the now-familiar pattern of elements of English law woven together with colonial innovations and borrowings to create in almost every settlement colony a body of colonial law significantly different from the English law, yet broadly similar to the law of other settlement colonies.

Telegrams and news copyright

The introduction of new technology in the colonies posed some interesting problems. One such arose with the introduction of the electric telegraph. This was first used for internal communications in Australia in the 1850s, though in New Zealand not until the 1860s. In 1872 each of the Australian colonies save Western Australia (linked in 1877) had not only connections with each other but also an international link to Britain via Asia and Europe. New Zealand was connected to Australia in 1875!¹

One of the main, if not the main, commercial interest in the international telegraph was its capacity to provide speedy tidings of overseas events for colonial newspapers. Any newspaper which failed to garner all the overseas cable news it could would be disadvantaged in the lively competition with rival journals. However it was obvious that there would be very substantial costs in arranging an adequate supply of cabled news. In the absence of any specific provision adapted to the novel situation, there seemed nothing to prevent any editor simply reprinting the cabled news as published by his more affluent rivals. Indeed the New Zealand courts were to hold that they had no power to intervene since there was no enforceable copyright in the telegrams.²

In anticipation of these problems, two of the most powerful Australian newspapers had determined to seek a form of statutory protection. Operating under the newly-minted cover of the Australian Amalgamated Press the proprietors of the Melbourne *Argus* and the *Sydney Morning Herald* sought a form of statutory copyright in the overseas cabled news printed by their papers. The syndicate persuaded the governments of Victoria and South Australia to pass acts³ which reserved a copyright of 24 hours in the contents of

¹ For the background to these developments, see Inglis, K.S.D. "The Imperial Connection: Telegraphic Communication between England and Australia 1872-1902", in Madden, A.F. and Morris-Jones, W.H. (eds) *Australia and Britain, Studies in a Changing Relationship* (U London Press, 1980) , pp. 21-6.

² *Holt v Webb* (1878) 4 NZ Jurist (NS) 34 (CA), holding that copyright in New Zealand was solely governed by the Copyright Ordinance 1842, which did not protect newspapers, let alone telegrams printed therein.

³ There appears to be no comparable act in New South Wales, though contemporaries referred to the passage of an act in that jurisdiction; see 1872 SAPD 455. The absence of any reports of parliamentary debates for New South Wales at the time means the issue cannot be clarified. The legislation in the other colonies was the Telegraphic Messages Copyright Act 1871(Vic) and Telegram Copyright Act 1872(SA).

telegrams sent from outside Australia to a newspaper. The copyright was enforceable by prosecution of the infringer, with fines substantial enough to deter breach on any commercial scale - a fine of £10 to £100 for a first offence, and £50 to £200 pounds for a second or subsequent offences.

In Victoria there was considerable discussion of the bill. Some members of the Parliament were of the view that as no other jurisdiction had enacted such protection, Victoria should not do so, but more saw the issue as a matter of ensuring newspapers received reasonable protection in return for the expense involved in getting telegrams, without creating a monopoly which would be deleterious to the public interest.⁴ Indeed the Government of New South Wales had earlier decided not to accept an offer by a London syndicate to build at their own costs the telegraph line from London to Australia in return for "exclusive privileges" in the use of the line so built because the Government feared the effect of a monopoly. The Victorian Government had not considered the offer made to it by the same syndicate:

"owing to a want of geographical accuracy on the part of its promoters, who addressed it to Melbourne, 'South Australia'"⁵

A further argument against any monopoly was a case in New Zealand where it was alleged that the Government had abused its monopoly over the telegram to hinder news telegrams reaching the *Otago Daily Times*, the editor of which was in the ranks of the Opposition.⁶

However the Bill passed into law in Victoria and South Australia enacted legislation on deliberately identical lines the following year.⁷ Western Australia too enacted a statute in 1872. Unlike the laws in the eastern colonies, the Western Australian Act⁸ was

⁴ 1871 VPD 1765, 1872-8 and 1887-1890.

⁵ Barkly to Lytton, 12 November 1858, Despatches of Governor of Victoria to Secretary of State for the Colonies, file A2346, ML.

⁶ See 'The Telegraph Libel Case' - *Regina vs George Burnett Barton* (*Otago Daily Times*, Dunedin, 1871), and the entry for G.B. Barton, 3 ADB pp.113-5. The case is referred to by one Victorian MP in the debate on the 1871 Bill: see 1871 VPD 1888.

⁷ 1872 SAPD 455.

⁸ Telegram Copyright Act 1872(WA).

introduced as a Government-sponsored measure. The provisions of the bill differed in detail from the acts passed in the other colonies. Protection was for a longer period, it was given to telegrams from anywhere outside Western Australia, there were lower penalties and there were no exceptions for publication for parliamentary or Governmental use as were found in the east. Some at least of these differences appear to have resulted from amendments made during the Bill's passage through the colonial Legislative Council.⁹ Given that telegraphic communication was several years away, such a rapid adoption of the eastern statutes is surprising.

By contrast New Zealand did not act until 1882,¹⁰ and the legislation here departed somewhat from the earlier statutes in that the copyright protection now only attached to the contents of the telegram as received, not to the news as published. Tasmania adopted a similar measure, though again applying to news cables from anywhere outside the colony, in 1891.¹¹ This act deliberately copied the New Zealand formulation of protection of the telegram, not the story resulting from it.¹²

It seems possible too that the Australasian precedents were followed in other jurisdictions. In 1895 Natal enacted a Telegraphic Message Copyright Act(Nat), in what appear to be similar terms.¹³

⁹ V. & P. of Leg.Co. of Western Australia, 14 and 16 August 1872.

¹⁰ Protection of Telegrams Act 1882(NZ).

¹¹ Newspaper Copyright Act 1891(Tas).

¹² *Hobart Town Mercury* 16 December 1891.

¹³ Anon, (1896) 1 JCL 98.

Water and irrigation

The common law relating to the use and control of natural water by landowners appears to have undergone a significant change in the nineteenth century. The medieval law held generally that rights to water use were determined by rights acquired by prescription, something akin to the doctrine of prior appropriation which came to represent the law in most of the United States of America. However in the nineteenth century the English courts shifted ground and came to embrace the riparian doctrine - that water in its natural state could not be owned. Instead owners of land bordering on natural water could exercise rights to use the water provided in doing so they did not infringe on the rights of the owners of lands up or downstream from their own lands.¹⁴ A broadly similar rule applied in Quebec , although derived somewhat differently!¹⁵

Riparian rights doctrines were far from suitable to the needs of colonial agriculture.¹⁶ Water was, in many areas, a scarce resource either permanently or seasonally. There was little chance that landowners could make significant use of natural water, especially where it was desired to use it for irrigation of crops, without prejudice to neighbouring owners. The limiting factor here was that riparian doctrine forbade the abstraction of water which a neighbour might have wished to use - it did not matter that the neighbour was not in a position to abstract and use it. Landowners who did not have riparian rights of course had no rights over a nearby natural waterway at all.¹⁷ Nor could the exercise of riparian rights be easily integrated into any system of management and control of waterways. the solution was to abrogate, in one way or another, the riparian rights doctrine.

¹⁴ For the foregoing, see McGrady, L. "Jurisdiction for Water Resource Development" (1967) 2 Manitoba LJ 219, 219-220.

¹⁵ Scott, W.B. "The Ownership and Use of Rivers and Streams in Quebec" (1939) 17 Can. Bar. Rev. 220.

¹⁶ Riparian rights could also cause difficulties in connection with the supply of water for urban purposes, as with the New Town Rivulet Act 1841(VDL), which a local judge considered repugnant to British law as it interfered with riparian rights without compensation. See Franklin to Russell 12 October 1841, CO 280/134.

¹⁷ See Clarke, S.D. and Renard, I.D. "The Riparian Doctrine and Australian Legislation" (1970) 7 MULR 475, 478-79.

The first traceable proposals in the settlement colonies¹⁸ for a new regime were the suggestions made by Denison while Governor of Van Diemen's Land, when he wrote to a friend that:

"I ... have been asked to bring in a local Irrigation Act. I shall I think see if I cannot manage a general irrigation Act, or rather, an act enabling the persons residing on the banks of any river to form themselves into a corporate body for the purposes of controlling the enpondion of the water, assuring a proper supply".¹⁹

The effect of this proposal is difficult to evaluate. While no later reforms reveal any direct derivative influence from Tasmanian law - indeed for much of the century Tasmanian water use was controlled by the Irrigation and Drainage Act 1868(Tas), itself derived from an Imperial act which regulated drainage and irrigation in Ireland²⁰ - it is notable that the later Victorian statutes of the 1880s, particularly the Water Conservation and Distribution Act 1881(Vic), do have elements which reflect a similar philosophy of local co-operative control of natural waters to regulate irrigation.

A more significant challenge to the riparian rights doctrine and its operation was the policy adopted in South Australia and Victoria in the 1870s of reserving to the Crown a strip of land along the course of natural waters so that private riparian rights could not come into existence.²¹ A similar reservation regime was created in at least some of the Canadian provinces late in the century.²² Various mining rights created by statute also carried with them rights to use water in various ways.²³

However the major innovation in the field of irrigation law came in 1886 when the Victorian legislature passed the Irrigation Act 1886(Vic), a measure largely drafted by

¹⁸ There was an earlier attempt in a Tobago statute of 1808 which authorised any landowner to bring water to his land through another's, if damages were paid for any losses caused. The legal adviser to the Colonial Office recommended disallowance on the grounds the statute was too generally worded. See Baldwin to Castlereagh 20 December 1808, CO 323/38, PRO.

¹⁹ Denison to E. Deas Thomson, 8 June 1850, Deas Thomson papers, file 1531, p.542, ML.

²⁰ Gore Browne to Buckingham, 7 October 1868, CO 280/375.

²¹ Clarke, S.D. and Renard, I.D. "The Riparian Doctrine and Australian Legislation" (1970) 7 MULR 475, 483-4.

²² La Forest, G.V. "Rights of Landowners in New Brunswick respecting Water in Streams on or adjoining their Lands" (1957) 10 UNBLJ 21, 28-9.

²³ Clarke and Renard, *op. cit.* n.21, p. 481

Alfred Deakin.²⁴ Deakin had studied American law relating to water use and proposed a new regime whereby the colonial state controlled water use rights as a separate form of property. This effectively severed use rights from ownership of land adjacent to the waterways, artificial or natural, along which the waters passed.²⁵

This Victorian legislation was to become the model for statutes in both South Australia (Water Conservation Act 1886(SA)) and New South Wales, (Water Rights Act 1896(NSW)). As might be expected, the debates in the legislatures of both these colonies reveal a widespread knowledge of the Victorian law, but the debates are spiced with references to American and even French law.²⁶

The willingness of Australian colonial politicians of a "Liberal" hue to countenance policies which required the state to take an active role in the control of resources has been attributed to electoral necessity - in the aftermath of the severe depression of 1890-93, only more interventionist and activist policies would hold at bay the electoral appeal of the nascent Labour movements and allow the "Liberals" to continue their political leadership. On this view state involvement and regulation of irrigation and water conservation, along with other "new liberal" policies such as closer settlement of rural areas, factory and shops legislation and reform of the public service, is not a ideological aberration from a tradition of laissez-faire liberal economics so much as a response to colonial exigencies.²⁷

Something akin to the Victorian law was also to be adopted in North America, where the Northwest Irrigation Act 1894(Can) provided that the rights to natural water vested in the Crown, and that the Crown could control the acquisition of rights by others.²⁸

²⁴ For details of Deakin's career, see La Nauze, J.A. *Alfred Deakin: A Biography* (Melbourne U.P. 1965).

²⁵ For the impact of Deakin's proposals, see Clarke and Renard, *op cit.* n.21, pp.487-88 and Davis, P.N. "Nationalization' of Water Use Rights in the Australian States " (1975) 9 U Qld LJ 1.

²⁶ See 1886 SAPD 268-270 and 1896 83 NSWPD(1st) 1288-1301 and 1413.

²⁷ Ward, J M "Colonial Liberalism and its Aftermath; New South Wales 1867-1917" JRAHS, 1981, vol 67. p.81, especially at 92.

²⁸ Clarke, S.D. and Renard, I.D. "The Riparian Doctrine and Australian Legislation" (1970) 7 MULR 475, 489.

This federal statute ran parallel to the relevant provincial legislation, the most significant of which was that in British Columbia, where since 1865 riparian rights were first modified by the creation of statutory rights to take water and later superseded altogether by a system of statutory rights²⁹ under the Water Privileges Act 1892(BC).

New Zealand only came to consider legislation on water use late in the century, and the most significant statute, the Water Supply Act 1891(NZ) opted for a system of local trusts controlling the supply and allocation of water through artificial waterways. The 1891 Act is a little unusual in that it was introduced at the request of two South Island local bodies who wished to have a more defined set of powers relating to irrigation than the earlier law had provided. These councils had drafted the bill, but it had been re-drafted by the Solicitor-General.³⁰ Somewhat surprisingly there was no discussion at all in the legislature of the legal regimes extant in other jurisdictions.

Of the settlement colonies, only the those in South Africa preserved the riparian rights doctrine unchanged throughout the nineteenth century. This was not for lack of knowledge of alternatives - an American consultant to the Cape Colony government in 1898 proposed legislation to assert the Crown rights to control and ownership of natural water, a proposal which would appear to have been at least partially inspired by the Australian statutes on the issue.³¹

²⁹ Armstrong, W.S. "The British Columbia Water Act : the End of Riparian Rights" (1962) 1 UBCLR 583, 584.

³⁰ See 1891 74 NZPD 434ff.

³¹ De Wet, J.C. "A Hundred Years of Water Law [1959] Acta Juridica 31, 34.

Artificial Fertilisers

One of the more unusual indications of the range of legislative influences on colonial statutes dealing with a single topic are to be found in various colonial jurisdictions which legislated to prevent fraudulent practices in relation to artificial fertilisers. Toward the end of the century, farmers in various colonies were finding that they had exhausted the natural fertility of the soil and artificial means were necessary to improve crop yields. As most farmers had only a rudimentary knowledge of fertilisers and their chemistry, they were relatively easy prey for unscrupulous suppliers. The parliamentary debates on this topic reveal that the problems facing consumers were serious. Fertilisers were often sold without proper indication of their chemical composition, and in many cases the useful chemicals had been unduly bulked up by more inert substances. Proof that there had been wrongful conduct by the vendors, however, required both a degree of scientific knowledge and access to scientific apparatus - neither a common feature in rural Australasia. In some cases, too, there were attempts by merchants of less than upright character to promote their sales by infringing the trademarks used by established and reputable suppliers. Not surprisingly colonial legislatures sought to deal with both aspects of the problem. In doing so, they provide an interesting early example of governmental action interfering, in the interests of consumer protection, with the play of market forces.

The first colony to enact legislation specifically designed to deal with the problem was New Zealand, with the Manure Adulteration Act 1892(NZ) setting up a system whereby suppliers of artificial fertilisers were required to state on the packaging of the product its chemical composition, a statement which was to be a warranty as to quality. Farmers were also granted the right to have samples of fertilisers analysed (for a fee) in a government laboratory. The bill, introduced by the Minister of Agriculture, enjoyed widespread political support, perhaps a product of McKenzie's efforts to ensure that farmers, importers and manufacturers had all been consulted between the first and

second readings of the bill.³² The New Zealand statute was soon copied in other jurisdictions. The first to do so was Tasmania, where the Manure Adulteration Act 1893(Tas) adopted the New Zealand regime.

The next to move, however, was South Australia where, although the Fertilisers Act 1894(SA) contained similar provisions to the New Zealand law, the inspiration appears to have been a recent English statute rather than the Antipodean version.³³ However the South Australian law was modified in 1898 by the Fertilisers Act Amendment Act 1898(SA), which incorporated some of the provisions of the New Zealand and Tasmanian law, as well as features drawn from American and Victorian law³⁴

The South Australian act of 1894 was largely copied by the Western Australian parliament in the Fertilisers and Feeding Stuffs Act 1895(WA), although there, uniquely, the warranty provisions were extended to artificially treated animal feedstuffs. English legislation of a similar nature on the point was referred to frequently during the debates on the bill.³⁵ Much the same is true of the Artificial Manures Act 1897(Vic), though that bill was slightly differently drafted and enjoys the distinction of being a private member's, rather than a Government, bill.

³² See 1892 78 NZPD 264-66.

³³ 1894 1 SAPD 1216.

³⁴ See 1898 1 SAPD 299ff.

³⁵ See 1895 8 WAPD (ns) 464-68.

Securities over chattels and produce

The nature of the developing colonial economies, their reliance on credit and the great fluctuations through which they went, brought pressure for effective laws to reconcile the interests of primary producers, most of whom relied on borrowed money for operating capital, and the mercantile community which provided the funds needed (or served as a channel for overseas or domestic investors). Some form of effective security for lenders was needed if the flow of funds was to be maintained, but English law was not entirely suited to the colonial demand. In English law a mortgage of a chattel did not actually require the physical transfer of possession of the chattel, but if possession was retained by the borrower, there were great difficulties if the borrower became insolvent, since the retention of possession by the borrower may have misled other creditors and was therefore could be considered to amount to an undue, and invalid, preference to the lender. It was possible for a borrower to give a different form of security over chattels without parting with possession by the execution of a "bill of sale", which entitled the lender, on default in payment, to seize and sell the chattel. Naturally such a system created problems with the dishonest borrower, since it was difficult for any lender to be certain that no other encumbrance existed which might render the security worthless. Much of the English, and colonial, legislation on bills of sale in the latter half of the nineteenth century was aimed at reducing the risk to vendors by the creation of some form of registration system so that prior encumbrances could be discovered. But the more potent objection to chattel mortgages and bills of sale in the colonial context was that they were only effective securities over chattels then in existence. A farmer might give a security over farm implements, but not over the crop he intended to raise with them; over sheep but not over their future lambs or their wool.³⁶

³⁶ Two most helpful sources on the general field of colonial law concerning instruments creating securities over chattels are Ellinger, E.P. and McKay, L. "Chattel Securities in New Zealand 1843-47" (1974) 3 Otago L.R. 153 and Risk, R.C.B. "The Golden Age: The Law about the Market in Nineteenth Century Ontario" (1976) 26 U Toronto LJ 307, 326-37.

The solution to at least some of the colonial difficulties was found in New South Wales in the 1840s. A prolonged and severe economic depression had hit the colonies hard. Most of the large sheep-farmers were in severe financial difficulties. Since few in fact owned the lands on which they depastured their sheep, the range of assets available as security was limited. Adversity spurred, among other measures, the creation of a novel form of security, the so-called "preferable lien" over future produce. Under the Preferable Lien Act 1843(NSW),³⁷ the owner of sheep could give to a lender a security over both sheep in a flock and the forthcoming wool-clip from those sheep. The borrower retained the right to possession and management of the sheep, but once the sheep were shorn, the wool came into the hands of the lender as security. The idea for the legislation came from an unknown member of the Sydney mercantile community, though it owed something to the concept of "bottomry bonds" recognised by Admiralty law, these bonds being securities granted over a ship not yet built to allow the raising of money to build the ship.³⁸ The legislation met with fierce criticism from the Colonial Office on the grounds that it was contrary to English law and imperiled the lender, as well as encouraging speculation. However the strong advocacy of Governor Gipps for the measure persuaded the Colonial Office to refrain from disallowance, though insisting it be regarded only as a temporary measure and not continue in force past 1846.³⁹ So useful a measure was, however, not to be given up easily and the colonial legislature kept passing similar acts,⁴⁰ usually described as temporary only, until a

³⁷ The statute has been differently described by various authors. In official correspondence it is more commonly referred to as the Preferable Liens Act, Castles, CALH p.172, refers to the legislation as the "Preferrable Liens Act"; some contemporary writers preferred the "Lien on Wool Act"; see e.g. Therry R., *Reminiscences of Thirty Years Residence in New South Wales and Victoria* (first published 1863, facsimile edition 1974, Sydney University Press, with introduction by J.M. Bennett), pp.236-7. Later writers have also been inconsistent in their usage.

³⁸ See CALH, pp.173-5.

³⁹ Ellinger & McKay, *op. cit.* n.36, p.158. As these authors show the degree of opposition does not appear to have been justified by the provisions of the Act.

⁴⁰ One of these was unsuccessful. The Lien on Wool Amendment Bill 1844 was not assented to by Gipps, but his objection was not to the principle but to details of the registration provisions it included. See Shaw, A.G.L. (ed) *The Gipps - La Trobe Correspondence 1839-1846* (Melbourne U.P. 1989), pp.302-03, and Gipps to Stanley 2 February and 5 February 1845, HRA ser.1 vol.24, pp.234-5 and 241-2.

permanent measure was sanctioned in the 1860s. By then other Australasian colonies had copied the New South Wales legislation.

The first colony to enact legislation on similar lines to New South Wales appears to have been Victoria with the Wool Liens Act 1853(Vic), a measure which was not only modelled on the New South Wales law, but also was accepted by the British authorities because they had sanctioned, if reluctantly, the earlier law.⁴¹ New Zealand passed the Wool and Oil Securities Act 1858(NZ) which had much the same effect as the New South Wales law, though without adopting the term "lien", and with the extension (apparently unmatched in any other colony) of the securities of this nature to produce from whaling.⁴² Queensland too enacted a Lien on Wool Act in 1861, and Western Australia legislated in 1866.⁴³

By that time two significant developments had begun in the colonies. The first extended the preferable lien concept to crops - a suggestion apparently first made in 1860 in a private members bill in Victoria.⁴⁴ New South Wales authorised such securities in the Liens on Crops Act 1862(NSW), again copied widely in other colonies⁴⁵

The second development, which was to cause considerable difficulties at times with the existing or future law of liens, was the commencement of colonial legislation concerning bills of sale. The English law had been substantially consolidated and reformed by the Bills of Sale Act 1854(Imp), which provided that a bill of sale giving a right to take possession of the chattel had to be registered within 21 days or the document was invalid as against other creditors or a trustee in bankruptcy. This legislation was soon copied in the Australasian jurisdictions.⁴⁶

⁴¹ Wood to Merivale 7 July 1852, CO 323/73, PRO.

⁴² See Ellinger & McKay, *op. cit.* n.36, pp.159-161.

⁴³ Liens on Wool and Stock Mortgages Act 1866(WA).

⁴⁴ 1860 6 VPD 482, discussing the Frauds on Creditors Prevention Bill.

⁴⁵ See CALH p.175., n.31 for a not entirely reliable list of statutes. The first Queensland legislation allowing crop liens was the Preferable Lien on Crops Act 1863(Qld).

⁴⁶ Secret Bills of Sale Act 1855 (NSW), Registration of Bills of Sale Act 1858 (Tas); Bills of Sale Act 1862(Vic); Bills of Sale Act 1867(NZ); Bills of Sale Act 1879(WA); Bills of Sale Act 1885 (SA); Bills of Sale Act 1886(Qld).

This development caused difficulties in at least two colonies where it was found that there was a conflict between the provisions of the preferable liens legislation and the newer Bills of Sale Acts. In Victoria the legislature passed acts for both in 1862, only to discover that there was a difficulty because the Bills of Sale Act 1862(Vic) could be considered to apply to growing crops as a form of personal property. To be fair to the draftsman, the conflict may not have been anticipated since it appears that the difficulty was in part caused by a contemporary decision of the Court of Common Pleas in Ireland which ruled that, contrary to common legal opinion, growing crops were personalty.⁴⁷ Fortunately an impasse was prevented by obtaining the disallowance of the Lien on Growing Crops Bill 1862,⁴⁸ and a later Victorian statute expressly declared growing crops to be personal chattels and brought them under the bills of sale regime. Somewhat surprisingly New Zealand encountered a similar difficulty with the Agricultural Produce Lien Act 1870(NZ), though here the difficulty was with crops severed from the land which undoubtedly were personalty. The difficulty was remedied by an amending Act the following year which made clear the priority of a crop lien in such circumstances.⁴⁹

For most of the last decades of the century the Australasian colonies maintained legislation covering both kinds of securities.⁵⁰ This is not to say that colonial legislation was uniform. The British law on bills of sale did not remain static, and there were differences in the degree to which the colonies adopted various of these amendments. Colonial ingenuity also at times caused differences, as with the adaptation of the Torrens title caveat system to bills of sale, an innovation tried successfully in Victoria in 1876.⁵¹ It is also notable that in a number of cases it appears that legislation

⁴⁷ Barkly to Newcastle 2 July 1862, VPRS.1084/4, VPRO.

⁴⁸ Newcastle to Barkly 1 Nov 1862, VPRS 1087/15, VPRO.

⁴⁹ Agricultural Produce Lien Act 1871(NZ); see Ellinger & McKay, *op. cit.* n.36, p.167.

⁵⁰ See Atkins, R.J. *Bills of Sale, Liens and Stock Mortgages in New South Wales* (2nd ed). (Law Book Co.of Australasia, 1939), pp.3-6; Coppel, E.G. *The Law of Bills of Sale* (Law Book Co. of Australasia, 1935), pp.1-7. Most colonies kept the statutes distinct, but the Bill of Sales Act 1899(WA) to an extent conflated the two kinds of security; see Sykes, E.I. "Bills of Sale and Other Puzzles" (1957) U Qld LJ. 152, 158-9.

⁵¹ Coppel, *op.cit.* n.50, pp.5-6.

of this nature was only passed because individual politicians sought to amend the law - the Bills of Sale Amendment Act 1886(SA) was a private member's bill,⁵² as, it seems, were the New Zealand crop liens statutes of 1870 and 1871.

The problems of creating a law of chattel securities suitable for colonial conditions were not confined to Australasia. In the various North American colonies largely similar problems arose and were met with somewhat different responses. In the province of Canada the local legislature enacted a form of bill of sale legislation, the Chattel Mortgages Act 1849(Can), which was drawn from United States, rather than English, law, and was subject to considerable amendment as difficulties were encountered.⁵³ Other colonies enacted bills of sale legislation more directly modelled on the English reform of 1854.⁵⁴ However, for reasons which can only be a matter of conjecture, nowhere among the North American colonies does anything like the preferable liens laws of Australasia appear.

⁵² See 1886 SAPD 1332.

⁵³ See Risk, R.C.B. "The Golden Age: The Law about the Market in Nineteenth Century Ontario" (1976) 26 U Toronto LJ 307, 332-34.

⁵⁴ Bills of Sale Act 1861 (Vancouver Island); Bills of Sale Ordinance 1870(BC) and see Joanes, A "Third Party Rights in Goods Subject to Conditional Sales Agreements and Chattel Mortgages" (1959) 1 UBCLR. 23.

Workmen's liens

Problems of credit and indebtedness were not, of course restricted to primary industry. One problem which appears to have been endemic in the colonies concerned the difficulties facing workmen and contractors who went unpaid for their labours or services on some building or project because their particular contract was with a subcontractor who had become insolvent. Privity of contract, of course, meant that they had no direct redress against the person or body for whom the work was ultimately done, and who reaped the benefits of the labours of those unpaid workers.

Proposals for reform came quite early in the colonies, with the suggestion that contractors and workmen be given, by statute, a lien on the property for the improvements they had effected. The first legislation to confer such a lien appears to have been passed in New Zealand in 1871, but the Contractors' Debts Act 1871(NZ) failed because it only gave to the workman or contractor a claim against the property of the person with whom he was in contractual relations. Such a right was frequently rendered nugatory because that person had no assets of adequate value. However in the North American colonies a more adequate safeguard was found by creating a statutory lien for workmen over the property on which they had worked to the extent of any unmet debts owed them under their particular contracts, irrespective of issues of privity. This form of lien existed in the civil law, as an inheritance from the Roman law, and had first been given statutory form in the United States in the late eighteenth century. The American idea was then taken up in Ontario and Manitoba in 1873, and by British Columbia in 1879.⁵⁵ The first reasonably comprehensive and effective Australasian legislation was in the Contractors' and Workmen's Liens Act 1892(NZ).⁵⁶ This statute was in turn largely copied in Queensland and South Australia. In part New Zealand's lead was because its government was much more sympathetic to the reform - if not a Government measure, it had government support - whereas similar bills had been

⁵⁵ Law Reform Commission of British Columbia, *Report on Debtor-Creditor Relationships, part 2* (1972) p.16.

⁵⁶ Wilson, J.N. *Contractors' Liens and Charges* (2nd ed) (Butterworths, Wellington, 1976), p.ix.

promised only to be dropped for almost a decade in South Australia.⁵⁷ It is notable that in all three Australasian colonies that legislated, the politicians promoting the bill had ties to organised labour and it seems probable that the trade union movement acted as a conduit for the passage of information and suggestions for legislation.⁵⁸

⁵⁷ 1893 SAPD 2490.

⁵⁸ The New Zealand bill was moved by Pember Reeves, and the South Australian bill by Tom Price, a labour unionist stalwart. For Queensland and Griffith's ties to the union movement, see Joyce, R.B. *Samuel Walker Griffith* (U Queensland Press, 1984) p.124.

Protection of family homes from creditors

Another example of legislation intended to protect the position of debtors is to be found in statutes such as the Family Homes Protection Act 1895(NZ), which allowed a family home to be set beyond the reach of the creditors of the owner. Normally where any person became indebted, the creditors could have recourse to any and all of the debtor's property. The Act allowed the family home to be exempt from such claims, provided the status of the home was registered and the owner proved at the time of registration the ability to pay any debts due. The New Zealand measure was first moved as a private member's bill in 1894 by Robert Stout, though it was not enacted until the following year when it received Government backing. Although the principle underlying the new legislation derived from the American Homestead Exemption laws, which were later adopted in Canada, the actual form of the 1895 statute was that adopted in South Australia in 1893.⁵⁹ The popular appeal of such a measure must have been enhanced by the frequency with which the severe economic depression of the early 1890s had caused previously prosperous traders to become insolvent.

⁵⁹ See (1895) 87 NZPD 374-75 and see (1896) 1 JCL 70.

Crisis legislation; rabbits, vine diseases and bank crises

There were times when a number of colonies were propelled by force of circumstances into enacting essentially similar legislation as a response to a widespread problem confronting each of them. One simple example of this is the legislation passed in five of the Australasian colonies in the 1870s and 1880s to deal with the numbers of rabbits, an introduced animal which had acclimatised well and bred until its numbers were in plague proportions and seriously affected the viability of pastoral farming in many areas.⁶⁰ While New South Wales and Queensland largely used a system of government inspectors to police the observance by runholders of terms in their leases to eliminate rabbits, the other colonies took a more innovative approach. In 1871 Tasmania passed the Rabbits Destruction Act 1871(Tas) which placed the obligation to control the pest on landowners and created a system of local boards of trustees to control the system. Both the system and the statute were then largely reproduced in the Rabbit Suppression Act 1879(SA), although that Act put control in elected Commissioners rather than elected Boards. The South Australian statute was in its turn the model for a Victorian statute in 1880⁶¹ and, less markedly, the New Zealand Act of 1882.⁶² Western Australia also copied the Tasmanian law with the Rabbit Destruction Act 1883(WA), although that act appears to have incorporated a Tasmanian change in 1882 to a system of local boards with inspectors appointed by the central Government.⁶³

Another example of similar legislation aimed at a common problem is provided by two waves of statutes in the Australian colonies to prevent the spread of diseases in grapevines. The first legislation on the point appears to have occurred in New South

⁶⁰ See for instance Roberts S. H. *History of Australian Land Settlement 1788-1920* (1924; reprinted Macmillan of Australia 1968), p.309.

⁶¹ Rabbit Suppression Act 1880(Vic).

⁶² Rabbit Nuisance Act 1882(NZ).

⁶³ For the change in Tasmania see Davis, A.H. "*A Lawyer's Letters*" - *A Popular Guide to the Common Law and Principal Statutes of Tasmania*" (Aikenhead & Button, Launceston, 1886), p. 33. It is a measure of the importance of the rabbit problem that the author had written of it in the newspaper columns which formed the basis for this book.

Wales, in 1867,⁶⁴ to hinder the spread of a disease, "oidium". This was a relatively simple statute which banned importation of vines or grapes unless the source had been approved, with criminal sanctions for breach. An essentially similar Act was passed in 1873⁶⁵ to deal with the threat posed by phylloxera, and this was quickly taken up in most of the other colonies.⁶⁶ Because these measures failed to prevent the disease becoming established in Australia new measures were needed. In 1877 Victoria enacted the Diseases in Vines Act 1877(Vic) which created a system whereby inspectors would check vineyards for signs of the disease and destroy any infected vines. Although under the 1877 Act growers were not to receive compensation for their losses, this was changed in 1880⁶⁷ the following year. South Australia copied both the scheme and the wording of the Victorian Act of 1877;⁶⁸ New South Wales largely adopted the Victorian statute of 1880.⁶⁹

Not all such "problem legislation" was as widely or uniformly adopted. An instructive example of varying responses to a common problem may be found in the reactions of different colonies to the "bank crisis" of 1893. This came about when an era of financial speculation on capital borrowed from English capital markets that had artificially buoyed Australian economies in the 1880s was followed first by a spectacular crash in 1891 and then by a panic in 1893 when it was known that large British deposits were to be withdrawn and repatriated.⁷⁰ This portended disaster since Australian banks, unlike those in Europe and North America, operated under laws which banknotes, as such, were not legal tender.⁷¹ Banks could issue notes, which

⁶⁴ Grape Vines and Grapes Importation Prohibition Act 1867(NSW).

⁶⁵ Grape Vines and Grapes Importation Prohibition Act 1873 (NSW).

⁶⁶ Diseased Vines Importation Act 1873(Vic); Vines Protection Act 1874(SA); Diseased Grape-Vine Importation Act 1879(Tas); Grape Vines Diseases Act Amendment Act 1877 (Qld).

⁶⁷ Phylloxera Vine Disease Act 1880(Vic).

⁶⁸ Diseases in Vines Act 1878 (SA)

⁶⁹ Vine Diseases Act 1886(NSW). There were some differences to the compensation system in the New South Wales Act, since the determination was by a statutory Board rather than according to criteria stipulated in the Act itself.

⁷⁰ Knaplund, Paul, *The British Empire 1815-1939* (Harpers, New York, 1941), p.464.

⁷¹ Blainey, Geoffrey *A Land Half Won* (MacMillan of Australia, 1980), p. 326.

were generally accepted though not legal tender, but (at least in theory) to no more than the amount of bullion reserves available. Attempts had been made unsuccessfully, in the past to allow notes to be more widely issued or to be legal tender, but they had not succeeded - indeed in Queensland in 1866 the Governor had indicated he would not give assent to a bill for the issue of unsecured bank notes by the Queensland Government even if such a bill did pass.⁷²

In the first half of 1893 the position of the banks reached crisis point. In April and May 1893, eight New South Wales banks ceased to make payments or ceased to trade at all - four other bank had failed in the two years prior to this.⁷³ Runs on the surviving banks began. The New South Wales government reacted by procuring the passage of two pieces of legislation aimed at improving liquidity and halting the panic. These were the Bank Note Issue Act 1893(NSW) and the Current Account Depositors Act 1893(NSW), passed under suspension of standing orders in two days. Under the first Act, the Government could authorise the issue of banknotes on a large scale. These notes were to be legal tender, and were to be secured as far as possible by a first charge on the total assets of the bank of issue. The second statute was more innovative. Under it, anyone who could prove a credit balance owed by a bank which had ceased to trade or to make payments could borrow from the Government (in the new legal tender notes!) a sum equivalent to half the credit balance, secured against that balance. Private institutions would on occasion lend a further amount.⁷⁴

Although the New South Wales Premier, George Dibbs, urged the other Australasian colonies to follow suit, sending copies to the respective premiers (Western Australia and New Zealand had anticipated this by telegraphing requests for copies), few actually took

⁷² Murphy, D.J. and Joyce, R.B. (eds) *Queensland Political Portraits 1859-1952*, (U Queensland Press, 1978), p.50. It has been suggested that in 1854 in New Zealand a promise to permit the issue of unsecured bank notes was made to attract political support from a financier-politician: McIntyre, W. David *The Journal of Henry Sewell 1853-7* (vol 2, (Whitcoulls, 1980), p.79.

⁷³ These figures are drawn from the file "Papers relating to the Bank Note Issue Act 1893", Colonial Secretary's documents, file 4/908.1, GANSW. Much of the following account is based on the materials in that file.

⁷⁴ On this see also Reid, Sir George *My Reminiscences* (Cassell & Co, London, 1917) pp.98-99.

legislative action. New Zealand passed a replica of the Bank Note Issue Act⁷⁵ and Queensland copied the system of Governmental loans to creditholders,⁷⁶ but the other colonies did not adopt either.⁷⁷ Queensland did however go slightly further and pass the Public Depositors Acts 1893(Qld) which allowed semi-public institutions such as hospitals to draw on funds held in banks that had stopped payment. Two months later Western Australia followed suit, though the list of enumerated institutions was slightly different.⁷⁸ South Australia did no more than amend its legislation governing bank holidays to allow additional holidays to be authorised by the Government as it chose.⁷⁹

⁷⁵ Bank Note Issue Act 1893(NZ).

⁷⁶ Treasury Notes Advances Act 1893(Qld).

⁷⁷ In Tasmania, the crisis did provoke the passage, despite a cabinet split and the opposition of the Premier, of the Bank of Van Diemen's Land Company Act 1893(Tas), a private member's Bill, which allowed the receiver of a collapsed bank to conduct a lottery of otherwise unsaleable land owned by the bank : Gormanston to Ripon, 16 Sept 1893, CO 280/396.

⁷⁸ Public Depositors Acts 1893(WA).

⁷⁹ Bank Holiday Amendment Act 1893(SA).

Weights and measures

Yet the force of colonial circumstances did not always produce identical results. It is perhaps surprising to find that in relation to such a simple but fundamental matter as the regulation of weights and measures the vagaries of colonial legislation could result in quite different legislative standards being set. Such diversity was relatively slow to appear, since the first Australian legislation on weights and measures appears to have been the Weights and Measures Act 1832(NSW). It is perhaps surprising that there was no earlier legislation as in 1826 the Colonial Office had pointed out to the Governor of New South Wales that the English statute regulating weights and measures, the Weights and Measures Act 1824(Imp), did not apply to the colonies and had suggested that the colonial Legislative Council might adopt and enact for the colony the same provisions.⁸⁰ In the meantime naval officers had been directed to use the new parliamentary system of weights in their dealings. The table of standard weights provided in the New South Wales Act of 1832 was dictated to a large extent by practicalities and the official standards to which were available to the Government.⁸¹ The New South Wales law was soon followed in Van Diemen's Land. The Weights and Measures Act 1833(VDL) was virtually a reprinting of the New South Wales Act save that some of the penalties were altered.⁸² The Governor of Van Diemen's Land considered that this act did not call for comment because its introduction was "under authority from the Colonial Department",⁸³ although there is no obvious source of such authority other than the 1826 instruction to New South Wales. Enforcement of these new statutes was placed in the hands of the Justices of the Peace.⁸⁴

⁸⁰ Bathurst to Darling 27 August 1826 in HRA, ser.1, vol.12, p.504.

⁸¹ Bourke to Goderich 30 October 1832, HRA, ser.1, vol.16, p.779.

⁸² The fine provided by the acts varied. In New South Wales section 4 provided for a fine of a fixed sum of £10, in the Van Diemen's Land act this became a discretionary 10/- to £10. In section 6, the New South Wales act provided for a fine of 5/- to £2, where in Van Diemen's Land it was again discretionary between 5/- to £10.

⁸³ Arthur to Stanley, 8 January 1834, CO280/46.

⁸⁴ CALH, p.82.

By contrast the contemporaneous legislation in Western Australia, the Weights and Measures Act 1833(WA) manifestly came from a different draftsman. Not only is there a difference of style, and a rather harsher set of penalties than was to be found in the eastern colonies or in England, but section 7 of the Western Australian Act provided specifically for an offence of false selling with intent to defraud. A further difference from the eastern colonies was a specific provision (s.11) for weight equivalents for loaves of bread. Such a measure had long been part of English law but, perhaps surprisingly, it was not used in the other Australian colonies.⁸⁵

These enactments were followed after a decade by the Standard Weights and Measures Act 1843(SA), and after three more years, the Weights and Measures Ordinance 1846(NZ). These two enactments owed much to the New South Wales legislation of 1832, being virtually identical. One significant difference, derived from the English Act of 1836, was that in both South Australia and in New Zealand the law forbade the use of "heaped" measures. As is noted elsewhere,⁸⁶ the British Act of 1836 might well have been considered to apply to New Zealand in any case. The express legislation on the point may be explained either as being done from an abundance of caution in case there was doubt as to the British Act's application - not implausible since although the 1835 statute referred to "imperial" measures, its machinery provisions were very specifically focused on the United Kingdom - or more simply, as being passed in ignorance of the true position.

Standardisation of the weights and measures used by the various colonies was obviously desirable and suggestions for its achievement were not long in coming. In the 1850s voices within the Colonial Office were advocating a quasi-federal structure for Australia. A committee of the Privy Council studying these proposals recommended a central legislature which would determine, inter alia, a standard system of weights and

⁸⁵ Fisse, Brent "The Use of Publicity as a Criminal Sanction Against Business Corporations" (1971) 8 MULR 107, 113, n.25.

⁸⁶ See above, p.124.

measures.⁸⁷ Although nothing came of this proposal, the colonies themselves did on occasion arrange conferences to discuss matters of mutual interest. In 1863 an Intercolonial Conference recommended the adoption of a standard system of weights and measures in all Australian colonies,⁸⁸ apparently envisaging as a possibility the American "central" system of measures of 100 lbs weight.⁸⁹ Standardisation was, however, not achieved until after Federation.

Indeed the colonial legislation of the latter part of the century is less concerned with harmonisation between the colonies as with ensuring consistency within the same colony. The Tasmanian legislature passed the Sale of Flour and Grain Act 1857(Tas), which provided standard weights for bushels of different grains, to end difficulties posed by the use of different standards for the bushel in the northern and the southern parts of the colony.⁹⁰ The next colonial statute, the Victorian Weights and Measures Act 1861-2, did not try to define these measures - perhaps a sign of the lesser importance of agriculture in that colony.

A few years later Queensland expressly legislated for some agricultural products in the Standard Weight for Agricultural Produce Act 1866(Qld). This act was clearly differently drafted from the Tasmanian Act. Not only did it cover only four grains (wheat, maize, oats, barley) and peas, whereas the Tasmanian act had included rye, beans and grass-seed, but the weights stipulated for bushel of maize and barley were different. It is indicative of the difficulty of determining the sources of acts that the Attorney-General of Queensland in making a report to the Governor (for transmission to the Colonial Office) on the Queensland legislation of 1866 gives no indication of the sources from which the Act was derived,⁹¹ or of the differences in the measures

⁸⁷ Ward, J.M. *Earl Grey and the Australian Colonies 1846-1857* (Melbourne UP, 1958), p.96

⁸⁸ *Report of Intercolonial Conference 1863, 1862-3 VPP*, pp.6ff.

⁸⁹ See (1879) 1 NSWPD 687, speech of Hon. A. Samuel MLC.

⁹⁰ See Editorial comment in *Hobart Town Mercury*, 1 February 1858.

⁹¹ Speakers to the Bill had referred to both a Victorian statute and a New South Wales Bill on the topic; unfortunately neither is traceable. See 1866 III QPD (1st) 142-3.

prescribed in that Act from those in use in other colonies.⁹² Some years later New South Wales, after a bill that was defeated in 1865, legislated on the topic. The Standard Weight for Agricultural Produce Act 1880(NSW) largely repeated the Queensland provisions though, again, the weight of a bushel of barley differed from that of the other colonies. This statute sprang from a private member's bill, introduced by a rural backbencher. The debate on the bill in the Legislative Assembly⁹³ included references to comparable legislation in Victoria, Tasmania, New Zealand and Canada. In the Legislative Council some opposition to the bill was expressed by a councillor who considered the Australian colonies should adopt the American "central" system of measures of 100 lbs weight, claiming that in Canada this was a lawful alternative to the English units used in Australia.

The last legislation prior to federation appears to have been that of Western Australia, the Weights and Measures Act 1899(WA). This largely re-enacted earlier Western Australian statutes, but s.32 did provide for agricultural products to be sold by weight. Curiously although the marginal note to the statute refers to the Queensland Act of 1866, the list of prescribed weights includes several items from the Tasmanian statute not to be found in the Queensland law. It is notable that, although the main bill was introduced at the prompting of the Perth Municipal Council,⁹⁴ the provision for weights for grain came from a rural backbencher in the debate in the Legislative Assembly, and again was passed amid suggestions for adopting a standard weight measure for all grain.⁹⁵

During this time it appears that New Zealand failed to move significantly - one of the few changes to New Zealand law in the period being the adoption, in 1868, of a Victorian section concerning purchases by volume.⁹⁶ Even then, the Weights and

⁹² C Lilley to Governor,, n.d. but October 1866, File JUS/31, QSA.

⁹³ (1879) 1 NSWPD 214 and 522-3.

⁹⁴ 1899 14 WAPD (ns) 693

⁹⁵ 1899 14 WAPD (ns) 691-3

⁹⁶ Weights and Measures Act 1368(NZ).

Measures Act 1868(NZ) began as a consolidation aimed at remedying defects to do with the weighing and sale of gold⁹⁷ but struck some difficulties when the Legislative Council disagreed with amendments by the House of Representatives to permit the sale of flour and oatmeal by a "ton" of 2,000lb. The debate in the Legislative Council showed considerable awareness of the variance in practice in Australia, with the Tasmanian practice of using the long ton being cited as a reason for the use of that standard.⁹⁸

⁹⁷ (1868) 2 NZPD 260.

⁹⁸ (1868) 3 NZPD 242.

Chapter 11

The creation of colonial law in practice 3 :

law reform

"... it would be admitted that almost every measure of law reform had met with very strong opposition from members of the legal profession".¹

Law reform in the colonies was far from uniform in its character and in the degree to which reforms became matters of substantial debate. In some cases, as illustrated by Torrens title legislation, reforms were passed by colonial legislatures despite the opposition of lawyers and members of the colonial government. In other cases, as with proposals to allow subjects to sue the Crown, reforms were passed easily in colonies where the local elite were receptive to change, but had a much harder passage where the local government was opposed. In both cases there are instances of back-bench success over opposition from ministers, a matter which was more common in nineteenth century political life where party politics was less developed than it was to become and party loyalty was more a matter of support on confidence issues than unwavering support on all matters.

These examples of relatively controversial reform may be contrasted with the low-key nature of the debates surrounding more technical areas of law such as statutory interpretation legislation and the use of powers of attorney.

Crown liability

The common law did not allow the Crown to be sued on its own writs, so no action lay as of right for tortious acts or breaches of contract by the Crown. Instead a person alleging injury by a wrongful act by the Crown could submit a "petition of right" seeking redress. If the Crown gave its fiat,² the petitioner could bring an action for

¹ Mr Coles MLA, 1882 SAPD 387.

² So named from the endorsement made on the petition "fiat justitiae" - let justice be done.

damages or (though this fell into desuetude for most of the nineteenth century) equitable relief. The petition of right procedure was defective in several respects. The procedure was cumbersome, although this was, in England, less of a problem after the Petition of Right Act 1860(Imp). More importantly, the English courts took the view that although the Crown could be liable for breach of contract on a petition of right, it could not be liable in tort, although in some cases individuals acting for the Crown might be personally liable in tort. Such cases were in practice, but not in theory, effectively tort actions against the Crown because the Crown normally took over the conduct of the case. And, of course, the requirement of the fiat limited the utility of the petition to those cases where the Crown consented to be sued.³

Whatever the merits of such a system in England where, at least in times of peace, the Crown was not deeply involved in the national economy, it had severe limitations in the new colonial societies where the Crown was by far the most important actor in the economy. The Crown was a very large-scale consumer of resources and employer of labour, it was the principal vendor of land and was responsible for many aspects of the economic infrastructure (such as bridges, roads and wharfs) which in Britain were provided by private enterprise or by local government. It mattered little whether the Crown carried these functions out directly or contracted them to others since in either case disputes about legal rights and liabilities could arise. Responsible government, when it came, avoided some of the difficulties of the fiat procedure, but the limitation on tort actions was particularly felt.

Perhaps surprisingly the discontent was only productive of reform in the Australasian colonies. In the various North American colonies, and even after federation, the only redress against the Crown was by petition of right, save a limited right of action against the Crown for negligence of Crown servants on a public work. Even this right of action

³ As to the above, see Hogg, P.W., *Liability of The Crown* (2nd ed) (Carswell & Co, Toronto 1989), pp.3-7 and New South Wales Law Reform Commission "Proceedings by and against the Crown" (Report No 24, 1975), pp.10-13.

was created only by a side-wind in the form of a jurisdictional provision affecting the Exchequer Court. The reasons for this surprising unwillingness to reform the law are obscure.⁴

By contrast in the Australian colonies discontent with the law was manifested from an early period. Some measure of the dissatisfaction with the existing state of affairs can be gained from the fact that the colonists were critical of the omission from the New South Wales Constitution Act 1842(Imp) of any right of redress against the Crown.⁵ In 1844 a Committee of the New South Wales Legislative Council which was drafting a petition for responsible government requested:

"fifthly, that an Act be introduced to enable persons, having claims of any description against the Local Government, to sue the Colonial Treasurer, or other Public Officer, as a nominal defendant, under such limitations as may be necessary to prevent frivolous and vexatious suits".⁶

Yet the first legislative initiative came not from New South Wales but from South Australia. In 1851 the South Australian Parliament passed the Claims Against the Crown Act 1851(SA). This statute provided for the person wishing to seek redress to petition the Governor-in-Council to appoint a nominal defendant for a trial against the nominal defendant of "all cases of dispute or difference touching any pecuniary claim" between the subject and the colonial Government.⁷ The Government might or might not grant that petition by giving a fiat, but responsible government may have made refusal of a fiat politically embarrassing. To avoid the possibility of frivolous claims, there was a requirement that the petition be countersigned by a barrister. This statute was disallowed by the Colonial Office on the basis that it left to the determination of the judges of the Supreme Court of the colony any issues as to whether any Crown actions

⁴ For the Canadian position see Hogg, P.W., *Liability of The Crown* (2nd ed) (Carswell & Co, Toronto 1989), pp.80-82; Law Reform Commission of British Columbia, *Report on Civil Rights - Part 1; the Legal Position of the Crown* (1972); Jameson, D.P. "Proceedings by and against the Crown in Canada" (1948) 26 Can. Bar. Rev. 373 and also see Scott, F.R., (1936) 14 Can. Bar. Rev. 252.

⁵ HRA, ser.1, vol.22, p.xi.

⁶ HRA, ser.1, vol.22 p.xii.

⁷ This use of the term "government" is unusual and was presumably intended to ensure claims were not made against the Government of the United Kingdom.

on which the suit was based had been done under the prerogative power of the Crown. The colonial Parliament redrafted the Act to make this a matter for the colonial Governor, or (if the Governor so chose) a matter which could be referred to the Secretary of State for the Colonies. This became the first colonial statute to reform the law, the Claims Against the Crown Act 1853(SA).⁸

New South Wales was next to act, with the Claims Against the Government Act 1857(NSW). This statute closely followed the South Australian Act except that the ability to bring an action was not limited to pecuniary claims and there was no requirement that the claim be supported by a barrister's signature. This formulation was adopted virtually verbatim in Western Australia in 1867.⁹ The New South Wales statute was also the basis for the Claims Against the Government Act 1865(Qld). Queensland did in fact have in force the New South Wales statute of 1856, which it had inherited, but the new law made one striking change, in that it permitted a claim to be made where any individual "deemed himself to have a just claim" against the Crown. This Act is the first of the statutes on this topic for which adequate parliamentary reportage is available, and the debates are illuminating.¹⁰ The bill was moved by a back-bench politician, a Mr Walsh, who prided himself on not being a lawyer. He stated that he had prepared the bill himself, though it had been "looked over" by the Parliamentary Draftsman (who did not approve of the principle underlying the bill). The formula used for entitlement to claim was, however, the work of Walsh himself. All the ministers who spoke on the Bill opposed it but there was strong support for it from other members. Other members did refer to the position in New South Wales and Victoria.¹¹ As indicated below, the Victorian precedent was not necessarily one favouring reform. The bill however succeeded, though only after a Select Committee

⁸ For the Colonial Office views, see Wood to Merivale 16 March 1854, CO 323/77, pp.271-273.

⁹ Claims Against the Government Act 1867(WA), and see Russell, p.42.

¹⁰ The debate is reported at (1865) II QPD 335-354. Walsh's speech is at pp.335-7.

¹¹ One member stated that he could not find a copy of the Victorian legislation in the Queensland Parliamentary Library, although the New South Wales law was available: (1865) II QPD 354.

had added provisions requiring a judicial certificate that there was a prima facie case and a provision allowing for orders for security for costs. Curiously enough in later years New South Wales was itself to return to this issue and in 1876 it amended the law to use the Queensland formula for entitlement to bring an action.¹²

Meanwhile Victoria had gone its own way with a rather different system. The first Victorian Bill, in 1856, was reserved for assent in Britain, which it received and became law in 1858.¹³ The Victorian legislation set out a much more detailed procedure than had the other Acts, but there were more important differences. Under the Victorian legislation, a court action could be started by the statutory petition and there was no need for governmental fiat. Further, and unlike the other colonies where the wording of the entitlement sections was very general, the Victorian legislation made it clear the entitlement to sue was restricted to claims in contract. Why this was so is not clear - the only fragmentary record of the Victorian debates shows an apprehension that the proposal was designed to give the squatters a mode of enforcing a claim to title to the Crown lands they occupied without proper legal tenure.¹⁴ However the Victorian legislation received considerable adverse publicity when it was used in 1865 to enable the government to ride out a parliamentary crisis when the Legislative Council refused supply. The then Attorney-General, Dennistoun Wood, devised a scheme whereby the London Chartered Bank lent money to the Government against the sums accruing to the Government's credit at the bank from customs revenues. The Bank then sued for repayment of the loan, the Government entered no defence and the bank became entitled to repayment by virtue of the court order. Since no fiat from the Governor was required, he was powerless to intervene.¹⁵

¹² Claims Against the Colonial Government Act 1876(Vic) and see Canaway, A.P. "Actions Against the Commonwealth for Torts" (1904) 1 Commonwealth LR 241.

¹³ Claimants Against the Crown Relief Act 1858(Vic).

¹⁴ (1856) 1 VPD 115ff.

¹⁵ The scheme and its political aftermath is described by Macintyre, S. *A Colonial Liberalism: The Lost World of Three Victorian Visionaries* (OUP of Australia, Melbourne, 1991), p.67.

This use, or abuse, of the Act did not prevent the Victorian statute being largely adopted in Tasmania by the Crown Redress Act 1859(Tas). The Tasmanian legislation (at that time also with the limitation to contractual liability only) is most unusual in that it appears to have been a government measure, albeit introduced in response to a speech from a private member. It might well have reached the statute-book a year earlier since it was first passed by the Legislative Council in 1858 session only to have the House of Assembly determine that it was a money bill and should not have originated in the upper House so that passage had to await its recommittal to the Legislative Council!¹⁶

The Victorian precedent affected the reception given to reform proposals in New Zealand. The first bill introduced to the colonial parliament on the subject was introduced by Thomas Bannatyne Gillies, a Dunedin lawyer, later a cabinet minister and Supreme Court judge. Gillies's bill was squarely based on contemporary Victorian legislation but the proposed bill was later taken up as a Government measure, and was amended significantly to require a fiat from the Governor to bring an action. This change, described as being intended to bring the bill more in accord with English law, appears to have been motivated also, at least in part, by the Victorian experience.¹⁷ The final result was the Crown Liabilities Redress Act 1871(NZ). It may be noted that there had earlier been a provincial ordinance passed by the Provincial Council of Taranaki declaring that provincial officers not to be personally liable on government engagements entered into by them. This was passed to avert the enforcement of an award of damages, by a Resident Magistrate, against a harbourmaster for failure to perform his duties.¹⁸ There appears not to be any equivalent legislation in any other colony.

Thus by the early 1870s, all the Australasian colonies had statutes of one form or another which allowed recovery of at least some claims against the Crown. Over the

¹⁶ *Hobart Town Mercury* 18 September 1858. A similar constitutional dispute as to the status of liability provisions in legislation of this type occurred in the 1890s in South Australia : see Miscellaneous file, Boucaut Papers, file V97, Mortlock Library.

¹⁷ See (1871) 10 NZPD 84 and 545.

¹⁸ No Liability of Provincial Officers Ordinance 1855 (Taranaki), and see Scholefield, G.H.(ed) *The Richmond - Atkinson Papers* (Government Printer, Wellington, 1960), vol.1, p.164.

next three decades or so, there were a number of changes made by different jurisdictions, mostly aimed at widening the circumstances in which the colonial Government could be liable. New South Wales did this by broadening the entitlement to sue to allow a petitioner to bring a claim

" at law or in equity in any competent court and every such case shall be commenced in the same way and the proceedings and rights of the parties therein shall as nearly as possible be the same" .¹⁹

This formula was later held to give rise to liability in tort as well as in contract.²⁰ It is not known whether this was intended. That Act also moved closer to the Victorian and Tasmanian position, where there was an entitlement to sue, by making it compulsory for the Crown to appoint a nominal defendant, in default of which the Colonial Treasurer automatically became the nominal defendant.

Other colonies took a different tack. In New Zealand liability was extended to "wrong or damage independent of contract", but only where the alleged wrong occurred on a "public work".²¹ This formulation was then taken up verbatim in Western Australia in 1898.²²

An even broader formulation was developed in Tasmania where the Crown Redress Act 1891(Tas) gave a right of action against the Crown for any acts, omissions or neglect by the Government or its servants which would have given grounds for an action in law or equity between subjects. This Act had a chequered parliamentary history. It began as a private member's bill in 1890 by a lawyer and back-bench member of the House of Assembly, a Mr Muglinton, who founded his proposal on a resolution of the House in the previous year that the Government should be liable in damages for its conduct of a railway which it had just purchased from impecunious owners. The Crown had declined to initiate legislation because it believed none was needed. However

¹⁹ Claims against the Colonial Government Act 1876(NSW), s3.

²⁰ *Farnell v Bowman* (1887) 12 App Cas 643 (PC).

²¹ Crown Suits Act 1881(NZ), and see Hogg, P.W., *Liability of The Crown* (2nd ed) (Carswell & Co, Toronto 1989), p.81.

²² Crown Suits Act 1898(WA), Hogg, loc.cit. n.21 and Canaway, A.P. "Actions Against the Commonwealth for Torts" (1904) 1 Commonwealth LR 241.

Muglinton received leave to introduce his Bill despite Government opposition. He indicated that, whatever the position might be about liability in contract, there was a need to ensure the Government was liable in tort, instancing the possibility of such causes of action as cattle killed by careless shunting, or fires started by sparks from railway engines (this latter example quickly became the paradigm case used in debate).²³ Muglinton's bill then passed both houses by substantial margins, only to be refused assent by the Governor on the recommendation of the Cabinet. The Cabinet objections to the bill centred on the very wide terms in which it was drafted, since it contained no provisions as to a limitation period and was on its face not restricted to the liability of the Crown in respect of the Tasmanian Government only so that the Imperial Government might also be amenable to suit.²⁴ Given these objections, the Cabinet recommended refusal of assent, on an undertaking that the Government would put forward a better drafted measure the following year. The 1891 Act was that measure. It is notable that the Government measure was significantly amended in its passage to ease the path of persons suing the Crown by allowing actions in any court, rather than just the Supreme Court, and by making payment of costs automatic if the court so ordered rather than payable only if the Government so chose. The latter provision appears to be taken from Victorian law, and speakers also showed familiarity with the costs provisions applying in New South Wales and Queensland.²⁵

²³ For the debate, see *Hobart Town Mercury* 25 October 1890.

²⁴ See *Hobart Town Mercury* 30 July 1891 and Inglis Clark to Hamilton, 2 December 1890. The drafts of the latter are in the Inglis Clark papers, University of Tasmania Library; a final version is enclosed with Hamilton to Secretary of State for the Colonies, 28 November 1892, CO 280/395.

²⁵ See *Hobart Town Mercury* 30 July 1891.

Torrens title

One of the few areas in which there has been any significant research into, and published discussion of, a legal initiative in one colony being adopted by other colonies is the creation and spread of the Torrens title system of registration of interests in land. This has been the subject of extensive writing by Whalan and others²⁶ and therefore the following discussion attempts to avoid unnecessary repetition of earlier accounts.

Robert Richard Torrens proposed his²⁷ new system of registration of land titles in a Bill introduced on to the South Australian parliament. The proposal attracted great public support, a further, revised, bill was introduced in 1857 by Torrens, as a private member's bill although he was by then in Cabinet (and, for a brief period in 1857, Premier). The measure drew virulent opposition from the local legal profession which went as far as to obtain an opinion from perhaps the leading English land law expert of the day, Sir Hugh Cairns. Despite this, the Bill passed into law as the Real Property Act 1858(SA).²⁸ That statute was significantly amended on several occasions,

²⁶ Whalan D.J. *The Torrens System in Australia* (Law Book Co Sydney 1982), ch.1; Whalan, D.J. "The Origins of the Torrens System and its Introduction into New Zealand" in Hinde, G.W.(ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971); Stein, R.T. and Stone, M. *Torrens Title* (Butterworths, Sydney, 1991) pp.20-26; Stein, R "Sir Robert Richard Torrens and the Introduction of the Torrens System" JRAHS, 1981, vol.67, p.119; Petrow, Stefan "Knocking Down the House? The Introduction of the Torrens System to Tasmania" (1992) 11 U Tas LR 167; Stein, R "Some Aspects of Title by Registration in the Maritime Provinces of Canada" (1976) 2 Dalhousie LJ 633; Harrison, W.N. "The Transformation of Torrens's System into the Torrens System" (1961) 4 U Qld LJ 125; Thom, D.J. "The Caveat in the Torrens System" (1924) 2 Can Bar Rev 327; Head, I.L. "The Torrens System in Alberta" (1957) 35 Can Bar Rev 1. For versions of Torrens title in the United States of America see Schick, Blair C. and Plotkin, Irving H., *Torrens in the United States* (Lexington Books, Lexington, Mass., 1978), ch.1

²⁷ The degree to which Torrens was inspired and/or assisted by Dr Ulrich Hubbe, a German lawyer from Hamburg who later settled in Adelaide, has aroused a degree of mild controversy which has not been resolved. One assessment would credit Hubbe with providing much of the theoretical underpinnings of the Torrens system by drawing on the law of the Hanseatic cities for the use of a system of certificates of title and, separately, for the principle that mortgages would not affect the freehold title to land but merely created charges on it. For this, see Loyau, G.E. *Notable South Australians* (privately published, Adelaide, 1885), pp. 156-7. By contrast a more modern writer considers Hubbe's contribution to have been relatively unimportant (Stein, R. "Sir Robert Richard Torrens and the Introduction of the Torrens System" JRAHS, 1981, vol. 67, p.119). Perhaps the most balanced assessment is that of Whalan who considers that Hubbe had little to do with the original conception that became the Torrens system but did contribute to the reworking of the scheme from its initial draft in 1856 to the Bill of 1857 (Whalan, D.J. "The Origins of the Torrens System and its Introduction into New Zealand" in Hinde, G.W.(ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971), pp.6-7).

²⁸ A copy of the opinion of Sir Hugh Cairns QC and Mr Thrupp "in relation to the Real Property Act 1860, passed by the Legislative Assembly of South Australia", 19 February 1861 is to be found in the Queensland archives, together with a memorandum by Torrens in rebuttal: Papers relating to the Real Property Bill, File JUS/W1,

sometimes on matters of substance and sometimes to get round the sometimes specious objections of the profession and the courts. The Torrens system only achieved a definitive form with the Real Property Act 1861(SA).

Other Australasian colonies were quick to adopt the reform - Queensland acted in 1861,²⁹ while Tasmania, Victoria and New South Wales enacted Real Property Acts based on the Torrens system in 1862. New Zealand followed in the wake of the Australian colonies some year later,³⁰ and the last Australasian colony to act, Western Australia, passed a Real Property Act 1874(WA), though this was based more on the existing Victorian legislation than on the South Australian original.³¹ The Torrens system was then taken up in the North American colonies. The first to adopt the new system was Vancouver Island in 1860, where the Land Registry Act 1860 was something of a hybrid of English and Torrens principles, created by a draftsman who had been sent the South Australian statute of 1858 by the Colonial Office - at whose instigation is not known.³² This was followed by British Columbia in 1871 and Manitoba in 1875, as well being made the law of the Northwest Territories (the lands which later became Alberta and Saskatchewan) in 1886.³³ The Torrens system also had some influence on the Ontario land legislation of 1875.³⁴ While the events leading to the relatively rapid adoption of the Torrens system in Vancouver Island and British

QSA. One measure of popular opinion about the lawyers' resistance to reform is provided by the fact that James Penn Boucaut, then a young lawyer beginning what was to be a successful political career, felt it necessary to state publicly his support for the Torrens system: Edgar, P.L. "Sir James Penn Boucaut: His Political Life 1861-75" (B.A. Hons. Thesis, University of Adelaide 1961).

²⁹ Real Property Act 1861(Qld)

³⁰ Real Property Act 1870(NZ)

³¹ Whalan, D.J. *The Origins of the Torrens System and its Introduction into New Zealand* in Hinde, G.W.(ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971), p.11.

³² See diCatri, V.(ed) *Thom's Canadian Torrens System* (2nd ed., Burroughs & Co, Calgary, 1962), pp.18-19.

³³ Head, I.L. "The Torrens System in Alberta" (1957) 35 Can Bar Rev 1. For later divergences in the Torrens legislation enacted in the Canadian provinces, see Thom, D.J. "The Caveat in the Torrens System" (1924) 2 Can Bar Rev 327.

³⁴ There is some dispute about the origins of this legislation, but it seems to owe more to English than to Australian law: see Neave, M, "The Concept of Notice and the Ontario Land Titles Act" (1976) 54 Can Bar Rev 132.

Columbia have not been chronicled in detail, the cause of reform appears to owe much to the efforts of Sir Matthew Baillie Begbie, the Chief Justice of British Columbia.³⁵

One important point which emerges from the literature but which has not received sufficient emphasis is the very diverse nature of the inception and passage of the Torrens legislation in the different Australasian colonies. In Queensland the Real Property Bill 1861 was a government measure, received support from the leaders of the local legal profession and passed without significant opposition.³⁶ The Bill had been adapted by the Queensland authorities from the South Australian Acts of 1860 and 1861, though it is clear that Torrens himself had some significant influence on the final version of the bill, including some suggested provisions concerning life interests which Torrens had drafted for a Victorian bill after finding that the South Australian legislature would not accept them.³⁷ In New South Wales too the reform received Government backing,³⁸ as eventually it was to do in Western Australia.³⁹

In the other colonies the position was more complicated. In Victoria the first Torrens Bill was introduced in 1859 as a private member's bill by G.S. Coppin, an actor and theatrical entrepreneur and a personal friend of Torrens. That Bill was dropped in the Legislative Assembly but a Government measure was introduced, though support was later withdrawn and the bill dropped. This bill appears to have been actually drafted by Torrens.⁴⁰ The following year James Service introduced a further Torrens Bill, which

³⁵ Williams, David R. *"The Man for a New Country" : Sir Matthew Baillie Begbie* (Gray's Publishing Co, Sidney, British Columbia, 1977), pp. 156-7.

³⁶ Whalan, D.J. *The Torrens System in Australia* (Law Book Co, Sydney, 1982), p.8.

³⁷ See Torrens to Ratcliffe Pring, 4 January 1861 and Torrens to Pring, 24 January 1861, Papers relating to the Real Property Bill, File JUS/W1, QSA.

³⁸ Whalan, D.J. *The Torrens System in Australia* (Law Book Co, Sydney, 1982), pp.10-11.

³⁹ The Governor's Speech of 23 June 1873 indicates the Government would introduce a Real Property Bill, though this was done because the Legislative Council in 1872 had indicated a belief that reform was needed: Minutes and V. & P. Leg.Co. W.A., 23 June 1873.

⁴⁰ Whalan, D.J. *The Torrens System in Australia* (Law Book Co, Sydney, 1982), p.10 says that the "... Bill does not seem to have been referred to Torrens for comment". This is erroneous and Torrens's authorship is shown by Torrens to Ratcliffe Pring, 4 January 1861 and Torrens to Pring, 24 January 1861, Papers relating to the Real Property Bill, File JUS/W1, QSA.

was passed in the face of opposition from members of the Cabinet, including the Attorney-General and the Minister of Justice.⁴¹

In Tasmania the reforms received a mixed reception.⁴² Support came from influential laymen, from some lawyers and from the Governor, Henry Fox Young, a former Governor of South Australia and another personal friend of Torrens. The Real Property Bill was introduced by the Solicitor-General, but as a private member's bill rather than as a Government measure - the Attorney-General was one of the Bill's leading Parliamentary opponents. However the Bill, though amended in minor detail, succeeded.

The passage of the New Zealand bill of 1870 shows a number of even more strange features. The New Zealand bill was introduced by Henry Sewell, the then Minister of Justice, as a Government measure and received widespread support, particularly from G.M. Waterhouse, formerly of South Australia, who had sat on the South Australian Select Committee on the Real Property Bill in 1858. Waterhouse was forced to take over much of the guidance of the Bill at later stages, because at the second reading Sewell bolted the Bill and, while maintaining it was a government measure, sought to move amendments which would have destroyed the effectiveness of the new system.⁴³

As this summary shows, the Torrens legislation shows, in some but not all colonies, several features which are quite common to colonial legislation. There is the use of the private member's bill procedure to introduce changes which a government was unwilling to introduce as a Government measure or which had caused a disagreement

⁴¹ Whalan, *ibid.* The Minister of Justice, Dennistoun Wood, went so far in his opposition as to deliver a stinging critique of Torrens legislation at a colloquy in London some years later; see Jenkins, E.(ed) *Discussions of Colonial Questions* (Strahan & Co, London, 1872).

⁴² See Petrow, Stefan "Knocking Down the House? The Introduction of the Torrens System to Tasmania" (1992) 11 U Tas LR 167, on which the following account is largely based.

⁴³ As to this, see Whalan, D.J. "*The Origins of the Torrens System and its Introduction into New Zealand*" in Hinde, G.W.(ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971), pp.12-20. It is interesting that Sewell's conduct is not mentioned in a letter written by J.C. Richmond on the bill (see Richmond to H.A. Atkinson 4 October 1870, in Scholefield, G.H.(ed) *The Richmond - Atkinson Papers* (Government Printer, Wellington, 1960), vol 2, p.311), which may indicate that Sewell's behaviour was not considered particularly reprehensible.

within the colonial cabinet, the importance of personal ties in attracting support for political or legislative activity and, underlying both, the effective and rapid exchange of information between the colonies. It may also be thought that a frequent feature of the debate was a distrust of the motives of lawyers who opposed reform.⁴⁴

Nor should it be thought that these processes ceased after the first wave of Torrens legislation. The New South Wales Examiners of Titles were asked to comment on proposals for amendments to the Real Property Act 1862(NSW). A letter from the senior Examiner, G.K. Holden, to the Minister of Justice,⁴⁵ reveals that New South Wales officials were very interested in proposed changes in the Victorian legislation, and vice versa.

"...I have within these few days received a new Bill which was reported on the Victoria Assembly on 25th May. It re-arranges the Act and embodies together with some further amendments, those of the two amending Acts which have already passed there.

"Many of the alterations coincide with those suggested here, - and are no doubt adoptions to some extent of my own proposals, - with regard to some of which I have been in correspondence with Hugh Chambers while others are ventilated in my published letters.⁴⁶

"On the whole, I think it will much aid us in preparing a good Bill for the Colony. It is a great improvement in arrangement of clauses, and even where the substance is unaltered, the language has been greatly improved. What I should propose is to take it as the substratum of our own New Act and to graft upon it any additional amendments that may on full consideration be deemed expedient"

The Torrens title statutes may therefore be considered to be unusual in the speed with which the different colonies adopted similar legislation, but otherwise they merely present, in accentuated form, many features to be found in the development of other areas of law. The involvement of private members on matters of substantial law reform,

⁴⁴ It is notable that many lay members considered they could often make as useful a comment on law reforms as could lawyers. One interesting example is the debate in the New Zealand Legislative Council on the Conveyancing Ordinance Amendment Bill 1867, a private member's bill which would have strengthened the position of financiers who lent money on the security of land since it would have authorised equitable mortgages without registration and shortened the time needed before foreclosure became lawful. The Bill was defeated at its second reading in the Legislative Council, apparently on the basis of arguments put forward by Domett, which included a lengthy quotation from Kent's *Commentaries on American Law* which criticised the principle of equitable mortgages: see 1867 NZPD 1001-1002.

⁴⁵ G.K. Holden to Charles Cowper, 27 June 1865, Colonial Secretary's Papers, file 4/742.2, GANSW.

⁴⁶ Holden had published several open letters to Torrens on aspects of the Real Property Act in the *Sydney Morning Herald* in July 1864.

the occasional influence of electoral imperatives and the diverse patterns of support and opposition from members of the legal profession are all to be found, in different measure, in other instances of law reform. The Torrens title legislation is thus an exemplar, not an exception.

Statutory interpretation legislation

Various Australasian colonies passed statutes to assist with the interpretation of other statutes during the 1840s and 1850s. The first appears to have been the South Australian Language of Acts Act 1843(SA), which was then taken almost verbatim into Western Australian law as the Shortening the Language of Acts Ordinance 1845(WA). These statutes appear to owe little to earlier English law, except that provisions which stated that references to the plural included the singular, and vice versa, and the masculine included the feminine⁴⁷ were to be found in the Criminal Law Reform Act 1826(Imp), although the interpretative rule applied only to penal provisions. The colonial statutes applied these generally and made a number of other rules to simplify the drafting and interpretation of statutes.

A second wave of statutes was passed in the early 1850s. While the Shortening Act 1853(SA) and the Acts Shortening Act 1867(Qld) seem to have gone little further than the Language of Acts Act 1851(Imp) - more commonly known as Lord Brougham's Act - the same is not true of the other colonies. In four other colonies local draftsmen incorporated parts of Lord Brougham's Act but went further. The New South Wales Acts Shortening Act 1852(NSW) was obviously the basis for the Legal Phraseology Act 1853(Tas), while there appears to have been a degree of independent drafting in the Acts Shortening Act 1851(Vic) and the New Zealand Interpretation Ordinance 1851(NZ).

The latter Ordinance did contain one distinctive provision, in s 3 which provided:
 "that the language of every Ordinance shall be construed according to its plain import, and where it is doubtful, according to the purpose thereof".

This appears to be the first effort by a colonial legislature to give a direction to the judiciary as to how to read the statute. Its origins are, unfortunately, obscure, but it seems possible that the legislators were concerned about the ability of colonial judges to

⁴⁷ For the history and application of such provisions, see Ritchie, M.E. "Alice Through the Statutes" (1975) 21 McGill LJ 685.

gloss the express words of a statute by appealing to an underlying and judicially discerned policy element.

If that was the case, it contrasts greatly with the North American position. Although two colonies had legislated to abrogate the rule that a statute took effect from the first day of the session in which it was passed,⁴⁸ the first general statute appears to have been passed in by the province of Canada in 1849. This statute is of special interest to an enquirer into New Zealand legal history, since it is the ancestor of s.5(j) of the Acts Interpretation Act 1924(NZ), the "cardinal rule of statutory interpretation"⁴⁹ in New Zealand which enjoins the courts to take a purposive approach to questions of statutory interpretation. While it has long been known that the provision was derived from Canadian law,⁵⁰ the exact origins have not been widely known. The wording of what is now s.5(j) of the New Zealand Act first appear in the Interpretation Act 1849(Can), s.5(28). That Act was introduced by the Hon. John Leslie M.L.C., then the Provincial Secretary, so it probably had official backing, though its precise status defied even contemporary reporters,⁵¹ and went through its readings in each Chamber without amendment.⁵² The reasons for the 1849 Canadian Act are not discoverable from existing records, but it may be speculated that the insistence on a mischief approach was intended to curb the excessively literalist approach of the local judiciary who had in a number of cases refused to take a purposive approach to statutes and had thus to a large extent frustrated local initiatives.⁵³ This might perhaps have gone unchallenged had not there been some expression by the French community, not by any means comfortable

⁴⁸ Commencement of Acts Act 1796(NB); Commencement of Acts Act 1801(UC).

⁴⁹ See Burrows, J.F. "The Cardinal Rule of Statutory Interpretation in New Zealand" (1969) 4 NZULR 253.

⁵⁰ It first appears in the Interpretation Act 1888(NZ), and is taken from the Canadian Acts Interpretation Act 1886, s.7. See Burrows, *op.cit.* n.49.

⁵¹ The *Montreal Pilot* March 9 1849 referred to it as "probably a Government Bill...".

⁵² (1849) 8 J.Leg.Co Canada p.100 and p.143.

⁵³ e.g. see the excessively literalist reading of a local bankruptcy statute in *Radenhurst v Macfarlane* (1845) 1 *Revue de Legislation et de Jurisprudence* 273, and also the views of Stuart CJ in *R v Quebec Board of Trade* (1847) 3 *Revue de Legislation et de Jurisprudence* 89. Backhouse has also pointed to the frustration of the Seduction Act 1837(UC) by restrictive judicial interpretation: Backhouse, C.B. "The Tort of Seduction: Fathers and Daughters in Nineteenth-Century Canada" (1986) 10 *Dalhousie LJ.* 45, 49 and 54-55.

under the new united province, that literalist readings of provincial statutes were having a detrimental effect on the laws of the French community.⁵⁴ It is possible therefore that the modern day rule of interpretation was originally intended, at least in part, to have as much a cosmetic and political effect as a real influence on the law - and to have been motivated by almost the reverse of the concerns of the New Zealand legislators of 1851.

⁵⁴ Lacoste, Louis Rene "Dissertation de quelques questions sur la section 36me de l'ordonnance de 1841 sur l'enregistrement" (1847) 3 *Revue de Legislation et de Jurisprudence* 121 and "J.C" "Privilege du Vendeur ou Bailleur de Fonds" (1847) 3 *Revue de Legislation et de Jurisprudence* 143.

Powers of attorney

The transient habits of many colonials and the paucity of good communications meant that in many cases colonists could not attend personally to many matters of business. The use of powers of attorney provided at least a partial solution to the difficulties of ensuring adherence to prescribed formalities for the making of contracts or the execution of other documents. However the fact that certain traders, lawyers or financiers often held a number of powers of attorney for different clients, and many individuals were less than rigorous in ensuring that powers of attorney were terminated when no longer needed or appropriate, led to an ever-present apprehension that the holder of a power of attorney might not in truth be entitled to wield the powers it appeared to impart.

The first initiative taken was in New South Wales where the Power of Attorney Act 1853(NSW) provided that where a power of attorney was stated in its own terms to be valid until the death of the donor of the power or until actual revocation, the power was to be taken as valid and effectual if the holder declared he had received no notice of such death or revocation. This approach was later to be adopted in New Zealand in the Powers of Attorney Act 1854(NZ). The New South Wales statute was also the starting point for two other Australian initiatives which resulted in significantly different legislation. In 1857, a private member's bill in the Victorian parliament sought to bring in a system consciously derived from the New South Wales law.⁵⁵ The Victorian government stated that it had no objection to the measure, but at the third reading the Attorney-General moved an amendment which transformed the bill by creating a system of registration by the Registrar-General of powers of attorney. Upon registration, a power was deemed valid and conclusive until such time as the registration was cancelled.⁵⁶ Both the new system and the wording of the Victorian Act were adopted in the Tasmanian Power of Attorney Act 1860(Tas), although the order of

⁵⁵ 1856 1&2 VPD 107.

⁵⁶ 1857 1&2 VPD 342.

the sections in the statute was changed and registration was placed in the hands of the Registrar of the Supreme Court.

A turn of events somewhat similar to the Victorian proceedings was later to occur in the Western Australian parliament. In 1896 a local lawyer-politician, Moss, moved a private member's bill modelled on the New Zealand statute, as it had been found that one unintended and undesirable consequence of the terms of the Torrens system in Western Australia was a requirement that transactions under the Act required a holder of a power of attorney to prove that the donor was actually alive at the time of the execution by the donee of the power of any document to be registered under the Transfer of Land Act.⁵⁷ Although once again the bill was not opposed by the government at its introduction in the Legislative Assembly, it was later sent to a Select Committee by the Legislative Council. That Committee came up with a scheme of registration akin to the Victorian and Tasmanian law. The change was welcomed by Moss, though on the ground that the new provisions followed a British Act of 1881 rather than on any acknowledgment of the Victorian/Tasmanian model law which seems at least as likely a source of the new Act.⁵⁸

These examples of law reform are largely concerned with legislation where colonial initiatives occurred largely independent of progress or change in Britain. Other examples, such as adoption and legitimation, of similar processes have been discussed earlier.⁵⁹ In other cases, as with the law of divorce, colonial developments depended on a change to the laws of England, though the colonial reformers' zeal for reform soon outran the British Parliament. Yet there were also instances where the development of colonial and British law occurs in a complex progression where the initiative was at times held by colonial and imperial governments. It is to that last type of development of the law by statute that attention is now turned.

⁵⁷ 1896 IX WAPD (NS) 154-55 and 604-05.

⁵⁸ 1896 IX WAPD (NS) 495.

⁵⁹ See above pp.216-222.

Chapter 12

The creation of colonial law 4:

developments mixing colonial and English influences

" [Patent law]... This interesting subject, important from its blending science with polity and its bearing on the happiness and progress of mankind".¹

One of the interesting features of the latter half of the nineteenth century is the interplay of opposing forces, of colonial and English views, of conservatism and innovation. Thus in fields such as the admission in criminal cases of evidence from a defendant or the legal control of a harmful substance such as opium, one finds in the colonial law a patchwork of provisions copied from England and colonial innovations designed to adapt English law to colonial conditions. On occasion the law was also influenced by the tension between centripetal and centrifugal forces, between suggestions of a common body of law on some topic for the whole Empire and the particularist tendencies of the colonies. On the one hand there were obvious advantages in the law being adapted to colonial circumstances by local legislatures, thus providing a range of slightly different colonial laws, though perhaps all owing something to British law. On the other hand there were equally obvious advantages in having similar laws throughout the Empire. Neither the British nor the colonial governments were to find it easy to reach a suitable equilibrium between these competing impulses, each of which was the more important at some times and in some areas of the law.

In some cases, as with the law relating to intellectual property, the critical question for the colonies was whether control over any particular law and its operation remained in their hands, or whether it would be in the hands of the Imperial Parliament or Imperial authorities. Many colonies were content to largely re-enact English statutes provided it was clear that this was their choice; few were prepared at any time to hand back to Britain control over any area they saw as important.

¹ Richard Birnie (Advocate-General of Western Australia) to Kennedy, enclosed with Kennedy to Labouchere 23 January 1857, CO 18/98.

Opium

There are a number of cases where the development of the colonial law reflects an intermingling of borrowings from the English statute book and from other colonies. The effects of this process in several different fields of law can be seen in the various statutes which impinged on the possession, use and sale of opium in the last century. In the colonies, and in Britain itself, there were few if any controls on the use of opiates, or indeed many other substances now strictly controlled by law - most poisons were freely available to willing purchasers.²

The first colonial proposal for legislation affecting transactions in opium appears to have been a private member's bill moved in the Victorian Parliament in 1857 by a Dr Tierney, apparently a medical doctor. His original bill, apparently largely modelled on the Arsenic Act 1851(Imp) and involving a regime whereby sales of specified substances could only be made to adults known to the seller and such sales then had to be recorded in a special register. Tierney's measure was intended to control the twin evils of the use of "hocussed" or drugged drinks in public houses (to allow victims to be robbed with ease) and the use of dangerous or noxious substances in patent medicines, something which had caused the deaths of some imbibers of such medicines. A Select Committee heard submissions on the bill, and the patent medicine lobby secured the modification of the bill to exclude their products. The Select Committee would however have controlled the sale of opium, morphia and laudanum as well as strychnine. The pharmacists and drug-sellers successfully lobbied against the bill, and no legislative controls on drug and poison sales were enacted in Victoria until 1876³

However well before 1876 legislation had been enacted in other colonies to control the sales of both opiates and other drugs. The first to enact controls was South Australia,

² The social background is recounted to some degree by Carney, T. "The History of Australian Drug Laws: Commercialism to Confusion?" (1981) 7 Monash LR 165 and by Solomon, R. and Green, M. "The First Century: The History of Non-medical Opiate Use and Control policies in Canada 1870-1970" (1982) 20 UWOLR 307 .

³ See Carney, op. cit n.2, p.172.

where the Sales of Poisons Act 1862(SA) limited the sales of poisons, required opiates to be labelled as poisons and required the registration of vendors of poisons on a model similar to that proposed for England but not enacted there until 1868. The South Australian statute in turn was largely copied by the Sale of Poisons Act 1866(NZ) and Sale of Poisons Act 1871(NZ). It is notable that in the debate that took place in the latter Act Henry Sewell, who moved it as a government measure, placed more reliance on the English statute of 1868 than on the South Australian forerunner - at one point meeting criticism of the list of drugs required to be recorded by stating that he: "thought it was sufficient for him to point to the Act of the Imperial legislature which had settled that list. The fact that it was the law in England was to him a most cogent reason why it should be adopted here"⁴.

Although the measure passed its first reading, it did so only narrowly and critics of it were placated by the bill being sent to a Select Committee, and later by an amendment to exempt the sale of large quantities of arsenic for use in pastoral agriculture. This hybrid of South Australian and English law was later to find its place on the statute books of all the other Australian colonies.⁵

A second sidelight on the tolerance with which the use of opium was viewed in some colonies is revealed by the terms of the carriers legislation which is to be found in several colonies by the 1870s. The Carriers Act 1830(Imp) had provided that a carrier was only liable for the full extent of any loss or damage to goods of certain enumerated classes where the actual nature of the goods and their value had been disclosed at the time of the making of the contract of carriage. In the British Act, the enumerated classes included such things as bullion, watches and lace. The first Australasian statute on the point, the Innkeepers and Carriers Act 1859(Vic) largely repeated the English law, but it did include opium in the list of enumerated goods which had to be disclosed. Those provisions, including the mention of opium, appear verbatim in the Carriers Act

⁴ 1871 10 NZPD 214.

⁵ Sale and Use of Poisons Act 1876(Vic), Sale and Use of Poisons Act 1876(NSW), Poisons Sale Act 1879(WA); Sale and Use of Poisons Act 1886(Tas) and Sale and Use of Poisons Act 1891(Qld).

1878(NSW). Curiously although the Mercantile Law Act 1880(NZ) copied some of these statutes, it omitted any provision for high-value items to be declared. By contrast in the Tasmanian legislation, the Common Carriers Protection Act 1874(Tas), the 1859 Victorian Act was adopted virtually word for word, save only that opium was omitted from the goods required to be enumerated.

It may be cynically considered that a major reason for the tolerance of opium by colonial authorities was as much a product of the very substantial customs revenues it generated as any concern for the "rights" of consumers. In the 1890s, speakers in parliamentary debates alleged that while opium duties, at 30/- per pound of opium, produced £472 for South Australia proper, for the Northern Territory the duty came to £7,508.⁶ In Queensland in the same period, a duty of £1 per pound of opium allegedly produced £24,000.⁷ While the sums involved in the Canadian provinces may have been somewhat smaller, they were still significant.⁸

Certainly Australian public opinion was apparently not unsympathetic to the use of opium, by Europeans at least, even in the closing years of the century. Although two colonies, South Australia and Queensland, did enact more stringent opium laws in the 1890s by placing limits on the sale or supply of opium rather than monitoring the occasions of supply as the poisons regime did, the statutes were far from being of general application. Instead they were largely concerned with preventing the supply of the drug to Aborigines, and the legislation appears to have been motivated by anti-Chinese sentiment, particularly a belief that Chinese residents of the tropical parts of the colonies (South Australia then still containing the "Northern Territory" later to come under Federal jurisdiction) were "debasement" young aboriginal women, a practice in which the supply of opium apparently took an important part. Other concerns included the exploitation of Aboriginal workers who were sometimes alleged to have been paid

⁶ 1895 2 SAPD 3022.

⁷ 1897 78 QPD 1541.

⁸ Solomon, R. and Green, M. "The First Century: The History of Non-medical Opiate Use and Control Policies in Canada 1870-1970" (1982) 20 UWOLR 307, 311-312.

solely in opium.⁹ The debates in each of the colonial legislatures referred often to the law and practice in the other, not always flatteringly, but the end results were somewhat different. In South Australia the Opium Act 1895(SA) forbade the sale or supply of opium to any aborigine or half-caste, except as medicine. By contrast the Queensland Aborigines Protection and Sale of Opium Act 1897(Qld) was a more general statute dealing with employment and alcohol as well. The most striking difference, however, is that the penal provisions of the Queensland Act were not restricted to the supply of opium to aborigines, but included supply to others as well. The penalties reflected the real interests of the legislators - supply to an aborigine or half-caste was punishable by a fine of up £100 for the first offence, while 6 months imprisonment could be imposed for subsequent offences. Supply to non-Aborigines was only punishable by a £50 fine. Yet this major difference between the statutes was not present at their initial stage - the South Australian Bill had provided for penalties for any person possessing or using opium, but the South Australian Legislative Council had removed from the bill anything which restricted the possession or use of opium by Europeans.¹⁰

⁹ See 1895 2 SAPD 3022 and 1897 78 QPD 1541ff, and Carney, T. "The History of Australian Drug Laws: Commercialism to Confusion?" (1981) 7 Monash LR 165, 185.

¹⁰ 1895 2 SAPD 2142-46 and 3061-66. Carney, *op. cit.* n.9, appears not to have been aware of this element of the legislative history of the enactment.

Criminal evidence

One area which reveals the range of influences affecting law reform in the colonies is revealed by the debates surrounding the passage of the various colonial statutes permitting a defendant in a criminal trial on indictment to give evidence. The first statute of general application to permit this appears to have been the Offenders Evidence on Oaths Act 1882(SA), moved, apparently as a Government measure, by Downer, the Attorney-General. The Act made the defendant a competent, though not a compellable, witness. Downer's speech at the second reading¹¹ is informative. He stated that he had suggested reforms in 1878, and would himself have preferred to follow those suggestions by making the defendant both competent and compellable. However as his cabinet colleagues would not agree to the latter element, it was not part of the Bill. He then made extensive reference to events in the House of Commons in Britain where a Commission on Evidence had fruitlessly recommended a change to the law, but had been urged in a private member's bill which, though not passed, did draw support from the British Attorney-General and Home Secretary. Downer also cited Stephen and Bentham. Other speakers referred to the English law, as well as to a recent New Zealand murder case.¹² Although some parliamentarians expressed a view that the colony should not legislate until Britain did, the Bill passed the Legislative Assembly by a substantial margin.

The next colony to reform the law appears to have been New Zealand, where a private member's bill modelled on English proposals won general support, though the Government was criticised for leaving such an important matter to a private member's initiative.¹³ The debates on the bill were far from profound, and it is interesting that there was no reference at all to developments in any other colony - though Scots and French law were on occasion mentioned.

¹¹ 1882 SAPD 280

¹² 1882 SAPD 282. The case is untraceable, but from the context it may well have been *R v Hall* (1887) 5 NZLR 93.

¹³ 1889 54 NZPD 611, 613.

This was followed by legislation in both Victoria and New South Wales in 1891. The Crimes Act Amendment Act 1891(Vic) was again moved by the responsible Minister, in this case the Minister of Justice, J.M. Davies, who said that the bill had passed through the Legislative Council the preceding year, and the clause giving the right to give evidence was, he said, modelled on the formulation used in Bills introduced at different times in the British Parliament. The bill as introduced was significantly amended during its passage, firstly to ensure that an unrepresented defendant had to be informed of the right to give evidence, but also that he or she could be cross-examined and any evidence given could be used against the defendant, as well as for his benefit, and secondly to limit the circumstances in which the defendant could be cross-examined as to prior convictions. Curiously the debates contain references to English and American law, but not to that of New Zealand or South Australia.¹⁴

The New South Wales Criminal Law and Evidence Act 1891(NSW) reveals slightly greater influence from developments in other colonies. The Act was primarily concerned with changes to the sexual offence provisions of the New South Wales law, and the provisions which permitted the defendant to give evidence, and regulated that right, were not in the forefront of the debate. Again the measure was a Government one, moved by the Attorney-General. Perhaps the most interesting feature is that the Attorney-General stated that he had himself drafted the proviso to the right to give evidence, a proviso under which cross-examination could go to the defendant's prior character only with the leave of the trial judge. E. P. Simpson, the Attorney-General said that while there were similar provisions in the Victorian legislation and the English Bills on the point, he had seen those only after drawing the New South Wales bill and introducing it.¹⁵

Queensland followed closely in the footsteps of New South Wales with the Criminal Law Amendment Act 1892(Qld), with the debate revealing a general knowledge of the

¹⁴ For the foregoing, see 1891 68 VPD 3122ff

¹⁵ 1891 52 NSWPD (1st) 604.

changes made in the other colonies, though the debate on the principle was brief and attention centred on an amendment moved late in the proceedings to ensure that neither a defendant nor his or her spouse could be forced to answer questions which tended to incriminate the witness - a provision somewhat differently drafted from the more limited provisions in other colonies.¹⁶

The last relevant statute before Federation was the Accused Persons Evidence Act 1898(NSW), a private member's bill promoted by a somewhat notorious Sydney ex-lawyer and politician, Richard Meagher.¹⁷ Meagher's concern was to ensure that a judge could not comment on a defendant's failure to give evidence,¹⁸ nor could a defendant be cross-examined as to character unless he or she raised good character as an issue. In regard to at least the former element, Meagher claimed, perhaps not entirely accurately, that similar provisions were in force in New Zealand and South Australia.

¹⁶ 1892 67 QPD 291-310.

¹⁷ Meagher had been struck off as a solicitor following his conduct in agitating for a commission to investigate the conviction of a client, whose conviction was ultimately annulled by a pardon, when Meagher knew from the client himself that he was guilty. See 10 ADB 470.

¹⁸ Thus ensuring a statutory reversal of *R v Kops* (1893) 14 NSW 150.

Intellectual property statutes.

Although the North American colonies were reasonably quick to pass legislation concerned with the protection of forms of intellectual property, this is not the case in Australasia or, it seems, in the South African colonies. Quite why this should be so is not clear. Certainly it is easier to find a basis for the diverse pattern of development in the different continents, since the external economic and intellectual influences were different.

Patents

The form of intellectual property to first gain legal protection under a colonial statute was the patent. In the absence of any other method of achieving protection in a colony, inventors had to seek a private statute from the local legislature. The procedure for the consideration of such bills is not clear, but it seems probable it was to some extent akin to the private bill procedure in the British parliament where the proponents of a bill had to make their case to a special committee. Whatever the procedure, personal patent acts are found in most of the colonies at one time or another.

Canadian patent law showed a very marked divergence from British law during the course of the nineteenth century. Unlike the Australasian colonies, the North American colonies were quick to enact general statutes empowering the grant of local patents by the colonial authorities. Although personal patents were granted by colonial statute in the 1820s, some were not free of difficulty and on occasion the Colonial Office objected.¹⁹ The need for personal acts was obviated by a series of colonial statutes in broadly similar terms setting up a regime for local patents. The first was in Lower Canada in 1824, and was followed by Upper Canada in 1827, Nova Scotia in 1833,

¹⁹ e.g. see Stephen's comment on the Bragg Patent Act 1820(LC), Stephen to Bathurst, 14 July 1820, CO 323/41, PRO.

New Brunswick (1834) and Prince Edward Island in 1837.²⁰ However the Colonial Office still scrutinised the colonial statutes carefully and in 1836 an Upper Canada statute to amend the law relating to inventions by importation was suspended on the grounds that it infringed the rights of British inventors. The matter was referred back to the local legislature but no further legislation appears to have resulted.²¹ The major change in Canadian patent law came soon after Confederation, when the new Federal Parliament enacted the Patent Act 1869(Can.) which drew very heavily on the United States Patent Act of 1836, although much of it was also a reproduction of English law.²²

By contrast both the South African colonies passed acts based on the English legislation,²³ even though the Afrikaner republics created a very different body of law, one which in the twentieth century was blended with the earlier English laws to make a distinctively different South African law.²⁴

In Australasia the story is a little different again. There were a variety of different procedures in the different colonies, but the development of Australasian patent law is shaped to a considerable extent by colonial resistance to suggestions by British officials of some kind of unified imperial patent system. A convenient starting point to examine the relevant law is provided by a memorandum on patent law circulated to the colonies in 1853 by Herman Merivale, a permanent official in the Colonial Office.²⁵ After drawing attention to two recent British Acts, the Patent Law Act 1852(Imp) and the Evidence Act 1852(Imp), he made enquiries as to the local patent law, if any, and as to the mode of proof of a British patent if necessary in any proceedings based on the patent. Merivale went on to suggest that it might be desirable to create a single system

²⁰ See Fox, H.G. *The Canadian Law and Practice relating to Letters Patent for Inventions* (4th ed., Carswell, Toronto, 1969), p.5.

²¹ Stephen to Glenelg 21 November 1836, CO 323/52, PRO.

²² Fox, *op. cit.* n.20, p.5. Also see Maybee, G.V. (1957) 35 Can Bar Rev 86.

²³ Patents Act 1860(Cape) and Patents Act 1870(Natal).

²⁴ Gernholtz, R.O.P. *Principles of South African Patent Law* (Juta, Capetown, 1971), p.8.

²⁵ Circular letter, Merivale to Governors, 2 January 1853. A copy is in the file "Correspondence between the Colonial Office and Victoria on Patent Law", file A 2367, DL.

of patent law for the Empire by extending the British law to cover the colonies as well. The colonies were asked to give their views.

This circular appears to have been, at the least, influenced by a debate then being conducted within British establishment circles over the nature of colonial self-government. Molesworth, a leading figure on colonial issues in British parliamentary circles, went so far in 1854 as to propose a bill which would have delimited the respective spheres of competence of the Imperial and colonial legislatures. Molesworth would have placed within the powers of the Imperial Parliament a number of matters, including the laws relating to patents and copyrights. No such bill was ever introduced - nor is it likely it would have found favour in Britain or in the colonies - but the inclusion of patent and copyright laws indicates the significance attached to achieving congruence between the laws of the various colonies and Britain.²⁶

At that time there appear to have been only one general patent statute in force in Australasia, the New South Wales Letters of Registration for Inventions Act 1852(NSW), and only in Victoria was there a statute which would alleviate, though not solve, the problems of proof of a British patent.²⁷ In other cases it would appear that enforcement might require a patentee to prove by evidence from appropriate witnesses that the patent in question was valid and had actually issued, as well as proving that the specifications were valid.²⁸ However Merivale's proposal had stimulated the Victorian Attorney-General to consider a local Act based on the British Patent Act of 1852²⁹ and legislation did result that year.³⁰

The responses to the circular indicate little enthusiasm for the proposed Imperial patent. Few were prepared to see British patents extend to the colonies.³¹ While the Victorian

²⁶ Knaplund, Paul, *The British Empire 1815-1939* (Harpers, New York, 1941), pp.204-210.

²⁷ The Evidence Act 1853(Vic) had largely re-enacted the Evidence Act 1852(Imp).

²⁸ Cf Smith to Denison, n.d., enclosed with Denison to Newcastle, 5 July 1853, CO 280/308.

²⁹ Stawell to La Trobe, 17 May 1853, enclosed with La Trobe to Newcastle, 19 May 1853, file A 2367, DL.

³⁰ Patent Act 1853(Vic.).

³¹ e.g. see Stawell to La Trobe, 17 May 1853, enclosed with La Trobe to Newcastle, 19 May 1853, file A 2367, DL.

response seemed to at least acquiesce to such a proposal, the local statute of 1853 adumbrated what later became explicit in the Patents Act 1856(Vic), that only patents granted under Victorian law - that is, either patents for inventions in Victoria or foreign (including British!) patents registered under the Victorian Act and given force by it - were effective in the colony. The 1856 Act could do this because it permitted patents for inventions by importation where the inventor was not a Victorian resident; the earlier act had required the patentee to be both the importer and the inventor.³² That defect had meant the Victorian legislature had had to provide a special form of patent protection to exhibitors at an International Exhibition in Melbourne in 1854.³³

Tasmania soon copied the Victorian precedent and acted to make it clear that only local patents were effective³⁴, as did New Zealand in 1860.³⁵ In both cases the statute was closely modelled on the Victorian Act. The Victorian statute appears also to have been drawn on when the New South Wales Parliament redrafted its patent law in 1857.³⁶ The earlier New South Wales Act was the basis for the Patents Act 1859(SA), although some divergences appear as a result of members seeking amendments, seemingly derived from the Victorian statute, which some apparently would have preferred as a a model.³⁷ Queensland differed again in that the Provisional Registration of Inventions Act 1867(Qld) gave greater protection to inventors while an application was being examined. Western Australia, though much later, also replicated the Victorian law in the Grant of Patents Act 1872(WA), which, unusually, passed through the legislature without amendment.³⁸

³² Ibid. For the 1856 Act see Barkly to Labouchere 12 January 1857, and Barkly to Labouchere 12 March 1857, Governor's Despatches to Colonial Office, file VPRS.1083/3, VPRO.

³³ Hotham to Grey, 13 October 1854, Governor's Despatches to Colonial Office, file VPRS.1084/2, VPRO.

³⁴ Letters Patent for Inventions Act 1858(Tas) and see Smith to Young, enclosed with Young to Bulwer Lytton, 9 December 1858, CO 280/341.

³⁵ Patents Act 1860(NZ).

³⁶ Registration of Inventions Act 1857(NSW).

³⁷ See 1859 SAPD 444 and 520-522. Participants in the debate also referred to the law and practice in England and the United States.

³⁸ Minute 6 August 1872, Minutes and V.&P. of Leg.Co. of Western Australia, 1872.

Whether the colony followed the Victorian or the New South Wales law, it is clear that no colony would concede that an Imperial system should be set up at the expense of the power of a colony to grant its own patents. Even the least developed Australasian colony, Western Australia, which appears not to have had any private patent acts to this time,³⁹ took the view that because of the "peculiar circumstances of the colony and its limited population" it would be inexpedient to initiate a system whereby patents were granted in London which would extend to the colony, preferring to remain with a system of local registration and grant.⁴⁰

The spate of general statutes in this period are not spurred solely by the Colonial Office suggestion. A much more prosaic motive was that the fees on an application under a general statute were lower than the previous private bill procedure, and the application might well be rather more certain of success. In South Australia the Chief Secretary used as an argument for a general statute that the four personal patent bills introduced that year had cost, on average, £50 each.⁴¹

It is not easy to determine just how important in practice the patent system was. While there were relatively few patents granted by private statute - by comparison with the four in South Australia in 1859 New Zealand had only two in the two decades to 1860⁴² - applications for patents may well have been much more common once it became a normal procedure. In New South Wales there were 64 applications under the Letters of Registration for Inventions Act 1852 (NSW) up to the end of 1862, of which two were declined, two withdrawn, and three not issued because the fee (£20, though on occasion

³⁹ There is correspondence between the Colonial Office and the Governor concerning the grant of a private Patent Act to a Mr Crease for an excavating machine (which Crease had patented in England already). The colonial authorities promised to introduce a Bill for the purpose, but no consequent Act has so far come to light. See Hampton to Newcastle 12 September 1862, CO 18/124.

⁴⁰ Fitzgerald to Newcastle 3 November 1853, CO 18/76.

⁴¹ 1859 SAPD 521. The figure of four bills appears to have been a slight increase on prior years - only four were granted in the two years 1857 and 1858 : Reports of Attorney-General to Governor on Bills 1857-58, file GRG 2/54, SAPRO.

⁴² Anderson Pipe Patent Act 1861 and Purchas and Ninnis Flax Patent Act 1861, see Grey to Newcastle, 28 November 1861, CO 209/165.

this was reduced) had not been paid. As against this level of five or six patents per year, in the year 1865 there were sixteen applications, all successful.⁴³ It is also interesting to note that in the 1870s, the Melbourne *Argus* published, as a regular feature, an outline of the specifications filed with patent applications.

The suspicion that greeted the British initiatives did not blind the colonial public or the colonial governments to the potential advantages of a system whereby patents granted in one colony would be effective in another. As early as the 1850s there had been suggestions for uniform legislation on a variety of subjects, of which patents was one.⁴⁴ Some years later an Intercolonial Conference recommended that a patent granted in any one colony should be valid in the other colonies on registration.⁴⁵ A decade later in 1873 another Intercolonial Conference specifically considered the desirability of uniform laws on patents, and agreement was reached not only that uniformity should be sought but that the Victorian Government would prepare a draft bill for the purpose.⁴⁶ There is no evidence of such a draft actually being prepared, let alone considered by colonial legislatures.

Despite the failure of Merivale's proposal for an Imperial system, subsequent Secretaries of State for the Colonies returned to the issue of patent law over the next few years. In 1856 Henry Labouchere sought information from the various colonies as to the current laws of the colonies and as the documents (and fees) required for a local patent by "Inventor or British Patentee".⁴⁷ More significantly in 1872 a House of Commons Select Committee on Patents recommended that the British Government take the lead in attempting to achieve uniformity of patent law between the "civilised countries of the world" and should ask foreign and colonial governments if they were

⁴³ See Colonial Secretary's Documents Concerning Patents, file 4/745.3, GANSW.

⁴⁴ Ward, J.M. *Earl Grey and the Australian Colonies 1846-1857* (Melbourne U.P., 1958), p.350.

⁴⁵ Report of Intercolonial Conference 1863, printed in 1862-3 VPP, pp.6ff.

⁴⁶ Minutes of Intercolonial Conference 1873 for 11 February 1873, 1873 SAPP No.31, p.39.

⁴⁷ Labouchere, circular despatch, 11 July 1856. For replies see, inter alia, Kennedy to Labouchere 23 January 1857, CO 18/98; Gore Browne to Labouchere 17 November 1856, CO 209/139, and Barkly to Labouchere, 12 January 1857, file A 2367, DL.

willing to enter into some international convention for this purpose. In pursuance of that recommendation, Lord Kimberley, the then Secretary of State for the Colonies wrote to the colonial Governments asking their views.⁴⁸ The colonial governments appear to have been reasonably supportive of the principle, though pointing to the inevitable difficulties caused by the difference in the institutions appropriate to the volume of applications.⁴⁹

A last suggestion for an imperial system operated from Britain was made as late as 1883, and once again was met with a firm rebuff from the colonial politicians who believed that patents (and trademarks, for these too were included in the suggestion) were matter solely for the colonial governments and legislatures.⁵⁰

Nor were the concerns of the British Government restricted to suggestions for an imperial system. The British officials were at least as much concerned to ensure that colonial statutes did not impinge too far upon the rights of British patent holders. In 1871, for instance, the Colonial Office requested that Victoria change a provision in the Patent Act 1870(Vic) because its specifically exempted devices on foreign ships from the publication provisions of the Patent Act (i.e. their presence on ships in the ports of Victoria did not affect the ability later to claim a patent in Victoria). The British authorities were concerned that the specific mention of foreign ships implied that British ships enjoyed no such privilege. Curiously the same issue had recently arisen in a Natal statute, but whether this was no more than coincidence cannot be determined.⁵¹

In the last decade of the nineteenth century a number of colonies did revisit their intellectual property laws⁵² and enact legislation based closely on recent British statutes which both consolidated the law and gave effect to Britain's international obligations

⁴⁸ Kimberley's request and the House of Commons Committee's recommendations are printed in 1873 SAPP No.43.

⁴⁹ e.g. see Du Cane to Kimberley, 25 December 1873, CO 280/382.

⁵⁰ Derby, circular despatch, 29 October 1883 and see e.g. Strahan to Derby, 19 February 1884, CO 280/390.

⁵¹ Kimberley to Canterbury, 10 February 1871; file VPRS.1087/25, VPRO.

⁵² Patents, Designs and Trademarks Act 1889(NZ); Patents, Trademarks and Designs Act 1890(Qld); Patents, Designs and Trademarks Act 1893(Tas); Patents Trademarks and Designs Act 1894(WA).

under various Conventions such as the Paris Convention of 1883 on industrial property. These statutes were then taken up by colonies to affirm their adherence to the conventions and to update their law. However these statutes did not concern themselves only with patents, as most of them revised the colonial law relating to trademarks as well.⁵³

Trademarks

The early history of trademark law in the colonies is both shorter and more uniform than was the case with patents. It seems that few if any colonies regulated by statute the use of trademarks until the latter half of the nineteenth century. Here again the impetus for action came from the Colonial Office, but in rather a different manner and with a different result. In 1863 Lord Newcastle circulated to the colonies a request for information as to any existing colonial trademark laws, together with a copy of the British Merchandise Marks Act 1862(Imp) and a suggestion that the colonies might wish to consider legislation on those lines.

This circular received a very different reception from that which Merivale's proposals of ten years earlier had encountered. Tasmania had itself earlier adopted a measure largely based on the British Act,⁵⁴ but most of the others not only promised to consider the issue⁵⁵ but did in fact introduce and secure passage of legislation over the next few years. Thus substantially, though not totally, similar Trademark Acts were passed in most Australasian colonies between 1864 and 1866.⁵⁶ Western Australia declined to

⁵³ See the comments of the Attorney-General of Tasmania that the 1893 Act repealed all the existing Tasmanian statutes on patents and trademarks, and substituted United Kingdom enactments, "thus bringing the Tasmanian law upon the subject of Patents; Designs and Trademarks into harmony with the Law of England and most of the Australasian Colonies", Attorney-General's Report on 1893 statutes, 4 January 1894, file GO 74, AOT.

⁵⁴ Trademarks Act 1863(Tas).

⁵⁵ For favourable colonial reaction see e.g. Grey to Newcastle, 1 December 1861, CO 209/175 and Darling to Newcastle 22 Jan 1864, file VPRS.1084/5, VPRO.

⁵⁶ Fraudulent Trademarks Act 1864(Vic); Merchandise and Trade Marks Act 1864(Qld); Trade Marks Act 1865(NSW); Trade Marks Act 1866(NZ).

act, on the basis that there was little or no occasion for trademark legislation, given the "present limited state of the population and trade of Western Australia".⁵⁷

The problem for users of trademarks within the Empire was that the colonial measures of the 1860s soon became somewhat obsolete in the face of the development of international law and practice relating to industrial property. British law was significantly changed by a number of statutes which both improved the domestic law and gave effect to her international obligations under the Paris Convention of 1883, which Britain signed on the basis that the convention could be extended by Britain's action alone to the other British possessions.⁵⁸ As has been mentioned, Britain found the colonies unwilling to accept any system of Imperial intellectual property law which eliminated colonial control over its own laws, and so the Colonial Office was obliged to rely on exhortations and requests that the colonies would enact appropriate legislation. Some did so reasonably expeditiously - the trademark provisions of the Patents, Designs and Trademarks Act 1889(NZ) largely replicated the Merchandise Marks Act 1887(Imp) - but many did not. In Tasmania the requests for action did not result in the introduction of a bill until 1893, and even then the bill was nearly derailed by the problems of trademarks on fertilisers⁵⁹ and the re-use of bottles embossed with trademarks.⁶⁰

Some of the different issues to be reconciled and the difficulties surrounding reform can be documented in considering the proposals for reform in New South Wales over the period 1887-1893, for which there are good archival sources.⁶¹ In 1887 a Colonial Office circular letter to the colonies requesting them to take legislative action against the use of fraudulent marks on merchandise, enclosing a copy of the British Merchandise Marks Act 1887. The writer pointed out that at the Colonial Conference of 1887 the

⁵⁷ Hampton to Newcastle 14 December 1863, CO 18/129.

⁵⁸ Circular Despatch of 9 July 1884. It and other documents on which the preceding passage is based are in file TA 315 GO 5/8, AOT.

⁵⁹ As to which see also pp.246-47 above.

⁶⁰ See *Hobart Town Mercury* 11 August 1893.

⁶¹ See the documents contained in Documents relating to Amendment of the Law relating to Patents and Trademarks, File 5/7746.1, GANSW, on which the following account is based.

colonial premiers had discussed the matter, at which time it had been suggested that the colonies should initiate legislation, modelled on the British Act, to give effect to the provisions of the Paris Convention of 1883 on Industrial Property, and the Rome Conference on that topic in 1886. This proposal was then circulated for comment, and the New South Wales Registrar of Patents recommended such an Act be passed. The Registrar of Copyright made a fuller report stating that, as trademark use in New South Wales was still governed by the local Act of 1865 which was drawn from the British Act of 1862, reform was long overdue and immediate legislation was recommended.

No action was taken in 1887 or 1888, despite representations from interested trade organisations (as in other colonies, the most concern was expressed by the bottlers of aerated waters and cordials who were concerned at the use of their marked or embossed bottles by other bottlers) but in 1889 a departmental minute drew attention to proposed legislation in Victoria. The Victorian Bill of 1889 was procured and correspondence ensued between the Department of Justice and the Parliamentary Counsel's office about the desirability of using the Victorian statute as a model for New South Wales. The Parliamentary Counsel appears to have been at the source of delays which saw the discussion meander on throughout 1889, 1890 and 1891, punctuated by occasional pleas from London for action, only to be diverted into fresh channels by consideration of a Queensland Bill in 1892. In that year the bottlers suggested that a stop-gap bill be prepared specifically to resolve the difficulties surrounding the use of bottles, but this plea too fell on deaf ears. Finally in 1893 a bill was introduced and passed. Such a delay is perhaps an extreme case and may be attributable, at least in part, to the fact that the proposed change would have taken the registration of Trademarks away from the Colonial Secretary's Office and transferred it to the Justice Department.

Copyright

The colonial law of copyright was perhaps the area of intellectual property law where economic issues most directly influenced the development of the law. As Ricketson has described,⁶² colonial authors were disadvantaged by the British copyright laws which only accorded protection to works first published in Britain, at the same time that colonial consumers were disadvantaged by the British publishers custom of charging very high prices for the first editions of copyright works, the editions most likely to be exported to the colonies. As the United States did not give protection to British works, there were large numbers of pirate editions which would be significantly cheaper for colonial consumers if they became available. Under the Foreign Imprints Act 1847(Imp) unauthorised editions could be imported into the colonies subject to the levying of a import duty which would be passed to the copyright holders. In practice the amounts collected under that scheme were very small.

Copyright law thus tended to involve colonial attempts to ensure some domestic protection for their own publications coupled with sufficient semblance of concern for British interests and attempts to ensure that in fact colonial access to infringing copies was not overly restricted. It is notable that the North American colonies were very slow to legislate at all - Canada appears not to have enacted any laws at all until well after federation, and then it resolutely adopted a system which cut across British law by allowing republication of British works in Canada, when published with the author's consent, and conferred on those works a copyright in Canada (which thus thwarted enforcement of any British copyright). The Copyright Bill 1875(Can) finally became law three years after its passage and only after some complex constitutional manoeuvres.⁶³

In the Australasian colonies a different pattern emerged, with most of the colonies enacting copyright legislation of their own to protect local works. The first to legislate

⁶² Ricketson, S. "Australia and International Copyright Protection" in Ellinghaus, M.P., Bradbrook, A.J. and Duggan, A.J. (eds) *The Emergence of Australian Law* (Butterworths of Australia, Sydney, 1989)

⁶³ Clokie, H. McD., "Basic Problems of the Canadian Constitution" (1942) 20 Can Bar Rev 395, 414-5. Also see de Montigny, Louigny "Copyright in Canada" (1927) 5 Can Bar Rev 27.

was New Zealand, where the Copyright Ordinance 1842(NZ) was passed to protect a soon-to-be published work on Maori grammar.⁶⁴

Some years later there came a number of Australian statutes. These Acts were largely, though not entirely, modelled on the English law but limited in their operation to the particular colony. It is interesting that the first to be introduced, in Victoria in 1869, appears to have been a private member's bill introduced with the acquiescence of the colonial Government who had received several deputations urging the introduction of a local law.⁶⁵ This Victorian Bill was later to be re-enacted almost verbatim in South Australia⁶⁶ and New South Wales.⁶⁷ The New South Wales statute of 1879 was also a private member's bill. The mover, William Windeyer (later to be Attorney-General and a judge of the Supreme Court) was one of the colonial lawyers who subscribed to the "textbook" theory - that it was best to copy the English statutes so as to obtain the benefits of judicial decisions on the English Act.⁶⁸ He must however receive credit for enabling legislation to succeed where the Cabinet, though in favour of reform, had considered there was insufficient public demand to make action desirable.⁶⁹

Some years later Queensland took a rather different tack. The Copyright Act 1887(Qld), a Government measure, first declared a number of British Acts to be in force in Queensland, but went on to add provisions for local registration. There were also provisions for the deposit of copyright works which were identical with those in New South Wales.⁷⁰ This statute in turn was used by Western Australia for its Act of the same year.⁷¹ Western Australia enacted a further measure only a few years later,

⁶⁴ Foden, N.A. *New Zealand Legal History*, (Sweet & Maxwell, Wellington, 1965) p.182.

⁶⁵ (1869) 8 VPD 1005 and 1837-9.

⁶⁶ The statement by Giles, A. "Literary and Artistic Copyright in the Commonwealth" (1905) 3 Commonwealth LR 107, 112 that the South Australian legislation came from the English law appears to be made without consideration of the evidence of a strong Victorian influence.

⁶⁷ Copyright Act 1878(SA); Copyright Act 1879(NSW) and see 1878 SAPD 441.

⁶⁸ Parsons, pp.147-8.

⁶⁹ Parsons, p.241.

⁷⁰ (1887) 52 QPD 95-103.

⁷¹ Copyright Register Act 1887(WA).

but drew on a different source. The Copyright Act 1895(WA) was largely taken from the Victorian Copyright Act 1890(Vic), except that Western Australia omitted provisions concerning designs and works of manufacture.⁷²

It may be that the Australian colonies were the more ready to enacting legislation largely replicating Imperial statutes because in this area the Colonial Office on occasion sought colonial opinion before, rather than after, bills were introduced into the British Parliament. It is not clear just how widespread this practice was, but on at least three occasions draft British bills were sent to the Victorian Government for comment by the colonial Attorney-General.⁷³ It is possible, too, that the somewhat more congenial tone of the Colonial Office dealings with copyright law owe something to the influence of Sir Henry Holland (later Lord Knutsford), a sometime legal adviser to the Colonial Office and an expert on copyright who was Assistant Under-secretary at the Colonial Office 1867-74 before leaving to begin a political career which later brought him back to colonial affairs as Secretary of State for Colonies 1887-1892.⁷⁴

No mention of the intellectual property legislation of the colonies would be complete without mention of the school of thought that opposed any form of intellectual property statute on the ground that the protection of intellectual property was productive of monopolies and should not be undertaken on that ground alone. Such a belief crops on occasion among politicians of different hues,⁷⁵ but there is one curious case where an important Government official appears to have had somewhat similar views as to the legislation which he was charged to supervise. In 1892 one J. Sprunson, the Registrar of Copyright in New South Wales, was asked to report on the desirability of amending the law to revert to an earlier system of enforcement of copyright in the colony by the use of Customs procedures to seize illicit or pirated editions. The Registrar's report

⁷² Cf (1896) 1 JCL 58.

⁷³ See Canterbury to Kimberley 6 November 1872, VPRS.1084/7; Attorney-General to Governor 23 June 1876, VPRS.1084/8 and Normanby to Hicks Beach, 10 Feb 1880, VPRS.1084/9, VPRO.

⁷⁴ Blakely, Brian L. *The Colonial Office 1868-1892* (Duke U.P., Durham N.C., 1972), p. 157

⁷⁵ See for instance G.M. Waterhouse's speech on the New Zealand Patents Bills 1870, (1870) 7 NZPD 33.

strongly opposed the use of the Customs procedure, noting that only Victoria of the Australian colonies still made use of it. In Sprunson's view the appropriate model for Australasian law was Canada, which he considered to be in a similar position to Australasia as a net consumer of publications though Canada did have a greater printing industry than the combined Australian colonies. The underlying basis for his views was that he was not in favour in principle of the protected monopoly of publishers in books to which they held the copyright. His opposition was the stronger because he believed the publishers were exploiting that monopolistic position to the detriment of colonial consumers.⁷⁶ Nothing, however, appears to have eventuated from his suggestions for change.

When the three areas of intellectual property law are looked at as a whole, three things stand out. The first is the strong British influence and inspiration which determined the basic elements of the law in the Australasian colonies and were highly influential even in the rather different Canadian legislation. Secondly there is the strong particularist influences which meant that, despite repeated Colonial Office suggestions to the contrary, most colonies insisted on erecting their own legal structure governing intellectual property, even though the architecture of these structures was often very derivative. In the last place it is notable that intellectual property law was frequently developed not by governmental action but by pressure groups and private members, a feature which makes its relative uniformity the more unusual.

⁷⁶ Report on Copyright Law by J. Sprunson, Registrar of Copyright, 23 January 1892, Papers relating to the Law of Copyright in New South Wales, Colonial Secretary's Department, File 5/7725, GANSW.

Chapter 13

Conclusion

This thesis began with the proposition that there was a widespread, indeed general, conception of statute law in the nineteenth century British settlement colonies which considered it as principally created from two distinct sources, local initiatives and adoptions of British statutes. It is accepted that this bi-polar view of legal development has never been totally unqualified. Legal writers and historians have on occasion (and increasingly so in more recent decades) recognised that there were occasions when colonies did adopt some legislation from other colonies. However the borrowing of legislation from other colonies has still been treated as a sporadic phenomenon - something done only on occasion and, even then a matter of very much less importance to legal development in the colonies than were either British statutes or local law reformers.

This thesis has sought to challenge that view of legal development in the settlement colonies and to emphasise the role that the borrowing and adaptation of legislation from other colonies played in the development of the law in the settlement colonies. It is suggested that the evidence shows that, in many areas of the law and at most periods in the years covered by this study, statute law in almost every colonial jurisdiction owed a great deal to the legislation of other colonies. Indeed the range and frequency of imitative legislation indicates that the borrowing of legislation, usually a borrowing of both concept and form, was a standard technique for colonial legislators, and one which was used on myriad occasions. The derivation of colonial statutes from the initiatives of other colonies was, therefore, neither sporadic nor peripheral to the development of a corpus of colonial statute law by local efforts or replication of British legislation. Legislative borrowing must be seen as being at least as important to colonial legal development as either of those two factors.

The reasons for the importance of legislative borrowing are not hard to discern, although it may be difficult to accurately determine which of them predominated in any

particular instance of legislative adaptation. Probably the most important single factor, as has been suggested in a number of places throughout this thesis, is the essentially pragmatic fact that colonial legislators worked with limited resources, something which impelled them to the use of precedents drawn from other jurisdictions because this both provided for enormous savings in time and effort on the part of the relatively small class of persons capable of drafting statutes *ab initio* and also allowed even relatively unskilled draftsmen to come up with bills which were in a form suitable for enactment. The availability of skilled legal practitioners who could perform the drafting of legislation was far from constant over time and between colonies. Some of the British North American colonies possessed strong legal professions from the latter two decades of the eighteenth century as a result of the migration of loyalist lawyers from the colonies lost in 1783; others such as British Columbia and Upper Canada were far less fortunate. It is, however, in the new colonies of Australasia that the scarcity of legal resources was most apparent¹. Few competent lawyers entered government service in the first years of each of the colonies. It was natural that colonial governments should seek to make the best use of what they had by benefiting from the efforts of draftsmen in other jurisdictions. It is acknowledged that on many occasions this took the form of the adoption of English statutes, but on many others colonial precedents were used instead. This was sometimes because English precedents could only function through the medium of institutions which did not exist in the very different colonial conditions, as was the case with provisions for the maintenance of *de facto* spouses and illegitimate children.² In other cases an English statute could, with some degree of modification, be made suitable for colonial conditions. Where this occurred, as with the legislation establishing Courts of Requests in New South Wales, it was natural for other colonies to prefer the colonial adaptation to the original. There were also occasions on which the colonies positively rejected extant English law and sought to create an alternative body of law derived from other sources, as with the bankruptcy legislation initiated by Burton

¹ As to this see above, pp.128-31.

² See above, pp.41-44.

in the Cape Colony. Where such innovations were successful, as Burton's was, it was likely to be adopted elsewhere, as events in Van Diemen's Land and New South Wales show.³ By contrast some purely colonial initiatives, such as the preferable liens legislation, which originated in New South Wales,⁴ or the goldfields legislation which spread from Australia to New Zealand and British Columbia,⁵ owed their popularity to their success in dealing with problems not encountered in Britain.

While the attractiveness of economy in the use of resources may have been greatest in the early years of each colony, especially during the periods of Crown Colony rule, it never completely disappeared. In later decades the legal resources available to governments were much greater, but then so were the demands upon them. As was discussed earlier,⁶ colonial governments in the era of responsible government encountered difficulties in ensuring adequate preparation of legislative materials. Where drafting was left to the limited time available to the colonial Attorney-General or was directed to an official appointed as Parliamentary Draftsman, the pressure of work provided an obvious incentive to prefer adaptation of existing texts to the preparation of new bills from scratch. Even where a wider range of draftsmen was available, cost constraints limited their use.

Nor were resource constraints limited to official draftsmen. The preparation by skilled draftsmen of private legislation and private member's bills alike was expensive;⁷ the use of precedents from other jurisdictions allowed such initiatives to be launched much more cheaply. Indeed, the use of material from other jurisdictions allowed politicians who were not lawyers to present private members bills on matters as diverse as Torrens title legislation⁸ and the legal liability of the Crown.⁹ In the absence of such ready

³ See above, pp.111-113.

⁴ See above, pp.249-51.

⁵ See above, pp.29-30.

⁶ See Chapters 6 and 7.

⁷ See above, pp.146-47.

⁸ See above, p.275, in regard to the first Victorian Torrens legislation.

⁹ See above, p.268.

precedents, it is unlikely that private member's bills could have played the important pivotal role in law reform that they did in many colonies.

Economy of resources was, of course, far from the only reason for reliance on precedents from other colonies. In the first half of the century in particular, colonies could be more certain that legislation would pass scrutiny by the Colonial Office if some colonial precedent could be cited.¹⁰ With the attainment of responsible government, this factor lost much of its importance, but it never completely disappeared. In some instances of controversial colonial legislation, as with divorce law reform¹¹, the validation of marriages between a widower and his deceased wife's sister¹² and the limitation of non-European migrants,¹³ it is clear that the final form of legislation to be found in many colonies is derived from the first colonial statutes to be accepted by the British authorities.

A third reason for legislative imitation, much more difficult to quantify and to separate from other factors, is the fact that many colonial legislators were not natives of the colony (or colonies) in which they were active in government or politics. In the early years of most colonies the governors, as well as influential figures such as the judges, were often men of experience in other colonies. The careers of Sir George Grey and Sir Frederick Weld are perhaps the most conspicuous examples of this trend,¹⁴ but there were other cases as well. Where legislative powers moved to elected assemblies, it was still common to find politicians who had been involved in public affairs in other colonies.¹⁵ The remarkable career of G.M. Waterhouse, and his use of South Australian precedents for bills in New Zealand,¹⁶ provide merely the most spectacular example of what was a common phenomenon, the initiation in one colony of legislation

¹⁰ As to this scrutiny, see Chapter 4.

¹¹ See above, pp.212-15.

¹² See above, pp.196-97.

¹³ See above, pp.81-83.

¹⁴ See above pp.120-21.

¹⁵ See the examples of persons with Victorian experience in New Zealand given above, p.23.

¹⁶ See above, p.24 (Deceased Wife Sister Marriage bill) and p.276 (Torrens title legislation).

of which the proposer had personal experience in another colony. In such cases it was obviously more likely that a colonial governor would succeed in carrying through his proposals - as Grey did on many occasions - than was the case with a single member of an elected legislature, but again this cause of legislative borrowing retained a degree of importance.

A similar, though slightly different, ground for borrowing comes with the widespread official and unofficial links between members of the governing elites in the different colonies. It is clear that on many occasions private meetings and correspondence between politicians and judges supplemented, or substituted for, official exchanges of information and views.¹⁷ On occasion these informal channels of communication created an awareness of measures which would be suitable for adoption if legislation on a point was desired. The extent of these interchanges and their total effect on colonial legislation cannot be easily estimated, but it may well have been both extensive and important. In the later years of the century a new form of exchange of ideas appears to have occurred among the more radical politicians who were kept abreast of developments in other colonies through information conveyed by the trade union movement.¹⁸

It must be always be borne in mind that colonial legislative practices were part of a dynamic and frequently changing system, in which each of these causes impelling the borrowing of precedents from other colonies interacted with the others in varying degree on occasion. This very mutability of colonial governments and colonial society brought forward a pattern of colonial political and social opinion that mingled imitation of some English ideas and opinions with a greater willingness to experiment with new institutions and a much more liberal (on occasion radical) attitude to social and legal reform¹⁹. This was of considerable importance in creating and maintaining divergences

¹⁷ See above pp.211-2 in relation to Alfred Stephen's correspondence on proposals for divorce law reform. Griffith, Way, Boucaut and Windeyer were also prolific correspondents.

¹⁸ As appears to have been the case with workmen's liens legislation, see pp.253-54, above.

¹⁹ See above, pp.15-20 for colonial thought; the openness to reform is shown in chapters 9, 10 and 11.

between English and colonial law. As the colonies developed economically and socially the more egregiously "colonial" features of their laws could seem out of place. There were more occasions on which English legislation could appear to be appropriate for the more complex economic and social structures evolving, and indeed in some areas, such as commercial law,²⁰ there is a perceptible movement to bring colonial law into line with that of England. But colonial interests were not identical with those of the Imperial government, and colonial social attitudes were not those of the English governing classes. Attempts to insist that the colonies yield to the dictates of Britain in legislation concerning social matters such as divorce were eventually to end in profound failure, as did the British attempts to limit racially based colonial legislation on immigration. In other spheres, as with intellectual property legislation,²¹ there is a complicated pattern of selective adoption of English law and acceptance of British Government proposals, a pattern largely determined by colonial perceptions of what would best protect the interests of the colony.

In the early years of the period under study the influences of distance and isolation, the rudimentary and unbalanced colonial economies and the poorly resourced colonial governments meant that the colonies had to seek to create a suitable body of law for their own governance. In those circumstances, reliance on English law was impractical. The development of a complete and original corpus of law in each colony was not practical nor an attempt to create one resources. Recourse to imitation of legislation enacted in other colonies was practically inevitable. Although the centripetal factors of the first half of the century were much reduced in the second half of the nineteenth century, there were still many factors militating against reliance on English precedents or reliance on local initiatives. The borrowing of legislation from other colonies continued, though mediated through somewhat different channels and, perhaps, somewhat less frequently and on a more discriminating basis. Any account of colonial

²⁰ See above, chapter 5.

²¹ See above, pp.292-305.

legal development must recognise central role that the practice of imitation, adaptation and adoption played in the formulation of the statute law of each of the British settlement colonies in the nineteenth century. Without the large-scale use of precedents from other colonies, colonial legal development would have been slower, more erratic and more diverse. Indeed without it, it would be difficult to generalise about "colonial" statute law. Yet it is clear that by late in the nineteenth century there was a recognisable and reasonably consistent body of colonial statute law, English in antecedents for the most part yet to a considerable extent divergent from contemporary English law. That there is a body of "colonial" law, as opposed to disparate bodies of law in the different settlement colonies, is the clearest evidence of the importance of the inter-colonial element in the development of the statute law in those colonies. It is to be hoped that future scholars will pay due attention to the phenomenon of intercolonial legislative borrowing and its effects on the development of the law in a number of jurisdictions.

Table A:
Historical table of colonies:

Australasia.

New South Wales: settled 1788; Legislative Council 1823; representative government 1842; responsible government 1855.

New Zealand: acquired 1840, separate colony 1841; Legislative Council 1841; representative government 1852; responsible government 1854.

Queensland: separated from New South Wales 1859; representative government 1859; responsible government 1859.

South Australia: settled 1837; Legislative Council 1837; representative government 1850; responsible government 1857.

Tasmania: settled as Van Diemen's Land 1803 (renamed 1853); Legislative Council 1823; representative government 1850; responsible government 1856.

Van Diemen's Land: *See* Tasmania

Victoria: separated from New South Wales 1851; representative government 1851; responsible government 1855.

Western Australia: settled 1829; Legislative Council 1829; partially elected legislature 1870; representative government 1890; responsible government 1890.

Canada (Dominion) Created 1867

British Columbia: established 1858 (merged with Vancouver Island 1866); appointed Legislative Council 1858; representative government 1871; responsible government 1872; joined Confederation 1871.

Canada (province): formed by union of Upper and Lower Canada 1841; representative government 1841; responsible government 1848; separated again 1867.

Cape Breton Island: acquired from France 1763, Legislative Council 1784; merged with Nova Scotia in 1820.

Lower Canada *see* Quebec

Quebec: acquired from France 1763; renamed Lower Canada 1791, united with Upper Canada 1841-1867; renamed Quebec 1867. Appointive Assembly 1774; representative government 1791; responsible Government 1867; joined Confederation 1867.

Manitoba: established 1870, responsible government 1870; joined Confederation 1870

New Brunswick: separated from Nova Scotia 1784; representative assembly 1784; responsible government 1848; joined Confederation 1867.

Newfoundland: control disputed with France in 17th century, full control by Britain 1713; Legislative Council 1824; representative government 1832; responsible government 1855; joined Canada 1950.

Nova Scotia. Possession disputed with France in 17th century, acquired from France permanently in 1713. Representative assembly 1749; responsible government 1848; joined Confederation 1867.

Ontario *see* Upper Canada.

Prince Edward Island: separated from Cape Breton Island 1769 as St. John's Isle, renamed 1799. Legislative Assembly 1851; representative government 1851; responsible government 1851; entered Confederation 1873.

Quebec *see* Lower Canada.

Upper Canada: established 1791, merged with Lower Canada 1841-67; recreated as Ontario 1867. Representative government 1791; responsible government 1867; entered Confederation 1867.

Vancouver Island: established 1793; appointed Legislative Council 1849; merged with British Columbia 1866.

South Africa

Cape Colony: Acquired from Holland 1815; Legislative Council 1834; representative government 1853; responsible government 1872.

Natal: Annexed 1843; representative government 1856; responsible government 1893.

Orange Free State: Briefly under British control 1848-54; independent until 1900.

Transvaal: British suzerainty abandoned 1852; annexed 1877; independent again 1881-1900.

TABLE OF SOURCES

1. Published governmental material

Draft Code for Victoria, (by W.E. Hearn), (Government Printer, Melbourne, 1885).

Historical Records Of Australia Series 1, vols 1-20 (Government Printer, Sydney, from 1927)

Opinions of the Attorney-General of New South Wales 1875-77, (Government Printer, Sydney, 1878)

Parliamentary records and documents :

New South Wales:

- Minutes, Votes & Proceedings of Legislative Council

- New South Wales Parliamentary Debates

New Zealand:

New Zealand Parliamentary Debates

Queensland:

Queensland Parliamentary Debates

South Australia:

South Australian Parliamentary Debates

South Australian Parliamentary Papers

Tasmania:

Tasmanian House of Assembly Journal

Tasmanian Parliamentary Papers

Victoria:

Victorian Hansard

Victorian Parliamentary Debates

Victorian Parliamentary Papers

Western Australia:

- Minutes and Votes and Proceedings of Legislative Council of Western Australia.

- Western Australian Parliamentary Debates

Statutes of :

British Columbia.

Lower Canada

New Brunswick

New South Wales

New Zealand

Nova Scotia

Ontario

Prince Edward Island

Quebec

Queensland

Manitoba

South Australia

Tasmania

Upper Canada

Victoria

West Australia

2. Unpublished governmental material

A. British Government - Colonial Office files*

General

Circular despatches to colonies, CO 854 series, CO 854/1 - CO 854/4, PRO.
Opinions of Legal Advisers 1790-1865, CO 323/34 - CO 323/77, PRO.

New South Wales

Miscellaneous opinions of J.F. Stephen CO 201/158, PRO.

New Zealand

Despatches, Governor to Colonial Office 1841-1867, CO 209/14 - CO209/23, PRO.

Tasmania

Despatches, Governor to Colonial Office 1828-1896, CO 280/16 - CO 280/399.

Western Australia

Despatches, Governor Western Australia to Colonial Office 1835-65, CO 18/15 -
CO 18/143.

Index and register of correspondence, Western Australia 1853-66 CO 714/11.

* Unless otherwise sourced, the Colonial Office papers consulted were those microfilmed by the Australian Joint Copying Project.

NEW SOUTH WALES

Attorney-General's papers GANSW

- letters to Colonial Secretary on Land titles 1851, file 4/7152.
- Correspondence Books, Attorney-General to Colonial Secretary, 1831-33, file 9/2677.
- letterbook Attorney-General to Colonial Secretary, 1847-50, file 9/2678.
- amendments to Trade Disputes Conciliation and Arbitration Act 1892, file 4/906.3.

Attorney-General's papers, ML

- Letterbook 1831-40, file A165, microfilm CY 1887.

Chief Justice's Letterbooks and correspondence, GANSW

- Letterbooks 1824-35, file 4/6551.
- Letterbooks 1852-56, file 4/6654.
- Letterbooks 1884-1905, file COD 89A-90.
- Letters received 1831-8, File 5/4758.
- letters to judges and draft replies 1840-45, File 5/4761.

Colonial Secretary's documents GANSW

- correspondence concerning bill to declare void an alleged marriage between Emmeline Emma Blake and Patrick Mehan, 1853, file 4/714.4.
- documents concerning patents (1862-65) file 4/745.3.
- documents relating to amendment of the law relating to patents and trademarks, 1887-94, file 5/7746.1.
- drafts of legislation 1826-31, file 4/1104.
- papers relating copyright 1892, file 5/7725, 189.
- papers relating to the Bank Note Issue Act 1893, file 4/908.1.
- Re Francis Fisher 1839, file 4/1137.
- Real Property Act 1862, file 4/742.2.

Governor's correspondence and despatches, GANSW

- Correspondence with New Zealand, file 4/1629.
- Correspondence relating to North Australia, 1846-48, file 4/1619.
- Correspondence, Governor Victoria to Governor New South Wales, 1852-60 re steam postal communication, file 4/1625.
- Despatches Governor to other Australian Colonies and Governor of New Zealand, file 4/1653, microfilm 2156.
- Register of Despatches received from other colonies, File 4/1632; microfilm AO 2914.

Register of Despatches, Colonial Office to Governor

- 1837-42, file 4/1605.
- 1845-53 file 4/1614.

Governor's papers, ML

- Darling to Bourke, 12 October 1831, file A1267⁻¹².
- Despatches, Governor to Colonial Office 1838-9, file A 1267⁻¹⁷.
- Despatches, Colonial Office to Governor 1839, file A 1280.
- Speeches by Gipps and Fitzroy to Legislative Council, file A 706, ML.

Justice Department Papers, GANSW

- Papers concerning the Administration of Estates Bill, 1884-86, file 5/7709.2.
- Papers concerning proposed Royal Commission into the Operation of the Supreme Court, 1886-7, file 5/7718.3.
- Papers relating to Procedure in the Court of Petty Sessions 1886-91, file 5/7722.1.
- papers relating to Society of Comparative Legislation 1895-1914, file 5/7766.1.

Parliamentary Counsels Office, APCNSW

- File of Miscellaneous documents 1874-96.
- Parliamentary Counsel's Office, Letter-book 1878-1896.

Solicitor-General's papers, GANSW

- correspondence 1828-9, file 5/4771.1.
- miscellaneous papers 1828, file 5/4771.3.

Votes & Proceedings of New South Wales Legislative Council 1837, file A1267 -14, ML.

NEW ZEALAND

Governor's papers, NZNA(W)

- correspondence 1845-49 file G 36/2.
- correspondence with Lieutenant-Governor of New Munster 1849-1853, file G 36.
- despatches 1847, file G 31.
- entry book of letters 1839-1842 file G 36/1.

Legislative Council Papers: NZNA(W)

Minutes and Proceedings of the Second Session of the Legislative Council of New Zealand.

Minutes and Proceedings of the Third Session of the Legislative Council of New Zealand.

Official Correspondence, Governor of New Zealand, 1842-45, in Papers of James Coates, DL

- Inward letters, file MS.Q.655.
- Miscellaneous documents file MS.Q.656.

QUEENSLAND

Chief Justice's papers, QSA.

- inward letters 1880-87, file SCT/A9.

Department of Justice papers, QSA

- Attorney-General's letterbook 1861-4, file JUS/G1.
- Correspondence with other colonies, file JUS/81.
- Miscellaneous Justice Department papers, file A/13 522.
- Papers relating to Bills, file series JUS/W.
- Reports of Attorney-Generals on Acts 1861-71, file JUS/31.

Governor's papers, QSA

- Official Correspondence 1884-86, file GOV/N.
- Register of Official Correspondence 1886-7, file GOV/81.

SOUTH AUSTRALIA

Attorney-General's Office, SAPRO

- index to letters received 1860-73, file GRG-1/4.
- miscellaneous bills, file GRG 2/73.
- miscellaneous documents on law reform, File GRG 1/86.
- record of bills introduced 1878- 1899, File GRG 1/66.
- reports on bills 1857-58 file GRG 2/54.

Colonial Secretary's papers, SAPRO

- correspondence, file GRG 24/6.

Governor's papers, SAPRO

- despatches, Governor to other Colonies 1841, file GRG 2/10.
- letters to Governors of Tasmania and New South Wales 1838-1844, file GRG 24/3.
- letters to officials and to other colonies etc. 1873-1894, file GRG 2/19.
- minutes of Exec.Co. of South Australia 1839-58, file GRG 40/1.
- Jervois Papers 1877-78, file GRG 2/20.

TASMANIA

Governor's papers AOT

- Bills for Assent and related Documents, 1870-93, file TA 315/GO 50/1.
- Circular Despatches, Colonial office to Governors 1884-5, file TA 315/GO 5/8.
- Correspondence with other Colonies and States 1875-1901 - TA 315/GO 42.
- Despatches from other Colonies 1862-1899, file TA 315/GO 19/1.
- Enclosures with Governor's despatches 1893-1900, file TA 315/GO 74.

Minutes Legislative Council, AOT

- 1828-30 file TA 315/EC4.
- 1848-51 file TA 315/EC8.

VICTORIA.

Attorney-General's Department papers, VPRO

- index to inward correspondence, file VPRS.251.
- inward correspondence 1840-43, file VPRS 6929.
- Minute Books 1856-73, file VPRS.256/2.
- Reference Books 1859-61, file VPRS.253.
- bills and annotations to draft Bills, file VPRS.10265.

Governor's Papers, VPRO.

- despatches, Colonial Office to Governor 1854-71, file VPRS 1087.
- despatches, Governor to Colonial Office 1851-93, file VPRS 1084.
- register of Despatches, Colonial Office to Governor, file VPRS 1404.
- reports of Attorney-General to Governor on bills reserved, file VPRS CO95 series.
- reports on Bills by the Clerk Assistant to the Legislative Assembly, file VPRS 6874.

Governor's papers, ML

- despatches, Governor to Colonial Office 1858-60, Files A 2345-7.
- Correspondence between Colonial Office and Victoria on Patent Law 1852-57, DL.

3. Unpublished Private Papers

1. collections

Papers of Sir Joseph Abbott, DL
- Correspondence, file A3808.

Papers of G.J. Angus, Mortlock Library.
- Drafts of bills, notes etc 1850-63, File V63.

Papers of Sir George Arthur, ML
- Correspondence with J F Stephen, file CYA 2164.
- correspondence with Bourke 1831-6; file A2168.

Papers of Sir Richard Baker, Mortlock Library
- Scrap-books, various, files PRG 38/1, PRG 38/4 PRG 38/11.

Papers of Redmond Barry, LaTL
- correspondence 1856-71, file MS 12161.
- correspondence 1878-9, file MS 8380.
- daybook 1842-68, file MS 8386.

Papers of Sir James Penn Boucaut, Mortlock Library
- correspondence, notes on draft bills 1865-80, file V97.
- Miscellaneous papers 1864-89, file V98.

Papers of Edward Carlile, LaTL
- correspondence 1890-1907 and materials on legislative drafting, file 17S 8323.

Papers of A Inglis Clark, University of Tasmania Archives
- correspondence 1874-98.
- Miscellanea and Memoranda to Governor 1874-90.

Papers of T.B. Gillies, Canterbury Museum

Papers of H.B. Gresson, Canterbury Museum.

Papers of Samuel Walker Griffith, DL
- Correspondence 1869-1883, file MS.Q.185.
- Correspondence 1884-87, file MS.Q.186.
- Correspondence 1887-1891, file MS.Q.187.
- Correspondence 1891-94, file MS.Q.188.
- Correspondence 1895-1900, file MS.Q.189.

Papers of Reginald Long Innes, DL.
- Judges note-book, file MS.174.

Papers of Townsend Macdermott, file MS 10819, LaTL

Papers of Sir James Martin, DL,
- miscellanea, file MS.138.

Papers of Alexander Oliver, University Archives, University of Sydney.

Papers of Sir Henry Parkes DL.,
- Correspondence, Vol. 3, file CYA 873.
- Correspondence, Vol. 19, file CYA 889.
- Correspondence, Vol. 34, file CYA904.
- Correspondence, Vol.35, file CYA905.
- Correspondence, Vol.42, file CYA 912.

Papers of Robert Burdett Smith, DL
- Miscellaneous documents , file As 514.

Papers of E Deas Thomson, ML
- correspondence file Vol. 1531-2.

Papers of Sir Samuel Way, Mortlock Library
- Letters to Sir Alfred Stephen, file PRG 30/8.
- Other outward correspondence, file PRG 30/12.
- Inward correspondence, file PRG 30/3.
- letters to Samuel Brook 1870, file D.3264/1-7 CL.

Papers of (Sir) William Charles Windeyer, ML
- Correspondence 1848-85, MSS 186/8, microfilm CY 2488.
- Correspondence 1886-90, MSS 186/9, film CY2489.
- Correspondence 1891-94, MSS 186/10, film CY2473.
- Correspondence 1895-97, MSS 186/11, film CY2476.
- Miscellaneous documents Doc 3163/

Papers of Bernhard Ringrose Wise, DL
- Correspondence 1889-1914, file A2646.

2. miscellanea

Miscellaneous Documents : DL

- Thomas de la Condamine to J Sampson, 27 May 1828, DL Document 28.
- Alfred Stephen to John Montagu, 14 July 1837, enclosing copy of Stephen to Franklin on the (Van Diemen's Land) Church Act 1837, DL Document 30.

Miscellaneous letters file, file 8730, La TL.

4. Unpublished works

- Campbell, C. "*Charles Cameron Kingston: Radical Liberal and Democrat*" (B.A. Hons. Thesis, University of Adelaide, 1970).
- Edgar, P.L. "*Sir James Penn Boucaut: His Political Life 1861-75*" (B.A. Hons. Thesis University of Adelaide 1961).
- Hague, R.M. "*History of the Law in South Australia*", (typescript, 1937), PRG 215, Mortlock Library.
- Hooker, Brian H.H. "*Hookers Index to the Acts and Ordinances issued by the Commonwealth, States And Territories of Australia, and the Federal Council*" (Typescript, Melbourne, 1929).
- Ireland, John, "*Three Cheers for Mr Ireland*" B.A.Hons.Thesis, University of Melbourne, 1988., LaTL.
- Loughlin, Graham "*South Australian Queen's Counsel 1865-1972*" (BA Hons.Thesis, University . Adelaide, 1974).
- Parsons, Robin, "*Lawyers in the New South Wales Parliament 1870-1890: A study in the Legislative Role of Private Members*" (PhD. Thesis, Macquarie University, March 1972).
- Spiller, Peter "*Two Judges - Father and Son: An analysis of the careers of Henry Samuel Chapman and Frederick Revans Chapman*". (Ph.D. thesis, University of Canterbury 1991)
- Wolfhagen, N., *Biographical notes on William Lambert Dobson* (unpublished, n.d.) file NS52/68, AOT.

BIBLIOGRAPHY

A. Books

- Akenson, Donald Harvey *Half the World From Home: Perspectives on the Irish in New Zealand 1860-1950* (VUP, Wellington, 1990)
- Alomes, Stephen and Jones, Catherine *Australian Nationalism: A Documentary History* (Angus & Robertson, Sydney, 1991)
- Atkins, R.J. *Bills of Sale, Liens and Stock Mortgages in New South Wales* (2nd ed). (Law Book Co.of Australasia, Sydney, 1939.)
- Australian Dictionary of Biography* (Melbourne UP, 1966-93)
- Australian Law Reform Commission *Working paper no. 8 - "Land Acquisition Law"* December 1977.
- Bailyn, Bernard and Morgan, Philip D (eds) *Strangers Within the Realm: Cultural Margins of the First British Empire* (U North Carolina Press, Chapel Hill N.C., 1991)
- Behan, H.F. *Mr Justice J.W. Willis* (privately published, Melbourne, 1979)
- Bennett, J.M.(ed) *A History of the New South Wales Bar* (Law Book Co, Sydney, 1969)
- Bennett, J.M. *History of The Supreme Court of New South Wales* (Law Book Co, Sydney, 1974)
- Bennett, J.M. *Portraits of the Chief Justices of New South Wales* (John Fergusson Pty Ltd, Sydney 1977).
- Bercusson, D.J. & Knafla, L.A. (eds) *Law and Society in Canada* (University of Calgary Press, Calgary 1979)
- Bernays, C.A. *Queensland Politics during 60 Years* (Government Printer, Brisbane, 1921).
- Billot, C.P. *The Life and Times of John Pascoe Fawkner* (Hyland House, Melbourne, 1985).
- Blackett, W. *May It Please Your Honour* (Cornstalk Publishing Co, Sydney, 1927).
- Blainey, Geoffrey *The Tyranny of Distance* (Sun Books, Melbourne, 1966).
- Blainey, Geoffrey *The Rush that Never Ended* (2nd ed., Melbourne UP, 1969)
- Blainey, Geoffrey *A Land Half Won* (Macmillan of Australia, 1980)
- Blakely, Brian L. *The Colonial Office 1868-1892* (Duke U.P., Durham N.C., 1972)
- Bourke B.J. and Corridon M.J. *Bourke's Liquor laws of Victoria* (Butterworths Australia 1972)
- Brander, M *The Emigrant Scots* (Constable, London, 1982)
- Brode, P. *Sir John Beverly Robinson* (U. of Toronto Press, Toronto, 1984)
- Broome, Lady *Colonial Memories* (Smith, Elder & Co, London, 1904).

- Campbell, I.D. *Law of Adoption in New Zealand* (2nd ed, (Butterworths of Australia Ltd, Sydney, 1957).
- Careless, J. *The Union of the Two Canadas : the Growth of Canadian Institutions 1841-57* (McClellan & Stuart Ltd, Toronto 1967).
- Carr, D.M.L. *The Colonial Office and Canada 1867-1887* (Toronto UP, 1955)
- Castles, A.C. *An Australian Legal History* (Sydney, Law Book Co., 1982)
- Castles, Alex C. and Harris, Michael C. *Law-makers and Wayward Whigs; Government and Law in South Australia 1836-1986* (Wakefield Press, Adelaide, 1987).
- Cell, J.W. *British Colonial Administration in the Mid-Nineteenth Century; the Policy-making process* (Yale UP, 1970)
- Coleman, Robert *Above Renown, The Biography of Sir Henry Winneke* (Herald & Weekly Times Ltd, Melbourne, 1988)
- Cooke, R.B. *Portrait of a Profession: the Centennial Book of the New Zealand Law Society* (A.H. and A.W. Reed, Wellington, 1969)
- Copland, D.B. *W E Hearn, First Australian Economist* (Melbourne UP 1935)
- Coppel, E.G. *The Law of Bills of Sale* (Law Book Co. of Australasia, 1935)
- Crisp, L.F. *Federation Fathers* (Melbourne UP 1990)
- Cullen, M.J. *Lawfully Occupied , the Centennial History of the Otago Law Society* (Dunedin 1979)
- Currey, C.H. *Sir Frances Forbes* (Sydney, Angus and Robertson, 1968)
- Currey, C.H. *The Brothers Bent* (Sydney U.P., 1968).
- Dalziel, Raewyn *Julius Vogel: Business Politician* (Auckland UP 1986)
- Davis, A.H. *A Lawyer's Letters - A Popular Guide to the Common Law and Principal Statutes of Tasmania* (Aikenhead & Button, Launceston, 1886)
- Dean, Sir Arthur *A Multitude of Counsellors: A History of the Bar of Victoria* (F.W. Cheshire & Co, for Bar Council of Victoria, Melbourne, 1968).
- Denison, Sir William *Varieties of Vice-Regal Life* (London, Longmans Green, 1870)
- Dowden, E.(ed) *The Correspondence of Henry Taylor* (Longmans Green, London, 1888)
- Dugdale, D.F. *Lawful Occasion: Notes on the History of the Auckland District Law Society 1879-1979* (ADLS, Auckland, 1979).
- Duman, Daniel *The English and Colonial Bars in the Nineteenth Century* (1983)
- Duncan, L. and Honsberger J.D. *Bankruptcy in Canada* (3rd ed.) (Canada Law Book Co, Toronto, 1978)
- Dutton, G. *The Hero as Murderer: The Life of Edward John Eyre, Australian Explorer and Governor of Jamaica, 1815-1901* (Collins, London, 1967).
- Dwarris, Sir Fortunatus *A General Treatise on Statutes* (2nd ed) (William Benning & Co., London, 1848)

- Eastwood J.J. and Smith F.B.,(eds) *Historical Studies: Australia and New Zealand: Selected Articles* (Melbourne UP 1964)
- Eddy, J.J. *Britain and the Australian Government 1818-1831 - the Technique of Government*. (Clarendon Press, Oxford 1969)
- Eddy, John and Schreuder, Deryck (eds) *The Rise of Colonial Nationalism* (Allen & Unwin, Sydney, 1988)
- Eggleston, Elizabeth *Fear, Favour or Affection* (A.N.U. Press, Canberra, 1976)
- Eldred-Grigg, S. *Pleasures of the Flesh*, (Reed, Wellington, 1984).
- Ellinghaus, M.P.; Bradbrook, A.J. and Duggan A.J.(eds) *The Emergence of Australian Law* (Butterworths Australia, 1989)
- Finn, P.D. *Law and Government in Colonial Australia* (OUP, Australia, 1987)
- Fitzpatrick, K. *Sir John Franklin in Tasmania 1837-43* (Melbourne UP 1949)
- Flaherty, D.(ed) *Essays in the History of Canadian Law* Vols. 1 & 2 (Osgoode Society of Canada, Toronto 1981 and 1983)
- Foden, N.A. *Constitutional Development of New Zealand in the First Decade 1839-49* (1937)
- Foden, N.A. *New Zealand Legal History (1642-1842)* (Sweet & Maxwell, Wellington, 1965)
- Fogarty, J.F. *Bourke and Fogarty's Maintenance, Custody and Adoption Law* (3rd ed, Butterworths Australia Ltd, Melbourne, 1972)
- Forde, J L *The Story of the Bar of Victoria* (Whitcombe & Tombs, Melbourne & NZ, 1913)
- Fox, H.G. *The Canadian Law and Practice relating to Letters Patent for Inventions* (4th ed) (Carswell, Toronto, 1969).
- Francis, Mark *Governors and Settlers; Images of Authority in the British Colonies 1820-60.*(Macmillan, London, 1992)
- Fricke, G.L.(ed) *Compulsory Acquisition of Land in Australia* (2nd ed) (Law Book Co 1982).
- Friedland, M.L. *A Century of Criminal Justice* (Carswell & Co, Toronto, 1984)
- Friedman, Lawrence *A History of American Law* (Simon & Schuster, New York, 1985).
- Gavan Duffy, Sir Charles *My Life in Two Hemispheres* (T. Fisher Unwin, London, 1898, facsimile edition, Irish UP 1969).
- Gernholtz, R.O.P. *Principles of South African Patent Law* (Juta, Capetown, 1971)
- Gisborne, William *New Zealand Rulers and Statesmen from 1840 to 1897* (Sampson Low Marston, London, 1897)
- Glazebrook, G.P. de T. *Sir Charles Bagot in Canada* (OUP, 1929)
- Golder, Hilary *High and Responsible Office: A History of the New South Wales Magistracy* (Sydney UP, 1991).

- Goodwin, C.D.W. *Economic Enquiry in Australia* (Duke University Press 1966)
- Graham, Jeanine *Frederick Weld* (Auckland UP, 1983)
- Grainger, Elena *Martin of Martin Place* (Alpha Books, Sydney 1970)
- Gurner, John Augustus *Life's Panorama* (Lothian Publishing Co, Melbourne, 1930).
- Hanks, P. and Keon-Cohen, B.(eds) *Aborigines and the Law* (Geo Allen and Unwin, Sydney, 1984)
- Hannan, D.J. *The Life of Chief Justice Way* (Angus & Robertson, Sydney, 1960).
- Harrison G.L. *Legislation on Insanity* (Privately printed Philadelphia 1884)
- Hartz, Louis *The Founding of New Societies: Studies in the history of the United States, Latin America, South Africa, Canada and Australia.* (Harcourt Price & World, New York, 1964).
- Hasluck, Paul *Black Australians (A Survey of Native Policy in Western Australia 1829-97* (Melbourne UP, 1942)
- Hall, H.L. *The Colonial Office; A History* (Longmans Green, London, 1937)
- Hamilton, W.B.(ed.) *The Transfer of Institutions* - (Duke UP, Durham N.C. 1964)
- Hanlon, A.C. *Random Recollections* (O.D.T., Dunedin, 1939)
- Henderson, G.C. *Sir George Grey: Pioneer of Empire in Southern Lands* (Dent & Co, London, 1907)
- Heussler, Robert *Yesterday's Rulers: The Making of the British Colonial Service* (Syracuse U.P., 1963)
- Hight, J.D. and Bamford, A. *Constitutional History and Law of New Zealand* (Whitcombe & Tombs, Christchurch 1914).
- Hill, Richard S. *Policing the Colonial Frontier* (Government Printer, Wellington, 1986)
- Hinde, G.W. (ed) *The New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971);
- Hirst J.B. *The Strange Birth of Colonial Democracy: New South Wales 1848-1884* (Allen & Unwin, Sydney 1988)
- Holt, H.T.E. *A Court Rises: The Lives and Times of the Judges of the District Court of New South Wales*) (Law Foundation of New South Wales, 1976).
- Holt, James *Compulsory Arbitration in New Zealand: The First Forty Years* (Auckland U.P., Auckland, 1986)
- Horwitz, Morton *The Transformation of American Law 1870-1960* (Harvard UP, 1977)
- Howell, P.A. *The Judicial Committee of the Privy Council: its Origins, Structure and Development 1833-1876* (Cambridge UP, 1979)
- Hoyle, R.R. *King O'Malley* (McMillan of Australia, 1981).
- Inglis, B.D. and Mercer, A.G.(eds) *Family Law Centenary Essays* (Sweet & Maxwell, Wellington, 1967).

- Jackson, Keith *The Failure and Abolition of the New Zealand Legislative Council* (Otago U.P., Dunedin, 1972)
- Jenks, E. *A History of the Australasian Colonies (from their Foundation to the year 1911)* (Cambridge UP 1912)
- Jenks, Edward *The Government of Victoria Australia* (Geo. Roberston, Melbourne 1897)
- Jenkins, E.(ed) *Discussions of Colonial Questions* (Strahan & Co, London, 1872).
- Johnson, Herbert A. *Essays on New York Colonial Legal History* (Greenwood Press, Westport Conn, 1981).
- Jourdain, R.W. *History of Land Legislation and Settlement in NZ* (Government Printer, Wellington, 1925)
- Joyce, R.B. *Samuel Walker Griffith* (U Queensland Press, 1984)
- Knaplund, Paul *James Stephen and the Colonial System 1813-1847* (Univ. Wisconsin Press, 1953)
- Knaplund, Paul *The British Empire 1815-1939* (Harpers, New York, 1941).
- Knox, Bruce(ed), *The Queensland Years of Robert Herbert, Premier; Letters and Papers* (U Qld Press, 1977)
- La Nauze, J.A. *Alfred Deakin : A Biography* (Melbourne U.P. 1965)
- Lane Poole, S.(ed), *Thirty Years of Colonial Government, a Selection of the Despatches and Letters of Sir George F. Bowen*, (Longmans, Green, London, 1889).
- Larcombe, F.A. *A History of Local Government in New South Wales* (three vols, Sydney University Press 1973-77)
- Laskin, B. *The British Tradition in Canadian Law* (Stevens, London, 1969).
- Law Reform Commission of the Australasian Capital Territory. *Report on Review of New South Wales Acts in force in the Australian Capital Territory dated 18th October 1972.* (Government Printer, Canberra, 1973).
- Law Reform Commission of British Columbia *Civil Rights - Part 1; the Legal Position of the Crown* (1972)
- Law Reform Commission of British Columbia *Report in the Absconding Debtors Act and Bail Act* (1978)
- Law Reform Commission of British Columbia *Report on the Replevin Act* (1978)
- Law Reform Commission of British Columbia *Report on Landlord and Tenant Relationships: Residential Tenancies* (1973)
- Law Reform Commission of British Columbia *Report on Debtor-Creditor Relationships, part 2* (1972)
- Law Reform Commission of British Columbia *Debtor-Creditor Relationships (Interim Report) part 4 - Pre-judgment Interest*
- Law Reform Commission of British Columbia *Report on Creditors Relief Legislation* (1979)
- Law Reform Commission of British Columbia *Report on Arbitration* (1982)

- Lennard, G. *Sir William Martin* (Whitcombe and Tombs, Christchurch, 1961).
- Loyau, G.E. *Notable South Australians* (privately published, Adelaide, 1885)
- Macintyre, S. *A Colonial Liberalism: The Lost World of Three Victorian Visionaries* (OUP of Australia, Melbourne, 1991).
- MacIntyre, W. David *The Journal of Henry Sewell 1853-7* (Whitcoulls, Christchurch, 1980).
- MacMillan, Mona *Sir Henry Barkly ; Mediator and Moderator 1815-1898* (A.A. Balkema, Capetown, 1970)
- Maddaugh, P D. *A Bibliography of Canadian Legal History* (Toronto, York U. Law Library 1972).
- Madden, A.F. and Morris-Jones, W.H. (eds) *Australia and Britain, Studies in a Changing Relationship* (University of London Press, 1980)
- Marindin, G. E.(ed), *Letters of Frederic Lord Blachford, Undersecretary of State for the Colonies 1860-71* (John Murray, London, 1896).
- Martin, A. W. *Henry Parkes: a Biography* (Melbourne UP, Melbourne 1980).
- Martin, A.W and Wardle, P. *Members of the Legislative Assembly of New South Wales 1856-1901: Biographical Notes.* (ANU Press, Canberra, 1959).
- Mayhew, P.K. *The Penal System of New Zealand 1840-1924* (Department of Justice , Wellington 1959).
- McConnell W.H. *Prairie Justice* (Burroughs & Co, Calgary, 1980)
- McIvor, Tim *The Rainmaker : A Biography of John Ballance, Journalist and Politician 1839-1893* (Heinemann Reed, Auckland 1989)
- McKenzie, P.D. *Spratt & McKenzie's Law of Insolvency* (2nd ed) (Butterworths, Wellington, 1972).
- McLintock, A.H. *Crown Colony Government in New Zealand*, (Government Printer, Wellington, 1958).
- McMartin, Arthur *Public Servants and Patronage: the Foundation and Rise of the New South Wales Public Service 1786-1859* (Sydney UP, 1983)
- McPherson, B H *The Supreme Court of Queensland 1859-1960* (Butterworths of Australia, Brisbane 1989).
- Meagher, R.P., Gummow, W.M.C. and Lehane, J.R.F. *Equity: Doctrines and Remedies* (2nd ed) (Butterworths of Australia, 1984)
- Mennell, S. *Dictionary of Australasian Biography* (Hutchinson & Co, London, 1892)
- Millard, G.W. *The Law of Personal Property in New South Wales* (Maxwell, Sydney, 1898).
- Millard, G.W. *The Law of Personal Property in New South Wales* (7th ed, by B.A. Helmore, 1965, Law Book Co of Australasia,)
- Millen, Julia *The Story of Bell Gully Buddle Weir 1840-1990* (Bell Gully Buddle Weir, Wellington, 1990)
- Molony, J.N. *An Architect of Freedom: John Hubert Plunkett in New South Wales 1832-1869* (ANU Press, 1973)

- Morphy, Howard and Edwards, Elizabeth (eds) *Australia in Oxford* (Pitt Rivers Museum, University of Oxford Monograph 4, 1988).
- Morris, E.E. *A Memoir of George Higinbotham* (Macmillan & Co, London, 1895).
- Morris, N. and Perlman, M.(eds) *Law and Crime: Essays in Honour of Sir John Barry*. (Gordon & Breach New York 1972).
- Murphy, D.J. and Joyce, R.B.(eds) *Queensland Political Portraits 1859-1952*, (U Queensland Press, 1978)
- Nadel, George *Australia's Colonial Culture: Ideas, Men and Institutions in Mid-Nineteenth Century Eastern Australia* (F W Cheshire, Melbourne, 1957).
- New South Wales Law Reform Commission *Proceedings by and against the Crown*
- New Zealand Dictionary of Biography*
- O'Farrell, Patrick *The Irish in Australia* (NSWUP, 1986)
- Ogilvie, M.H. *Historical Introduction to Legal Studies* (Toronto, Carswell, 1982).
- Paton, G W (ed). *The Commonwealth of Australia: The Development of its Laws and Constitution* (Stevens and Sons, London, 1952)
- Peart, C. *The Three Lives of Gavan Duffy* (New South Wales UP 1979)
- Pember Reeves, William *State Experiments in New Zealand* (Allen & Unwin, London, 1902)
- Pike, D. *Paradise of Dissent: South Australia 1829-1857"* (2nd ed., Melbourne UP, 1967)
- Pope-Hennessy, James *Verandah: Some Episodes in the Crown Colonies 1867-89* (Geo. Allen & Unwin, London, 1964)
- Potts, E.D. and Potts, A. *Young America and Australian Gold: Americans and the Gold Rush of the 1850s* (U Queensland Press, 1974)
- Prentis, Malcolm *The Scots in Australia* (Sydney UP, 1983)
- Read, David B. *The Lives of the Judges of Upper Canada and Ontario; from 1791 to the Present Time* (Rowse and Hutchison, Toronto, 1888).
- Reid, Sir George *My Reminiscences* (Cassell, London, 1917)
- Renton, A.W. and Phillimore G.G. (eds), *Burge's Commentaries on Colonial and Foreign Laws Generally and in their Conflict with each other and with the Law of England* (2nd ed., London, 1907)
- Richardson, I.L.M. and Dunn, W.H. *Sir Robert Stout* (Reed, Wellington, 1961)
- Roberts, David *Paternalism in Early Victorian England* (Croom Helm, London, 1979).
- Roberts S. H. *History of Australian Land Settlement 1788-1920* (1924; reprinted McMillan of Australia 1968)
- Roberts-Wray, K *Commonwealth and Colonial Law* (Stephens, London, 1966).
- Robson, J.L.(ed.). *New Zealand; The Development of its Laws and Constitution* (2nd ed., 1967, London, Stevens & Sons)

- Roe, M.(ed) *The Flow of Culture: Tasmanian Studies* (Australian Academy of the Humanities, Canberra, Occasional Papers No.4, 1987).
- Romney, Paul M. *Mr Attorney: The Attorney-General for Ontario in Court, Cabinet, and Legislature, 1791-1899* (Osgoode Society, Toronto, 1986)
- Rose, D.J. *Lewis's Australian Bankruptcy Law* (8th ed.) (Law Book Co, Sydney, 1984).
- Russell, E. *A History of the Law in Western Australia* (edited and completed by F.M. Robinson and P.W. Nicholls) (Perth, UWA Press, 1980)
- Scholefield, G.H.(ed) *The Richmond- Atkinson Papers*, (Government Printer, Wellington, 1960)
- Seymour, J A. *Dealing with Young Offenders in New Zealand: the system in evolution* (Legal Research Foundation Monograph, Auckland, 1976)
- Sharp, C.A. (ed.) *The Letters of the Hon. Constantine Dillon 1842-53* (A.H. and A.W. Reed, Wellington, 1954)
- Shaw, A.G.L. *Sir George Arthur 1784-1854* (Melbourne UP, 1980)
- Shaw, A.G.L.(ed) *The Gipps - La Trobe Correspondence 1839-1846* (Melbourne U.P. 1989)
- Sinclair, Keith,(ed) *Tasman Relations, New Zealand and Australia 1788-1988* (Auckland UP 1987).
- Snow, A.H. *The Question of Aborigines* (G.P.Putnam, New York, 1921)
- Spiller, P.R. *History of the District and Supreme Courts of Natal* (Butterworths, Durban 1986)
- Spiller, Peter *The Chapman Legal Family* (Victoria University Press, 1992)
- Starke, J.G. *Assignments of Choses in Action in Australia* (Butterworths, Sydney, 1972)
- Stembridge, S.R. *Parliament, The Press and the Colonies 1846-1880* (Garland, New York, 1982)
- Stevens, F.S.(ed) *Racism: the Australian Experience* (Australia and New Zealand Book Co., Sydney, 1972)
- Stewart, W. Downie *Life and Times of Sir Francis Bell* (Butterworths, Wellington, 1937).
- Stockton, A.A. *The Judges of New Brunswick and their Times*, from the manuscript of the late Joseph Wilson Lawrence, edited and annotated by A.A. Stockton. (published by Acadiensis magazine, St. John, New Brunswick, 1907).
- Sutton, K.C.T. *Sales and Consumer law in Australia* (Law Book Co, 1983)
- Swainson, William *New Zealand and its Colonisation* (Smith Elder, London, 1859)
- Swinfen, D B *Imperial Control of Colonial legislation 1813-1865 : A Study of British Policy toward Colonial Legislative Powers* (Clarendon Press, Oxford, 1970)
- Tarring, C.J. *Chapters on the Law Relating to the Colonies* (4th ed., Stevens & Haynes, London, 1913)
- Taylor, Henry *Autobiography* (London, Longmans Paul, 1885)

- Therry, R. *Reminiscences of Thirty Years Residence in New South Wales and Victoria* (first published 1863, facsimile edition Sydney UP 1974).
- Tidrick, Kathryn *Empire and the English Character* (I.B. Tauris & Co., London, 1990)
- Tomasic, M.(ed.) *Legislation and Society in Australia*, (Geo. Allen and Unwin, Sydney, 1980)
- Toose, P., Watson R., and Benjafield, D. *Australian Divorce Law and Practice* (Law Book Company of Australia, 1968).
- Trainor, Luke *British Imperialism and Australian Nationalism* (Cambridge UP, Melbourne, 1994)
- Treatt, F.B., St. John, E.H. and Mahoney, D.L. *McKenzie;s Practice in Divorce* (Law Book Company of Australia, Sydney, 1952).
- Visser, D.P. *Essays on the History of Law* (Juta, Capetown, 1989)
- Waite, P., Oxner, S. and Barnes, T.(eds.) *Law in a Colonial Society: The Nova Scotia Experience"* (Carswell, Toronto, 1984)
- Walker, R.E. and Walsh, C. *The Married Women's Property Act 1901(NSW)* (Law Book Co of Australasia, Sydney, 1950).
- Walter, James(ed) *Australian Studies: A Survey* (OUP, 1989).
- Ward, A. *A Show of Justice* (ANU Press, 1974)
- Ward, J.M. *Earl Grey and the Australian Colonies 1846-1857* (Melbourne UP 1958)
- Ward, J.M. *Empire in the Antipodes* (Edward Arnold, London, 1966)
- Wettenhall, R.L. *A Guide to Tasmanian Government Administration* (Platypus Publications, Hobart, 1968)
- Whalan D.J. *The Torrens System in Australia* (Law Book Co, Sydney, 1982.)
- Williams, David R. *"The Man for a New Country" : Sir Matthew Baillie Begbie* (Gray's Publishing Co, Sidney British Columbia, 1977).
- Willis, John *A History of Dalhousie Law School* (U Toronto Press, 1979).
- Wilson, J.N. *Contractors' Liens and Charges* (2nd ed., Butterworths, Wellington, 1976).
- Wright, Raymond *A People's Counsel: A History of the Parliament of Victoria* (OUP, Melbourne, 1992)
- Yorston, R.K. and Fortescue, E.E. *Australian Mercantile Law* (2nd ed) (Law Book Co of Australasia, Melbourne, 1940).
- Young, D.M. *The Colonial Office in the Early Nineteenth Century* (Longmans, London, 1961).
- Young, Sir John M. *Sir William Foster Stawell* (Melbourne UP 1989).

B. Pamphlets and Ephemera

- Crisp, M. *"History and Status of the Legal Profession"* (U Tasmania, 1968).
- Fisher, T.J. *"Colonial Law Reform"* (Sydney, J Reading and Co. 1870)
- Jones, C.E. *"Michie's Bottle Bill"* (Mason, Firth & McCutcheon, Melbourne, 1870)
- Parsons, T. *"Law in Victoria"* (James Caple, Melbourne, 1859)
- Sheridan, J.B. *"First Impressions of a Law Reformer"* (Adelaide Advertiser, Adelaide, 1880).
- Stephen, Alfred *"Speeches of Alfred Stephen in the Legislative Council on the Second Reading of the Divorce Extension Bill"* (printed by Robert Bone, Sydney, 1886).
- Stephen, Alfred *"Australian Divorce Bills: The Objections raised to them, religious and social, considered"* (Sydney, n.d. but probably 1888).
- 'The Telegraph Libel Case' - Regina vs George Burnett Barton* (Otago Daily Times, Dunedin, 1871)

Newspapers

Advertiser (Adelaide)

Age (Melbourne)

Argus (Melbourne)

Hobart Town Mercury

Sydney Morning Herald.

Victoria Law Times and Legal Observer (Melbourne)

Lower Canada Law Journal

C. Articles

- Acheson, F.O.V. "Adoption among the Maoris of New Zealand" (1922) 4 JCL&IL(3rd series) 60
- Acworth W.M. "The Rights of Railway Passengers in Respect of Unpunctuality" 3 JCL&IL(2nd Series) 31
- Adams, F.B. "Confessions" (1963) 1 NZULR 5
- Allan, E.D. "A New Look for Trustees" (1963) 1 U Tas LR 797
- Altschul, S. and Carron, C. "Chronology of Some Legal Landmarks in the History of Canadian Women" (1975) 21 McGill LJ 478
- Arnett, E.J. "Canadian Regulation of Foreign Investment" (1972) 50 Can Bar Rev 213
- Armstrong, W.S. "The British Columbia Water Act : the End of Riparian Rights" (1962) 1 UBCLR 583
- Arthurs, H.W. "Developing Industrial Citizenship : A Challenge for Canada's Second Century " (1967) 45 Can Bar Rev 786
- Atherton, Rosalind "Expectation without Right: Testamentary Freedom and the Position of Women in 19th Century New South Wales" (1988) 11 UNSWLJ 133
- Atherton, Rosalind "New Zealand's Testator's family Maintenance Act of 1900 - The Stouts, the Women's Movement and Political Compromise" (1990) 7 Otago LR 202.
- Axworthy, C.S. "Credit Unions in Canada: The Dilemma of Success " (1981) 31 U Toronto LJ 72
- Aylen, John A. "The Mortmain Laws of Quebec" (1923) 1 Can Bar Rev 748
- Backhouse, Constance "Labour Unions and Anti-Combines Policy" (1976) 14 Osgoode Hall LJ 113
- Backhouse, Constance "Desperate Women and Compassionate Courts : Infanticide in 19th Century Canada" (1984) 34 U Toronto LJ 447
- Backhouse, Constance "Pure Patriarchy: Nineteenth Century Canadian Marriage" (1985) 31 McGill LJ 265
- Backhouse, Constance "The Tort of Seduction: Fathers and Daughters in Nineteenth-Century Canada" (1986) 10 Dalhousie LJ 45
- Baker, G. Blaine "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 Law and History Review 219.
- Baldwin, Sean "New Zealand's Legal Identity" (1989) 4 Canterbury LR 173.
- Bale, Gordon "Limitation of Testamentary Disposition in Canada" (1964) 42 Can Bar Rev 367
- Barry, J.V. "The Defence of Provocation" (1948) 4 Res Judicata 129
- Beaglehole, J.C. "The Colonial Office 1782-1854" HSA NZ, 1940, vol 1, p.170
- Beauchesne, A "The Provincial Legislatures are not Parliaments" (1944) 22 Can Bar Rev 137

- Bedwell, C.E.A. "Conditions of Admission to the Legal Profession" (1911) 12 JCL(2nd series) 209
- Beinart, B. "Liability of a Deceased estate for Maintenance" [1958] Acta Juridica 92
- Bennett, J.M. and Forbes, J.R. "Tradition and Experiment: Some Australian Legal Attitudes in The Nineteenth Century" (1971) 7 U Qld LJ 172
- Bennett, J.M. "The Status and Authority of the Deputy Judge-Advocates of New South Wales " (1958) 2 Sydney LR 501
- Bennett, J.M. "The Law Institute of New South Wales" (1960) 3 Sydney LR 292
- Bennett, J.M. "The establishment of Jury Trial in New South Wales" (1961) 3 Sydney LR 463
- Bennett, J.M. "The Establishment of Divorce Laws in New South Wales" (1962) 4 Sydney LR 241
- Bennett, J.M. "Historical Trends in Australian Law Reform" (1969) 9 UWALR 211
- Bennett, J.M. "The day of retribution - Commissioner Bigge's Inquiries in Colonial New South Wales" (1971) 15 AmJLH 85
- Bennett, J.M. "Sir Julian Salomons: Fifth Chief Justice of New South Wales" JRAHS, 1972, vol. 58, p.101.
- Bennett, J.M. "The Office of Sheriff: Historical Notes on its Evolution in New South Wales " (1974) 7 Sydney LR 360
- Bennett, J.M. "Sir Henry Wrenfordsley" (1977) 13 UWALR 25
- Bennett, J.M. "Patronage and the Law: The Career of J.F. Hargrave" JRAHS, 1980, vol.66, p.97
- Bentham, R.W. and Bennett, J.M. "Fusion or Separation? Historical Notes on the Division of the Legal Profession in New South Wales" (1959) 3 Sydney LR 285
- Berns, Sandra S. "Women in English Legal History: Subject (almost), Object (irrevocably), Person (not quite)" (1993) 12 U Tas LR 26
- Binavince, E.S. "Economic Growth Through Constitutional Safeguards " (1971) 17 McGill LJ 189
- Bisschop, W.R. "Modern Romano-Dutch Law" (1926) 42 LQR 237
- Bisschop, W.R. "Romano-Dutch Law in South Africa" (1904) 20 LQR 41
- Bissonette, A.L. "Canadian Death Duty Legislation 1892-1958" (1958) 36 Can Bar Rev 215
- Blair, D.G. "Combines, Controls or Competition?" (1953) 31 Can Bar Rev 1083
- Blumenstein, J.H. "Matrimonial Jurisdiction in Canada" (1928) 6 Can Bar Rev 570
- Bouck, J.C. "Introducing English Statute Law into the Provinces: Time for a Change?" (1979) 57 Can Bar Rev 74
- Bowker, W.F. "Ten More Years under the Contributory Negligence Acts" (1965) 2 UBCLR 198

- Bowker, W.F. "Fifty-five Years at the Alberta Bar : George Hobson Steer Q.C." (1982) 20 Alberta LR 242
- Bowker, W.F. "Stipendiary Magistrates and the Supreme Court of the North West Territories 1876-1907" (1988) 26 Alberta LR 245.
- Boyce, P.J. "The Governors of Western Australia under Representative Government, 1870-1890" (1961) 4 University Studies in History 101.
- Boyd, N. "The Origins of Canadian Narcotics Legislation : the Process of Criminalization in Historical Context " (1984) 8 Dalhousie LJ 102
- Brierley, J.E.C. "Quebec's Civil Law Codification Viewed and Reviewed" (1968) 14 McGill LJ 521
- Brent, Gail "The Development of the Law Relating to the Participation of Canadian Women in Public Life" (1975) 25 U Toronto LJ 358
- Brett, P. "Civil and Criminal Defamation in Western Australia" (1951) U WA LR 43
- Brettingham-Moore, C.G. "The Office of Master" (1963) 1 U Tas LR 797
- Brooks, N. "The Common Law and the Evidence Code: Are They Compatible?" (1978) 27 UNBLJ 27
- Brown, D. "Police Offences" (1972) 10 UWALR 254
- Brown, E.G. "British Statutes in the Emergent nations of North America 1606-1949" (1963) 7 AmJLH 95
- Brown, E. "Equitable Jurisdiction and the Court of Chancery in Upper Canada "(1983) 21 Osgoode Hall LJ 275.
- Brown, Mannie "Dependants' Relief Acts (part 1)" (1940) 18 Can Bar Rev 261
- Brown R. "Comparative Legislation in Bankruptcy" (1900) 2 JCL&IL(Series II) 251.
- Brown, W.J. "The Hare Election System in Tasmania" (1899) 15 LQR 51
- Bridgewater, T.R. "Childrens Courts" (1906) 7 JCL&IL(2nd series) 375
- Buck, A.R. "'A Blot on the Certificate' Dower and Women's Property Rights in Colonial New South Wales" (1987) 5 Aust J of Law and Soc 87
- Burchell, C.J. "Canadian Admiralty Jurisdiction and Shipping Laws " (1929) 45 LQR 370
- Butterworth, A.R. "The Immigration of Coloured Races into British Colonies" (1900) 1 JCL&IL(2nd series) 336.
- Cahill, Barry " `How far English Laws are in Force Here' Nova Scotia's First Century of Reception Law Jurisprudence" (1993) 42 UNB LJ 113
- Cameron, B.J. "Law Reform in New Zealand" (1956) 32 NZLJ 72, 88, 106.
- Campbell, Enid "Women and Public Functions" (1960) 1 Adelaide LR 190
- Campbell, Enid "The Royal Prerogative to create Colonial Courts " (1964) 4 Sydney LR 343.
- Campbell, Enid "Prerogative rule in NSW 1788-1823" JRAHS 1964, vol. 50, p.161

- Campbell, Enid "Colonial Legislation and the Laws of England" (1965) 2 U Tas LR 148
- Campbell, Enid "Conditional Land Grants by the Crown" (1966) 5 Sydney LR 267
- Canaway, A.P. "Actions Against the Commonwealth for Torts" (1904) 1 Commonwealth LR 241
- Carney, T. "The History of Australian Drug laws: Commercialism to Confusion?" (1980) 7 Monash LR 165
- Carney, T. "Civil and Social Guardianship of Intellectually Handicapped People" (1981) 8 Monash LR 199
- Cassidy, Julie "A Re-appraisal of Aboriginal Policy in Colonial Australia: Imperial and Colonial Instruments Recognising the Special Rights and Status of the Australian Aborigines" (1989) 10 JLH 365
- Castles, A.C. "Discretionary Power in Adoption Statutes" (1956) 7 Res Judicata 307
- Castles, A.C. "The Reception and Status of English law in Australia" (1963) 2 Adelaide LR 1
- Chapman, F.R. "Law Reporting in New Zealand" (1933) 9 NZLJ 53.
- Chartrand, P.E. "The Status of Aboriginal Land Rights in Australia" (1981) 19 Alberta LR 436
- Cheffins, B. "The Development of Competition Policy 1890-1940: A Re-Evaluation of a Canadian and American Tradition" (1989) 27 Osgoode Hall LJ 449.
- Christie, I. "Inducing Breach of Contract in Trade Disputes: Development of the Law in England and Canada " (1967) 13 McGill LJ 101
- Christie, James "The Legislative Council of New Zealand" (1924) 6 JCL&IL(3rd series) 19
- Christie, James "The Divorce Law of New Zealand" (1927) 9 JCL&IL(3rd series) 95.
- Christie, James "The Statute Law of New Zealand specially applicable to Women and Children" (1929) 11 JCL&IL(3rd series) 209.
- Clarke, S. D. and Renard, I.D. "The Riparian Doctrine and Australian Legislation" (1970) 7 MULR 475
- Claxton, B. "Commercial Arbitration under Canadian Law" (1943) 21 Can Bar Rev 171
- Clay W.G. "The Law of Employers' Liability" (1897) 2 JCL(1st series) 1
- Clokie, H. McD. "Basic Problems of the Canadian Constitution" (1942) 20 Can Bar Rev 395
- Cohen, M. "Towards Reconsideration in Anti-Combines Law and Policy" (1963) 9 McGill LJ 81
- Colgate, W. "William Osgoode, Chief Justice " (1953) 31 Can Bar Rev 270
- Collins, C.W. "Matters of Social Conscience: Western Australia 1829-90" (1968) 2 University Studies in History 1.
- Cooke, Sir Robin "The New Zealand National Identity" (1987) 3 Canterbury LR 182.

- Cooley, Rita W. "Predecessors of the Federal Attorney-General: The Attorney-General in England and the American Colonies" (1958) 12 *AmJLH* 304
- Coppel, E.G. et al, "Compulsory Acquisition of Land in Australia" (1921) 3 *JCL&IL*(3rd series) 251
- Coppel, E.G. "The Control of the Custody of Children by the Supreme Court of Victoria" (1939) 2 *Res Judicata* 33
- Cornford, P.A. "The Administration of Justice in New Zealand 1841-1846 (A Legislative Chronicle) [Part I] The Fisher Period" (1970) 4 *NZULR* 18
- Cornford, P.A. "The Administration of Justice in New Zealand 1841-1846 (A Legislative Chronicle) [Part II] The Swainson Period" (1970) 4 *NZULR* 120.
- Cornford, P.A. "Crown Law Office - Early History" [1964] *NZLJ* 423
- Cornish, W.R. "Cumulative Protection for Industrial Designs" (1973) 8 *UBCLR* 219
- Craig, W.H. and Scott, M.F.C. "The Maintenance of Concubines" (1963) 1 *U Tas LR* 685
- Cranston, R.F. "The Aborigines and the Law : An Overview" (1973) 8 *U Qld LJ* 60
- Crommelin, M. "Jurisdiction over Onshore Oil and Gas in Canada " (1975) 10 *UBCLR* 86
- Crommelin, M. "Mineral Exploration in Australia and Western Canada" (1974) 9 *UBCLR* 38
- Crouse, G. "A Critique of Canadian Criminal Legislation " (1934) 12 *Can Bar Rev* 545, 601
- Currey C.H. "The Influence of the English Law Reformers of the Early Nineteenth Century on the Law of New South Wales" *JRAHS*, 1937, vol.23, p.227.
- Currey C. H. "The Law of Marriage and Divorce in NSW" *JRAHS*, 1956, vol 41, p.978.
- Curry, G. "A Bundle of Diverse Offences: The Vagrancy Laws with special reference to the New Zealand Experience" (1972) 1 *Anglo-American LR* 523.
- Daunton-Fear, M.W. "Habitual Criminals and the Indeterminate Sentence" (1968) 3 *Adelaide LR* 335
- Davenport, T.R.H. "Some Reflections on the History of Land Tenure in South Africa, seen in the Light of attempts by the State to impose political and economic Control" [1985] *Acta Juridica* 53
- Davidson, A.P. "A Skeleton in the Cupboard : Master and Servant Legislation and the Industrial Torts in Tasmania" (1976) 5 *U Tas LR* 123
- Davies, S. "Aborigines, Murder and the Criminal Law in early Port Philip 1841-51" *Hist.Studies*, 1987, vol.22, p.313.
- Davison, J.F. "The Problem of Liquor Legislation in Canada" (1926) 4 *Can Bar Rev* 468
- Davison, J.F. "Marriage and Divorce " (1927) 5 *Can Bar Rev* 654
- Davis, A.G. "Liability for Animals in New Zealand" (1963) 1 *NZULR* 5

- Davis, B.H. "Legal Aspects of the History and Background of Town and Country Planning" (1969) 3 NZULR 310
- Davis, P.N. "'Nationalization' of Water use Rights in the Australian States " (1975) 9 U Qld LJ 1
- de Montigny, Louvigny "Copyright in Canada" (1927) 5 Can Bar Rev 27
- De Wet, J.C. "A Hundred Years of Water Law" [1959] Acta Juridica 31
- Del Buono, V.M. "The Right to Appeal in Indictable Cases" (1978) 16 Alta LR 446
- Denison, J.S. "Conveyancing under the Ontario Devolution of Estates Act" (1937) 15 Can Bar Rev 516
- Dickens, B.M. and Cook, R.J. "The Development of Commonwealth Abortion Laws" (1979) 28 ICLQ 424
- Dickson, R. "Legal Aspects of the Factory Acts" (1981) 2 J Leg Hist 276
- Donaldson, R.A. and Jackson, J.A. "The Foreign Investment Review Act: An Analysis of the Legislation" (1975) 53 Can Bar Rev 170
- Doogue, J.A. "Nelson District Law Society Centenary" [1986] NZLJ 73
- Doull, John "Benefit of Clergy" (1941) 19 Can Bar Rev 22
- Doull, J. "The First Chief Justice of Cape Breton - Richard Gibbons" (1945) 23 Can Bar Rev 415.
- Duffy, I.L.H. "English Bankrupts 1571-1861" (1980) 24 AmJLH 283
- Dunlop, C.R.B. "Execution Against Personal Property in England and British Columbia " (1972) 7 UBCLR 171
- Dunlop, C.R.B. "Execution against Real Property in British Columbia" (1973) 8 UBCLR 246
- Dunlop, C.R.B. "Some Aspects of the Charging Order as a Remedy for Unsecured Creditors " (1967) 3 UBCLR 83
- Durrans, Peter J. "The House of Commons and The British Empire 1868-1886" Can JH, 1974, vol.9, p.19.
- Edgeloe, V.A. "The Adelaide Law School 1883-1983" (1983) 9 Adel LR 1
- Edgeworth, Brendon "Defamation Law and the Emergence of a Critical Press in Colonial New South Wales (1824-1831)" (1988) 6 Aust J of Law and Soc 50
- Egerton, H.E. "The Seventeenth and Eighteenth century Privy Council in its relations with the Colonies" (1925) 7 JCL&IL (3rd series) 1
- Elisofon, H. "A Historical and Comparative Study of Bastardy" (1973) 2 Anglo-American LR 306
- Ellinger, E.P. and McKay, L. "Chattels Securities in New Zealand 1843-1887" (1974) 3 Otago LR 153
- Else-Mitchell, Rae "The Foundation of New South Wales and the Inheritance of the Common Law" JRAHS, 1963, vol.49, p.1

- Emery, H.T. "Some Legal Aspects of Oil Development in Alberta " (1950) 28 Can Bar Rev 1071
- Falconbridge, J.D. "Bills of Lading: Proper Law and Renvoi" (1940) 18 Can Bar Rev 77
- Falconbridge, J.D. "The Disorder of the Statutes of Limitation" (1943) 21 Can Bar Rev 669
- Farr, D.M.L. "The Organisation of the Judicial System of Vancouver Island and British Columbia 1849-71" (1967) 3 UBCLR 1.
- Farrar, J.H. "Dr. C.J. Foster, Canterbury's First Law Teacher" (1980) 1 Canterbury LR 5.
- Fine, J. David "The Right to Marry" (1976) 12 UWALR 405
- Finn, Jeremy "The Imperial Laws Application Act 1988" (1989) 4 Canterbury LR 93
- Fisse, Brent "The Use of Publicity as a Criminal Sanction Against Business Corporations" (1971) 8 MULR 107.
- Fitzpatrick, Sir Denis "Legitimation by Subsequent Marriage" (1905) 6 JCL&IL(2nd series) 22
- Flaus, W.R. "Discipline within the New Zealand Legal Profession" (1973) 6 VUWLR 377
- Foster, R.L. "The Influence of Legislation on the Development of Life Insurance in Canada" (1953) 31 Can Bar Rev 786
- Francis, J. "A Bibliography of Canadian Mining Law" (1932) 10 Can Bar Rev 584
- Friedland, Martin "Canadian Criminal Justice 1892-1992" (1993) 42 UNBLJ 175
- Fry, T.P. "Land Tenures in Australian Law " (1946) 3 Res Judicata 158
- Gibson, James A. "Political Prisoners, Transportation for Life and Responsible Government in Canada" (1975) LXVII Ontario History, p. 185.
- Gilbert, A.G.W. "New Brunswick's First Chief Justice" (1958) 11 UNBLJ 29
- Giles, A. "Literary and Artistic Copyright in the Commonwealth" (1905) 3 Commonwealth LR 107 and 145
- Girvin, Stephen D. "Three Irish-born Judges at the Cape 1861-1896" (1989) XXIV (ns) The Irish Jurist 99.
- Glassman, H.P. "The Maine Habitual Offenders Statute" (1967) 13 McGill LJ 653
- Gray, Stephen "Planting the Flag or Burying the Hatchet: Sovereignty and the High Court decision in *Mabo v Queensland*" (1993) 2 Griffith LR
- Gray, V.E. "Dependants' Relief Legislation" (1939) 17 Can Bar Rev 233
- Greig, Sir James "The Joint and Equal Guardianship of Infants in various Legal Systems" (1924) 6 JCL&IL (3rd series) 238.
- Gunn, D.W. "Provincial Taxation of Paid-Up Capital of Foreign Corporations" (1941) 19 Can Bar Rev 31

- Hahlo, H.R. "A Hundred Years of Marriage Law in South Africa" [1959] *Acta Juridica* 47
- Hancock, M. "Discharge of Deportees on Habeas Corpus" (1936) 14 *Can Bar Rev* 116
- Hanson, H.A. "The Evolution of Municipal Government in New Brunswick" (1951) 4 *UNBLJ* 23
- Harley, D.M. "Possessory Title to Wilderness Land" (1958) 11 *UNBLJ* 7
- Harris, I.C. "The Federal Council of Australasia" *JRAHS*, 1988, vol.74, p.32.
- Harrison, W.N. "The Transformation of Torrens's System into the Torrens System " (1961) 4 *U Qld LJ* 125
- Harvey, A. "Herman Merivale, the Colonial Office and the Australian Colonies 1848-60" *JRAHS*, 1974, vol. 60, p.89.
- Harvey, D.C. "Nova Scotia's Blackstone" (1933) 11 *Can Bar Rev* 339
- Haskins, G.L. "Influences of New England Law on the Middle Colonies" (1983) 1 *Law & History Review* 238.
- Hastings, W.K. "The Wakefield Colonisation Plan and Constitutional Development in South Australia, Canada and New Zealand" (1990) 11 *JLH* 279.
- Head, I.L. "The Torrens System in Alberta" (1957) 35 *Can Bar Rev* 1
- Heighington, W. "Parliamentary Status and Provincial Legislatures " (1933) 11 *Can Bar Rev* 295
- Henderson, L.M., et al, "The Legal Status of Illegitimates in the Commonwealth of Australian" (1921) 3 *JCL&IL*(3rd series) 13
- Heuston, R.F.V. "Sir John Salmond" (1964) 2 *Adel LR* 221
- Histed, Elise "The Introduction and Use of the Grand Jury in Victoria" (1987) 8 *JLH* 167
- Hogg P.W. "Victoria's Crown Proceedings Act 1958" (1970) 7 *MULR* 342.
- Holden, A.C. "Divorce in the Commonwealth : A Comparative Study " (1971) 20 *ICLQ* 58
- Holdsworth, W.S. "The History of the Criminal Information" (1923) 1 *Can Bar Rev* 300
- Hooper, A. "Some Anomalies and Developments in the Law of Homicide " (1967) 3 *UBCLR* 55
- Horsburgh, M. "Subsidy and Control: Social Welfare Activities of the New South Wales Government 1858-1910" (1977) 2 *J Aust Stud* 64.
- Howell, P.A. "The Van Diemen's Land Judge Storm " (1966) 2 *U Tas LR* 253
- Howes, D. "From Polyjurality to Monojurality: The Transformation of Quebec Law 1875-1929" (1987) 32 *McGill LJ* 523
- Hoyt, W.L. "Some Aspects of Married Women's Property" (1961) 13 *UNBLJ* 32
- Hubbard, H.A "Marriage Prohibitions, Adoptions and Private Acts of Parliament : The Need for Reform " (1983) 28 *McGill LJ* 177

- Hunter, I. A. "Obscenity, Pornography and Law Reform" (1975) 2 Dalhousie LJ 482
- Hutchison, P.P. "Sir John J.C. Abbott: Barrister and Solicitor " (1948) 26 Can Bar Rev 934
- Ilibert, Sir Courtenay "Introduction to review of Legislation. (1900) 3 JCL&IL(2nd Series) 279 ff.
- Jacobs, D.M. "The Application Of Anti-Trust Legislation in North America " (1966) 15 ICLQ 470
- Jackson, J. "Matrimonial Finance Consequent on Divorce : the English Structure" (1982) 20 Alberta LR 229
- Jameson, D.P. "Proceedings by and against the Crown in Canada" (1948) 26 Can Bar Rev 373
- Jamieson, N.J. "English Law but British Justice" (1980) 4 Otago LR 488
- Joanes, A. "Third Party Rights in Goods Subject to Conditional Sales Agreements and Chattel Mortgages" (1959) 1 UBCLR 23
- Johnson, C.O. "Did Judah P. Benjamin plant the `States Rights' Doctrine in the Interpretation of the British North America Act?" (1967) 45 Can Bar Rev 454
- Johnson, D.R. "Accounts receivable Financing in Canada : Nature of the Charge and Rights of Priority " (1981) 15 UBCLR 87
- Johnson, T. "In a Manner of Speaking: Towards a Reconstitution of Property in Mid-Nineteenth Century Quebec" (1987) 32 McGill LJ 637.
- Johnson, W.S. "Extra-territorial Criminal Legislation" (1935) 13 Can Bar Rev 137
- Johnson, W.S. "Sources of the Quebec Law of Evidence in Civil and Commercial Matters " (1953) 31 Can Bar Rev 1000
- Jordan, F.J.E. "The Federal Divorce Act (1968) and the Constitution" (1968) 14 McGill LJ 209
- Joslin G.S. "'Mortmain' in Canada and the United States: a Comparative Study " (1951) 29 Can Bar Rev 620
- Joyce, R.B. "Sir William McGregor : A Colonial Governor" HSAZ, 1963, vol. 11, p.18
- Kawashima, Y. "Legal Origins of the Indian Reservation in Colonial Massachusetts" (1969) 13 AmJLH 42
- Keith, A.B. "Merchant Shipping Legislation of the Empire" (1910) 11 JCL(2nd series) 294
- Kennedy, G.D. "The Legal Effects of Adoption" (1955) 33 Can Bar Rev 751
- Keon-Cohen B.A. "Mad Judge Montagu: A Misnomer?" (1976) 2 Monash LR 50
- Keon-Cohen, B.A. "John Walpole Willis: First resident Judge in Victoria" (1972) 8 MULR 703
- Kercher, Bruce "An Indigenous Jurisprudence? Debt recovery and Insolvency Law in the New South Wales Court of Civil Jurisdiction 1788-1814" (1988) 6 Aust J of Law and Soc 15

- Kercher, Bruce "The Transformation of Imprisonment for Debt in England 1828 to 1838" (1984) 2 Aust J of Law and Soc 60
- King, Hazel "Pulling Strings at the Colonial Office" JRAHS, 1975, vol.61, p.145.
- King, Hazel "Richard Bourke and his Two Colonial Administrations; a comparative study of Cape Colony and New South Wales " JRAHS, 1964, vol.49, p.360
- Knafla, L.A. and Chapman, T.L. "Criminal Justice in Canada : A Comparative study of the Maritimes and Lower Canada 1760-1812 " (1983) 21 Osgoode Hall LJ 245
- Knight, H. "The Organisation of the Bar in the British Empire" (1915) 15 JCL(2nd series) 161.
- Kolish, Evelyn "Imprisonment for Debt in Lower Canada 1791-1840" (1987) 32 McGill LJ 603.
- Kostal, R.W. "Legal Justice, Social Justice: An Incursion into the Social History of Work-Related Accident Law in Ontario 1860-86".
- La Forest, G.V. "Rights of Landowners in New Brunswick respecting Water in Streams on or adjoining their Lands" (1957) 10 UNBLJ 21
- La Forest, G.V. "Some Aspects of the Writ of Fieri facias" (1959) 12 UNBLJ 39
- La Forest, G.V. "The History and Place of the Registry Act in New Brunswick Land Law" (1970) 20 UNBLJ 1
- Lahore, J.C. "Art and Function in the Law of Copyright and Designs" (1971) 4 Adelaide LR 182
- Lalande, L. "The Status of Organised Labour " (1941) 19 Can Bar Rev 638
- Larsen, N. "Statute Revision and Consolidation: History, Process and Problems" (1987) 19 Ottawa LR 321.
- Laskin, B. "The Supreme Court of Canada: the First Hundred years - A Capsule Institutional History " (1975) 53 Can Bar Rev 459
- Laycock, J.E. "Juvenile Courts in Canada" (1943) 21 Can Bar Rev 1
- Laycraft, J.H. and Head, I.L. "Theories of Ownership of Oil and Gas" (1953) 31 Can Bar Rev 382
- Lederman, W.R. "The Independence of the Judiciary : Part III - the Status of Superior Court Judges in Colonial North America" (1956) 34 Can Bar Rev 1139
- Ledermann, W.R. "Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 McGill LJ 185
- Lee R.W. "Comparative Legislation as to Habitual Drunkards (1900) 3 JCL&IL(2nd Series) 241.
- Lendrum, S.D. "The `Coorong' Massacre' : Martial Law and the Aborigines at First Settlement" (1977) 6 Adelaide LR 26
- Leon, J.S. "The Development of Canadian Criminal Justice: A Background for Reform" (1977) 15 Osgoode Hall LJ 71
- Linden, A.M. "A Century of Tort Law in Canada : Whither Unusual Dangers, Product Liability and Automobile Accident Compensation?" (1967) 45 Can Bar Rev 831

- Lortie, L. "The Early Teaching of Law in French Canada" (1975) 2 Dalhousie LJ 521
- Love, P.A. "Renewing Our Renewable Forest Resource: The Legislative Framework" (1982) 7 Dalhousie LJ 297
- Lucy, Richard "The Division of Powers between the British Empire and its Australian Self-Governing Colonies 1855-1900" (1988) 6 Aust J of Law and Soc 83
- Lutes, R.E. "Obscenity Law in Canada" (1974) 23 UNBLJ 30
- MacDonald, J.A. "A Critique of Habitual Criminal Legislation in Canada and England" (1969) 4 UBCLR 87
- MacFarlane, B.A. "The Right to Counsel at Trial and on Appeal" (1990) 32 CLQ.440.
- MacIntosh, Jeffrey G. "Minority Shareholder Rights in Canada and England 1860-1987" (1987) 27 Osgoode Hall LJ 561.
- Mackintosh, James "Limitations on Free Testamentary Disposition in the British Empire" (1930) 12 JCL&IL(3rd series) 13.
- MacTavish L.R. "Uniformity of Legislation in Canada " (1947) 25 Can Bar Rev 36
- Madhara Menon, N.R. "A Note on the Law and Practice relating to Habitual Offenders in India " (1967) 13 McGill LJ 675
- Magee, F.A. "Notice under the Ontario Land Titles Act" (1933) 11 Can Bar Rev 245
- Makuch, S.M. "Zoning: Avenues of Reform" (1973) 1 Dalhousie LJ 294
- Manchester, A.H. "Ecclesiastical and Matrimonial Relief before 1857 " (1968) 6 Sydney LR 25
- Manchester, A.H. "Simplifying the Sources of the Law: An essay in law reform. Part II - J.F. Stephen and the codification of the Criminal law in England and Wales." (1973) 2 Anglo-American L.R. 527
- Manchester, C. "Lord Campbell's Act: England's First Obscenity Statute" (1988) 9 JLH 223.
- Manson, Edward "The Admission of Aliens" (1902) 4 JCL&IL (2nd series) 114
- Manson, Edward "Remuneration of Trustees and Executors" (1903) 5 JCL&IL(2nd series) 185
- Marquis, G. "In Defence of Liberty: 17th Century England and 19th Century Maritime Political Culture" (1993) 42 UNB LJ 69
- Marston, Geoffrey "Historical Aspects of Colonial Criminal Legislation Applying to the Sea" (1980) 14 UBCLR 299
- Martel, E. "The Debtor's Discharge from Bankruptcy" (1971) 17 McGill LJ 718
- Martin, J.C. "The Burden of Proof as Affected by Statutory Presumptions of Guilt" (1939) 17 Can Bar Rev 37
- Martin, Linda "From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales" (1986) 9 UNSWLR 111
- Martin, P. "The Declaratory Judgment " (1931) 9 Can Bar Rev 540
- Masciotra, V. "Quebec Legal Historiography" (1987) 32 McGill LJ 712.

- Mason, H.G.R. "One Hundred years of Legislative Development in New Zealand" (1941) 23 JCL&IL(3rd series) 1
- Matson, I.M. "University of Canterbury Faculty of Law: An Historical Note" (1980) 1 Canterbury LR 1.
- Matthews, E.L. "South African Legislation relating to Marriage or Sexual Intercourse between Europeans and Natives or Coloured persons." (1920) 2 JCL&IL(3rd series) 117
- Maugham, Lord "Observations on the Law of Evidence with Special Reference to Documentary Evidence" (1939) 17 Can Bar Rev 469
- McClemens, J. and Bennett, J.M. "Historical Notes on the Law of Mental Illness in New South Wales" (1962) 4 Sydney LR 49
- McCoy, E.J. "Technical Owners and the Public Utilities Board" (1983) 21 Alberta LR 23
- McDonald, D.T. "The Nineteenth Century New South Wales Civil Service reform and the Northcote-Trevelyan Report" JRAHS, 1985, vol71, p.107.
- McDonald, J.D.N. "New Zealand Land Legislation" HSANZ, 1952, vol. 5, p.195
- McDorman, Theodore L. "The History of Shipping Law in Canada: the British Dominance" (1983) 7 Dalhousie LJ 620
- McGinnis, J.D. "Statute Law and the Owl of Minerva: the Bills of Exchange Act 1882" (1986) 24 Alberta LR275
- McGrady, L. "Jurisdiction for Water Resource Development" (1967) 2 Manitoba LJ 219
- McKay, I.L. "Historical Aspects of the Estate Tax" (1978) 8 NZULR 1
- McLaren, John "Meeting the Challenges of Canadian Legal History - the Albertan Contribution (1994) 32 Alberta LR 423
- McLaren, John "The Legal Historian, Masochist or Missionary? A Canadian's reflections" (1994) 5 Legal Education Review 67
- McLean, S.J. "The Railway Act of Canada" (1928) 6 Can Bar Rev 415
- McMinn, T. "The Premiership of William Forster 1859-60" JRAHS, 1981, vol.67, p.238
- Melling, M.W. "Cleaning House in a Suddenly Closed Society: The Genesis, Brief Life and Untimely Demise of the Habitual Criminals Act 1869". (1983) 21 Osgoode Hall LJ 314
- Mercier, Jean "Immigration and Provincial Rights" (1944) 22 Can Bar Rev 856
- Merritt, Deborah J. "Hypatia in the Patent Office: Women Inventors and the Law 1865-1900" (1991) 35 AmJLH 235.
- Mettarlin, D.N. "The Quebec Trust and the Civil Law" (1975) 21 McGill LJ 175
- Mewett, A.W. "The Criminal Law 1867-1967" (1967) 45 Can Bar Rev 726
- Mills, J. "The Composition of the Victorian Parliament 1856-1881" HSANZ, 1942, vol. 2, p.25.

- Miners, N.J. "Disallowance and the Administrative Review of Hong Kong Legislation by the Colonial Office 1844-1947" (1988) 18 Hong Kong LR 218.
- Moore, Sir Harrison "A Century of Victorian Law" (1934) 16 JCL 175
- Morris, H.F. "The Development of Statutory Marriage Law in 20th Century British Colonial Africa" (1979) 23 J. African Law 37
- Morrow, W.G. "A Historical Examination of Alberta's Legal System - the First 75 Years" (1981) 19 Alberta LR 148
- Nadelmann, K.H. "Enforcement of Foreign Judgments in Canada" (1960) 38 Can Bar Rev 68
- Neave, M. "The Concept of Notice and the Ontario Land Titles Act" (1976) 54 Can Bar Rev 132
- Neave, M. "Indefeasibility of Title in the Canadian Context" (1976) 26 U Toronto LJ 173
- Neave, M. "Conveyancing under the Ontario Registry Act : An Analysis of the Priority Provisions and Some Suggestions for Reform " (1977) 55 Can Bar Rev 500
- Nicholson, Bradley J. "Legal Borrowing and the origins of Slave Law in the British Colonies" (1994) 38 Am JLH 38
- Norman, F.I. and Young, A.D. "Short-sighted and doubly short-sighted are they Game Laws of Victoria 1858-1958" J Aust Stud, 1980, volume 7, p.2.
- O'Connor, D. "Criminal Appeals in Australia before 1912" (1983) 7 Crim. LJ 262
- O'Connor, W.F. "Property and Civil Rights in the Province" (1940) 18 Can Bar Rev
- O'Halloran, C.H. "Development of the Right of Appeal in England in Criminal Cases" (1949) 27 Can Bar Rev 152
- O'Halloran, C.H. "Right of Review and Appeal in Civil Cases before the Judicature Acts 1875" (1949) 27 Can Bar Rev 46
- O'Hare C.W. "Admiralty Jurisdiction" (1979) 6 Monash LR 91
- O'Regan, R.S. "Immature Age and Criminal Responsibility under the Griffith Code " (1980) 14 U WA LR 354
- Oosterhoof, A.H. "The Law of Mortmain : A Historical and Comparative Review" (1977) 27 U Toronto LJ 257
- Oppel, W. "Step-parent Adoptions in Nova Scotia and British Columbia" (1981) 6 Dalhousie LJ 631
- Parker, G. "The Juvenile Court Movement" (1976) 26 U Toronto LJ 140
- Parker, G. "The Juvenile Court Movement "The Illinois Experience" (1976) 26 U Toronto LJ 252
- Parker, G. "The Legal Regulation of Sexual Activity and the Protection of Females" (1983) 21 Osgoode Hall LJ 187
- Parker, G. "Trial by Jury in Canada" (1987) 8 JLH 178.
- Parsons, Angus and Campbell A.L. "The South Australian Centenary of Legislation" (1936) 17 JCL&IL(3rd series) 21.

- Patterson, G. "The Establishment of the County Court in Nova Scotia" (1943) 21 Can Bar Rev 394
- Payne, J.D. and Downs, M.P. "Permanent Alimony" (1970) 9 UWOLR 1
- Pearce, C.A. "Trade Unions in Canada" (1932) 10 Can Bar Rev 349, 524
- Petrow, Stefan "Knocking down the House? Introduction of Torrens System to Tasmania" (1992) 11 U Tas LR 167
- Piggott, T.F. "The Execution of British and Colonial Judgments within the Dominions" (1922) 38 LQR 339
- Pike, D. "The Introduction of the Real Property Act in South Australia" (1961) 1 Adel 169
- Polden, P. "The Public Trustee in England 1906-1986" (1988) 9 JLH 228
- Pollock, E.M. and Latter, A.M. "Recent legislation on Inebriates in England and the Colonies" (1900) 2 JCL&IL(2nd Series) 251.
- Poole, T.C. "Administration of Trusts by Joint Stock Companies" (1889) 5 LQR 395
- Pothier, D. "Workmen's Compensation : The Historic Compromise Revisited " (1983) 7 Dalhousie LJ 309
- Prabhu, M.A. "Freight Rate Regulation in Canada " (1971) 17 McGill LJ 292
- Pue, W.W. "The Criminal Twilight Zone: Pre-trial Procedures in the 1840s " (1984) 22 Alberta LR 154
- Puckett, T.C. "Credit Casualties : A Study of Wage Garnishment in Ontario " (1978) 28 U Toronto LJ 95
- Quentin-Baxter, Alison "Women and the Suffrage" [1993] NZLJ 132
- Raudzens, G.K. "Upper Canada and New South Wales to 1855: The Feasibility of Comparative Colonial History" JRAHS, 1981, vol.67, p.193.
- Read, J.E. "The Early Provincial Constitutions " (1948) 26 Can Bar Rev 621
- Read, J.S. "Studies in the Making of Colonial Laws: An Introduction" (1979) 23 J African Law 1
- Renton, A. Wood "The History of the Colonial Office" (1889) 1 Juridical Review 287
- Renton, A. Wood "The Work of the West Indian Commissioners: (1) The Administration of Justice in the West Indies prior to 1825" (1890) 2 Juridical Review 155
- Renton, A. Wood "Preliminary Examination of Patents and Compulsory Licences (1900) 2 JCL&IL(2nd Series) 294
- Riddell, W.R. "William Firth, the Third Attorney-General of Upper Canada 1807-1811" (1923) 1 Can Bar Rev 326, 404
- Riddell, W.R. "'Fi.Fa.' Lands in Upper Canada" (1929) 7 Can Bar Rev 448
- Riddell, W.R. "Early Provincial Interference with Private Property" (1933) 11 Can Bar Rev 177

- Riddell, W.R. "Notes on the Pre-Revolutionary Judiciary in English Colonies " (1933) 11 Can Bar Rev 316, 376
- Risk, R.C.B. "The Nineteenth Century Foundations of the Business Corporation in Ontario" (1973) 20 U Toronto LJ 270
- Risk, R.C.B. "A Prospectus for Canadian Legal History" (1974) 1 Dalhousie LJ 227
- Risk, R.C.B. "The Golden Age: The Law about the Market in Nineteenth Century Ontario" (1976) 26 U Toronto LJ 307
- Risk, R.C.B. "The Last Golden Age : Property and the Allocation of Losses in Ontario in the Nineteenth Century" (1977) 27 U Toronto LJ 199
- Risk, R.C.B. "The Law and the Economy in Mid-Nineteenth century Ontario : A Perspective" (1977) 27 U Toronto LJ 403
- Rogers, A.W. "Some Legal Problems of Banking" (1943) 21 Can Bar Rev 529
- Romney, Paul "From Constitutionalism to Legalism - Trial by Jury, Responsible Government and the Rule of Law in the Canadian Political Culture". (1989) 7 Law and History Review 121.
- Rosenbaum, S. "Rule-making in the Courts of the Empire" (1915) 15 JCL(2nd Series) 128
- Ross, S.D. "The Legal Profession in Tasmania" (1975) 5 U Tas LR 1
- Ryan, J.L. "Law and Industrial Relations: The Influence of the Courts: II" (1970) 2 Otago LR 298.
- Ryan, John L. "The New Zealandness of New Zealand Law" (1972) 1 Anglo-American LR 204
- Ryder, P.A. "Ward Chipman, Sr : An Early New Brunswick Judge" (1959) 12 UNBLJ 65
- Salmond, J.W. "The Limitations of Colonial Legislative Power" (1917) 33 LQR 117
- Sargisson, H. "Matrimonial Property Legislation : its history and a Critique of the present N.Z. Law" (1976) 3 Auckland LR 82
- Seaborne Davies, D. "Irresistible Impulse in English Law" (1939) 17 Can Bar Rev 147
- Schuyler, R.L. "Parliament and the Dominions: a Retrospect" (1928) 3 Cambridge LJ 209.
- Scott, F.R. "s.94 of the British North America Act" (1942) 20 Can Bar Rev 525
- Scott, F.R. "Publishing False News " (1952) 30 Can Bar Rev 37
- Scott, W.B. "The Ownership and Use of Rivers and Streams in Quebec" (1939) 17 Can Bar Rev 220
- Shannon, R.W. "Husband's Liability for Wife's Tort" (1926) 4 Can Bar Rev 567
- Sharpe, R.J. "Habeas Corpus in Canada" (1975) 2 Dalhousie LJ 239
- Sharwood, R.L. "The Local Courts on Victoria's Gold Fields, 1855 to 1857" (1986) 15 MULR 508.
- Sheppard, D.R. "The Public Trustee in British Columbia" (1966) 2 UBCLR 422

- Sholl, V. "The Administration of Justice in Victoria : the State and its Lawyers " (1956) 7 Res Judicata 33
- Skelly, S.J. "A Comparative Survey of the Development of Matrimonial Relief " (1966) 2 Manitoba LJ 29
- Slinn, P. "The Mining Ordinance of Northern Rhodesia : A Legislative History 1924-1958 " (1979) 23 J African Law 84
- Smart, R.S. "A New Patent Act " (1923) 1 Can Bar Rev 158
- Smith, B. "The Law of Lotteries in Canada" (1962) 1 UBCLR 277
- Smith, D. Stanley "Adoption of Children in New Zealand" (1921) 3 JCL&IL(3rd series) 165.
- Smith, H. "Judges and the Lagging Law of Compensation for Personal Injuries in the Nineteenth Century" (1981) 2 JLH 258
- Smith, J.C. "The Concept of Native Title" (1974) 24 U Toronto LJ 1
- Spencer, J. "The Alien Landowner in Canada" (1973) 51 Can Bar Rev 389
- Spiller, Peter "The Jury System in Early Natal (1846-1874)" (1987) 8 JLH 129
- Spiller, Peter "The Transplantation of English Legal Traditions into the Colony of Natal (1846-1910)" (1988) 6 Aust J of Law and Soc 129
- Spiller, Peter "The Career of Henry Chapman in Dunedin" (1990) 7 Otago LR 305
- Spiller, Peter "Chapman J. and the *Symonds* Case" (1990) 4 Canterbury LR 257.
- Spiller, Peter "The History of New Zealand Legal Education: A Study in Ambivalence" (1993) 4 Legal Education Review 223.
- Solomon, R. and Green, M. "The First Century: The History of Non-medical Opiate Use and Control policies in Canada 1870-1970 " (1982) 20 UWOLR 307
- St. Laurent, L.S. "The Law of Quebec" (1932) 10 Can Bar Rev 442
- Stanley, Della "Richard Chapman Weldon 1849-1925 - Fact, Fiction and Enigma" (1990) 12 Dalhousie LJ 539
- Stein, R. "Some Aspects of Title by Registration in the Maritime Provinces of Canada " (1976) 2 Dalhousie LJ 633
- Stein, R. "Sir Robert Richard Torrens and the Introduction of the Torrens System" JRAHS, 1981, vol.67, p.119.
- Stein, R. "Torrens Title - a case for the Registration of Trusts in New South Wales" (1982) 9 Sydney LR 605
- Stewart, N.J. "The Reservation or Exception of Mines and Minerals " (1962) 40 Can Bar Rev 329
- Stoodley, June "An Early Aspect of Queensland Mining Law: the Area of Gold-mining Leases" (1965) 5 U Qld LJ 179
- Stoodley, June "Miner v. Landowner: The Conflict over Mining on Private Land in Queensland" (1966) 5 U Qld LJ 353
- Stout, Sir Robert "Is the Privy Council a Legislative Body?" (1905) 21 LQR 9

- Strickland, P. "A Comparative Study of the Anti-trust Laws of the British Dominions and their Administration. Part 2, Australia" (1937) 19 JCL&IL(3rd series) 52.
- Strickland, P. "A Comparative Study of the Anti-trust Laws of the British Dominions and their Administration. Part 3 New Zealand" (1937) 19 JCL&IL(3rd series) 62.
- Strickland, P. "A Comparative Study of the Anti-trust Laws of the British Dominions and their Administration. Part 1, Canada." (1936) 17 JCL&IL(3rd series) 240.
- Stubbs, Roy St.George "Adam Thom" (1963) 1 Manitoba Law School J 120
- Surrency, E.C. "Revision of Colonial Laws" (1965) 9 AmJLH 189
- Sutton, R.J. "Bankruptcy and the Execution Creditor" (1978) 4 Otago LR 340
- Teed, E.L. "The Effect of s.12 of the Evidence Act" (1971) 21 UNBLJ 65
- Thom, D.J. "The Caveat in the Torrens System " (1924) 2 Can Bar Rev 327
- Thomas, J.C. "Impeachment of A Party's Own Witness by a Prior Inconsistent Statement" (1982) 16 UBCLR 35
- Thorner, T. and Reddekopp, G.N. "A Question of Seduction: The Case of *McMillan v Brownlee* " (1982) 20 Alberta LR 447
- Tucker, E. "The Determination of Occupational Health and Safety Standards in Ontario 1860 -1902: From the market to Politics to...?" (1984) 29 McGill LJ 260
- Turner, Sir Alexander "Changing the Law" (1969) 3 NZULR 404
- Turner, J. Neville "Marriage of Minors " (1967) 8 U WA LR 319
- Tyndale, O.S. "The Quebec Law of Evidence compared with that of France" (1934) 12 Can Bar Rev 641
- Verdun-Jones, S.N. "The Evolution of the Defences of Insanity and Automatism in Canada from 1843 to 1979 : A Saga of Judicial Reluctance to Sever the Umbilical cord to the Mother Country?" (1979) 14 UBCLR 1
- Wahn, I.G. "The Canadian Law of Trade Combinations" (1945) 23 Can Bar Rev 10
- Ward, J.M. "Colonial Liberalism and its Aftermath: New South Wales 1867-1917" JRAHS, 1981, vol.67, p.81
- Welborn, Suzanne "Politicians and Aborigines in Queensland and Western Australia 1897-1907" Studies in Western Australian History, 1978, vol. 2, p.18.
- Westover, Lionel "Last Judge of the Old Far West" (1931) 9 Can Bar Rev 24
- Wettenhall, R.L. "Early Railway Management Legislation in Tasmania" (1961) 1 U Tas LR 446
- Wettenhall, R.L. "Early Railway Management Legislation in New South Wales" (1962) 1 U Tas LR 446
- Whalan, Douglas "The Immediate Success of Registration of Title to Land in Australasia and Early Failures in England" (1967) 2 NZULR 416
- White, Stephen "The Pitfalls of Imitation: The New South Wales First Offenders Probation Act 1894" (1983) 13 VUWLR 137.

- White, S. "The Making of the New Zealand Criminal Code Act of 1893: A Sketch" (1986) 16 VUWLR 353
- Willcocks, R.E. "Town Planning" (1910) 11 JCL(2nd series) 211
- Williams, A.W. "Colonial Origins of Land Acquisition law in New South Wales and Queensland" (1989) 10 JLH 352
- Williams, C.R. "Silence and the Unsworn Statement: An Accused's Alternatives to Giving Sworn Evidence" (1976) 10 MULR 481
- Williams, D.V. "New Zealand Immigration Policies and the Law: a Perspective" (1978) 4 Otago LR 185
- Williams, D.V. "The Foundation of Colonial Rule in New Zealand" (1988) 13 NZULR 54.
- Williams, Glanville "Dominion Legislation relating to Libel and Slander" (1939) 21 JCL&IL(3rd series) 161
- Williamson, J.R. "Waive the Bulk Sales Act?" (1977) 26 UNBLJ 20
- Willis, J. "Section 96 of the British North America Act" (1940) 18 Can Bar Rev 517
- Windeyer, Sir Victor "A Birthright and Inheritance" (1962) 1 U Tas LR 635
- Windeyer, V. "A Presage of Federation" JRAHS, 1986, vol.61, p.311.
- Wiren, S.A. "Testator's Family Maintenance in New Zealand" (1929) 45 LQR 378
- Wood, G.A. "Construction and Reform : The establishment of the New Zealand Supreme Court" (1968) 5 VUWLR 1
- Woodcock, George Review of Robert A. Huttenback *Racism and Empire: White Settlers and Coloured Immigration in the British Self-Governing Colonies 1830-1910* (Cornell UP 1976) Can JH 1977, vol.9. p.238.
- Zabel, S. "Legislative History of the Gold Coast and Lagos Marriage Ordinance 1884: part III" (1979) 23 J African Law 10
- Ziegel, J.S. "Some Aspects of the Law of Contempt of Court in Canada, England and the United States" (1958) 5 McGill LJ 229