

1990

Imperial Statutes in Australia and New Zealand

Peter M. McDermott

Follow this and additional works at: <http://ePublications.bond.edu.au/blr>

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

Imperial Statutes in Australia and New Zealand

Abstract

[extract] Upon the foundation of the colony of New South Wales the inhabitants, as subjects of the Crown, inherited the law of England. Section 24 of the Australian Courts Act 1828 (Imp) later provided that statutes which were in force in England, as at the date of the passing of the Act (ie 25 July 1828) to be applied in the courts of New South Wales and Van Dieman's Land (later Tasmania) where they were applicable in the colony by reason of local conditions, and the administrative and judicial machinery then in existence. Sir Victor Windeyer commented that lawyers often regard the Australian Courts Act as 'the good root of title of our inheritance of the law of England'. However, Sir Victor Windeyer has pointed out that the source of the inheritance is the common law itself. The purpose of the Australian Courts Act was to fix a date, with certainty, up to when Imperial statutes were received.

Keywords

Imperial Statutes, Australia, New Zealand

IMPERIAL STATUTES IN AUSTRALIA AND NEW ZEALAND

by Peter M McDermott*

Barrister at Law, Queensland

Reception of Imperial Statutes

Upon the foundation of the colony of New South Wales the inhabitants, as subjects of the Crown, inherited the law of England.¹ Section 24 of the *Australian Courts Act* 1828 (Imp)² later provided that statutes which were in force in England, as at the date of the passing of the Act (ie 25 July 1828) to be applied in the courts of New South Wales and Van Dieman's Land (later Tasmania) where they were applicable in the colony by reason of local conditions, and the administrative and judicial machinery then in existence.³ Sir Victor Windeyer commented that lawyers often regard the *Australian Courts Act* as 'the good root of title of our inheritance of the law of England'. However, Sir Victor Windeyer has pointed out that the source of the inheritance is the common law itself. The purpose of the *Australian Courts Act* was to fix a date, with certainty, up to when Imperial statutes were received. The date of the passing of the Act was selected so that reforms to the criminal law made by *Peel's Acts* could be applied in the colonies.⁴ As later Australian colonies became constituted, legislation similar to the *Australian Courts Act* provided for Imperial statutes to be received into the colonies; in Western Australia and South Australia legislation provides for English law to be received at later dates (1 June 1829 and 28 December 1836 respectively).⁵ Similar legislation provides for the reception in New Zealand of Imperial statutes as at 14 January 1840.⁶

* Visiting Professor, Law School, Bond University.

1 See, Castles, 'The Reception and Status of English Law in Australia', (1963) 2 Adel LR 1.

2 9 GeoIV c83 (Imp).

3 See, *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283, 311; *Quan Yick v Hinds* (1905) 2 CLR 345, 356; *Miller v Major* (1907) 4 CLR 219, *Mitchell v Scales* (1907) 5 CLR 405, 411; *Winterbottom v Vardon & Sons Ltd* [1921] SASR 364, 369; *Rogers v Squire* (1978) 23 ALR 111, 116. See also *Attorney-General v Stewart* (1816) 2 Mer 143, 160.

4 See, Windeyer, A 'Birthright and Inheritance', (1962) 1 U of Tas LR 635, 636, 668.

5 See, *Victorian Constitution Act* 1855 (18 & 19 Vic c55), s40; *Queensland Supreme Court Act* 1867 (21 Vic No 23), s20; *Billy v Hartley* (1892) 4 QLJ 137; *SA Acts Interpretation Act* 1915 (No 1215 of 1915), s48; (*Language of Acts Act* 1872 (35 & 36 Vic No 9), Ordinance No 2 1843) WA; *Winterbottom v Vardon & Sons Ltd* [1921] SASR 364, 368; *WA Interpretation Act* 1919 (9 GeoV No XX), s43.

6 See, *English Law Act* 1908 (1908, No 55)(NZ), s2.

Statute Law Revision—Australia

Legislation in Victoria, New South Wales, Queensland, and the Australian Capital Territory relates to the revision of Imperial statutes.⁷ The precedent for this legislation is the *Imperial Acts Application Act 1922* (Vic). The scheme of the legislation is that all enactments, commencing with the *Statute of Merton*,⁸ that were in force at the time of the passing of the *Australian Courts Act* are, with certain exceptions, generally repealed.⁹ The legislation preserves legislation of fundamental constitutional and historical significance, eg *Magna Carta*, *Petition of Right*, *Habeas Corpus Acts*, *Bill of Rights*.¹⁰ In Victoria and the Australian Capital Territory, a later statute has transcribed this fundamental constitutional legislation into the statute law of that State.¹¹ In this context it should be appreciated that State law may displace the operation of Imperial statutes.¹² The relatively uniform legislation also provides for the transcription into local legislation of various Imperial enactments,¹³ such as the *Marine Insurance Acts* of 1745 and 1788.¹⁴ In some cases, this process of transcription may have been superseded by prior local legislation.¹⁵ In the Australian Capital Territory important Imperial statutes are transcribed in modern terminology, the relevant ordinance is very comprehensive.¹⁶ Quite apart from the various State Acts relating to Imperial statutes, some other State Act may preserve an Imperial statute.¹⁷

The Australian statutes which repeal Imperial enactments differ in an important respect. The Victorian statute is the only statute which contains a “Westbury savings”.¹⁸ The savings clause was quite deliberately modelled on the “Westbury savings” contained in the English statute law revision

7 *Imperial Law Application Act 1922* (13 GeoV No 3270)(Vic); *Imperial Acts Application Act 1969* (No 30, 1969)(NSW); *Imperial Acts Application Act 1984* (No 70, 1984)(Qld); *Imperial Acts Application Ordinance 1986* (No 93, 1986)(ACT).

8 20 HenIII (1235-1235)(Imp).

9 *Imperial Laws Application Act 1922*, s7 (Vic); *Imperial Acts Application Act 1969*, s8(1) (NSW); *Imperial Acts Application Act 1984*, s7 (Qld).

10 *Imperial Laws Application Act 1922* (Vic), s6, Second Schedule; *Imperial Laws Application Act 1969* (NSW), s6, Second Schedule (Part 1); *Imperial Acts Application Act 1984* (Qld), s5, First Schedule.

11 *Imperial Acts Application Act 1980* (No 94426)(Vic); *Imperial Acts Application Ordinance 196* (ACT), Third Schedule.

12 See, eg *R v Walker*, Court of Criminal Appeal of Queensland, CA No 192, 1988, 1 December 1988 per McPherson J. (It is not necessary to consider *Magna Carta* in further detail because even if, by force of s24 of the *Australian Courts Act 1828*, the provisions of ch 39 of *Magna Carta* have ever formed part of the law of Queensland, they have long since been displaced by local statutes.)

13 *Imperial Law Application Act 1922*, ss4, 9-91 (Vic); *Imperial Acts Application Act 1969*, ss13-42 (NSW); *Imperial Acts Application Act 1984*, ss8-13 (Qld). The Queensland Act did not provide for an extensive transcription of Imperial Acts. The *Property Law Act 1974* (Qld) contains provisions which are a restatement of important Imperial property statutes, eg *Statute of Marlborough 1267* (52 HenIII c23), *Tenures Abolition Act 1660* (12 CarII, c24).

14 19 GeoII c37 & 28 GeoII c56 (Imp).

15 See, eg Lee, ‘Manual of Queensland Succession Law’ (2nd edn, 1985), p120 (n64).

16 *Imperial Acts Application Ordinance 1986* (No 93, 1986); *Imperial Acts (Substituted Provisions) (Amendment) Ordinance 1987* (No 45, 1987)(ACT).

17 Section 109 of the *Real Property Act 1861* (Qld) preserved the effect of the statute 13 Eliz I ch 5: see, *Friedman v Barrett*, ex p *Friedman* [1962] QdR 498, 512 per Gibbs J. The statute 13 Eliz I c5 was later repealed by s3 of the *Property Law Act 1974* (Qld).

18 *Imperial Acts Application Act 1922*, s7 (proviso).

statutes.¹⁹ The explanatory paper which accompanied the Bill in respect of the Victorian statute contains the following passage:

Clause 7 is the great repealing section with elaborate savings clauses, such as are adopted in the English Statute Law Revision Acts. It is of course desirable that this should be expressed as generally as possible.²⁰

The savings clauses in the New South Wales statute is derived from s38 of the *Interpretation Act 1889* (Imp)²¹ transcriptions of which are in force in most jurisdictions.²² Such a savings clause does not, like a "Westbury savings", preserve a principle of law or the jurisdiction of a court that has been established or conferred under a repealed enactment.²³

The absence of a "Westbury savings" from the New South Wales statute was based upon the consideration that the presence of such a clause made it difficult to ascertain the extent of a repeal, particularly as it was intended to make a substantial alteration in the law (i.e. repeal the remaining provisions of the *Statute of Frauds*²⁴ then in force).²⁵ It is, of course, not always an easy task to ascertain whether a particular Imperial statute has any utility. From time to time there have been examinations of Imperial statutes in force in various jurisdictions. In New South Wales, Bignold and Oliver compiled lists of Imperial statutes that were in force. In 1874 Oliver concluded that some 214 statutes, up to the time of the passing of the *Australian Courts Act*, were in force in New South Wales.²⁶ In Victoria, Sir Leo Cussen similarly compiled a table of Imperial statutes which were in force in that State.²⁷

Difficulties have occurred because of the absence of a "Westbury savings" in some statute law revision statutes that repeal Imperial enactments. Instances are to be found in important areas of law relating to procedure and property. An important aspect of the law relating to set-off will first be examined.

Statutes of Set-Off

One instance is to be found in respect of the right of legal set-off, as distinct from equitable set-off,²⁸ which was conferred by the *Statutes of Set-off*.²⁹ In *Southern Textile Converters Pty Ltd v Stehar Knitting Mills Pty Ltd*³⁰ Sheppard J held that the repeal of these statutes by the *Imperial*

19 As to the "Westbury Savings": see generally, McDermott 'Statute Law Revision Statutes—Westbury Savings' [1988] Statute LR 139.

20 See, Vol II *Victorian Statutes* (1929), p1225.

21 52 & 53 Vic c63 (Imp).

22 *Imperial Acts Application Act* 1969, s9 (marginal note). The *Imperial Acts Application Act* 1984 (Qld) does not contain a savings clause in view of the operation of the savings clause in the *Acts Interpretation Act 1954-1977* (Qld), s20.

23 Cf, *Conroy v Lowndes* [1958] QdR 375; *Edward Street Properties Pty Ltd v Collins* [1977] QdR 399; *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 QdR 245.

24 29 ChasII c3 (Imp).

25 See, *Application of Imperial Acts* (LRC (NSW) 4, 1967), p34.

26 Ibid, p28.

27 See, Vol II *Victorian Statutes* (1929), pp 1229-1238.

28 See, Spry, 'Equitable Set-offs' (1969) 43 ALJ 265.

29 2 GeoII c22, s13 (1729), Geo II c24, s5 (1735)(Imp).

30 [1979] 1 NSWLR 692. See also, *Leichhardt Emporium Pty Ltd v AGC (Household Finance) Ltd* [1979] 1 NSWLR 701.

Law Application Act 1969 (NSW) had the consequence that there was no longer any right to set-off mutual debts in New South Wales. On appeal the Court of Appeal differed from Sheppard J in ruling that the *Statutes of Set-off* (and s78 of the *Supreme Court Act* 1970 (NSW)) are purely procedural in nature. Hutley and Glass JJA held that reliance could be placed on a rule of court which provided that a monetary cross-demand could be included in a defence and set off against a plaintiff's claim (pt 15, R 25).³¹ Hutley JA remarked:

The fact that the revocation of the *Statutes of Set-off* had actually occurred, may be assumed not to have been a blunder by the law reformers, who, after all, were mainly the same people who had prepared the *Supreme Court Act*, 1970, but as part of the same scheme, and R 25 of pt 15 should be seen as a partial restoration, though purely procedural in form of what had been repealed.³²

However, the relevant rule of court was omitted by an amendment to the rules of court which was made in 1984.³³

In the last century, the *Statutes of Set-off* were repealed in England by statutes that contained a "Westbury savings". This was recognised by Sheppard J who remarked:

The *Statutes of Set-off* were repealed in England by the *Civil Procedure Acts Repeal Act* 1879 and the *Statute Law Revision and Civil Procedure Act* 1883. The former Act contained s4(1)(b) which saved from the repeal 'any jurisdiction or principle or rule of law or equity established or confirmed' under any repeal enactment. The preamble of the latter Act referred to certain enactments 'the subject matter whereof is provided for or by under the *Supreme Court of Judicature Act*, 1873, and the Acts amending it, or rules made pursuant thereto' . . . It was by reason of the provision of those statutes that the Court of Appeal in *Hanak v Green*³⁴ was able to conclude that the law relating to set-off was, in 1958, the same as it had been prior to their coming into force, and repealing the *Statutes of Set-off*.³⁵

It might be mentioned that the *Statute Law Revision and Civil Procedure Act* 1883 (Imp) similarly contained a "Westbury savings" in the proviso to s5 of the Act.³⁶

The repeal of the *Statutes of Set-off* in New South Wales has the unfortunate consequence of abrogating the availability of a right of set-off which was conferred under the Statutes. Derham considers that this is relevant in restricting the availability of the following claims insofar as they are dependent upon the existence of the *Statutes of Set-off*:

- i. a liquidated cross-demand against a claim for freight or under a bill of exchange;
- ii. the set-off under *George v Clagett*.³⁷

31 *Stehar Knitting Mills Pty Ltd v Southern Textile Converters Pty Ltd* [1980] 2 NSWLR 514.

32 [1980] 2 NSWLR 514, 520.

33 *Supreme Court Rules* (Amendment No 154), 1984. See also, Derham, 'Set-off' in 'Australian Finance Law' (Business Law Education Centre, Melbourne, 1989), p247.

34 [1958] 2 QB 9, 22.

35 [1979] 1 NSWLR 692, 697-698.

36 See, *Winfield v Boothroyd* (1886) 54 LT 574, 577.

37 (1797) 7 TR 359.

- iii. an assignee of a debt would not take subject to a liquidated cross-demand that could not be employed in an equitable set-off; and
- iv. a surety's right of exoneration would not extend to a set-off of mutual debts.³⁸

Apart from equitable set-off, there still exists bankruptcy set-off which is conferred under a federal statute.³⁹ The only basis for the right to set-off mutual debts in New South Wales would be regarding a right to set-off as procedural and hence allowable under s78 of the *Supreme Court Act 1970 (NSW)*.⁴⁰

The right of legal set-off has been examined by some law reform agencies in their review of Imperial enactments. The Law Reform Commission of New South Wales considered that the statutes were unnecessary, and could be repealed.⁴¹ The Law Reform Commission of the Australian Capital Territory⁴² recommended that the statutes could be repealed as the jurisdiction of the court was safeguarded by s11(a) of the *Australian Capital Territory Supreme Court Act 1933*.⁴³ This provision confers upon the Supreme Court of the Australian Capital Territory the same original jurisdiction proceeded by the Supreme Court of New South Wales before 1 January 1911. However, it is submitted that the better view on this question is the decision of Sheppard J in *Southern Textile Convertors Pty Ltd v Stehar*⁴⁴ that the right of legal set-off is not merely procedural in nature, and is based upon statute. This was recognised by the Law Reform Committee of South Australia which, in discussing s13 of 2 *GeoII* c22, commented:

If the section is not to be kept as part of the law of South Australia then a section to that effect must go in the *Supreme Court Act* as this and a later statute of *GeoII* [i.e. 8 *GeoII* c24] are the only warrant for legal set-off in South Australia.⁴⁵

In Victoria the right of set-off of mutual debts has been preserved despite the repeal of the Statutes of Set-off by the presence of a "Westbury savings" in s7 of the *Imperial Acts Application Act 1922 (Vic)*.⁴⁶

Grantees of Revision Act

It may also be appropriate to discuss some examples from the field of property law. In *Lamp Finance Pty Ltd v Tooth & Co Ltd*⁴⁷ it was held that an express covenant in a lease granted before the *Conveyancing Act*

38 See, Derham, 'Set-Off' (1987), corrigenda.

39 *Bankruptcy Act 1966 (Cth)*, s86.

40 *Stehar Knitting Mills Pty Ltd v Southern Textile Convertors Pty Ltd* [1980] 2 NSWLR 514, 517.

41 See, n23 (*ante*), pp 107-108.

42 *Report on Imperial Acts in Force in the Australian Capital Territory* (1973), p40.

43 *Seat of Government Supreme Court Act 1933* (No 34, 1933), as amended (Cth).

44 [1979] 1 NSWLR 692.

45 See, *Inherited Imperial Statute Law on Practice*, (55th report, 1980) p23. See also, discussion on 8 *GeoII* c24, *ibid*, pp23-24.

46 See, Derham 'Set-Off' (1987) p8 (n16).

47 Unreported, Supreme Court (NSW), Carruthers J, CLD No 14490 of 1980, 29 June 1984, noted [1984] ACLD 606.

1919 (NSW)⁴⁸ (except a covenant within s117(4)(b) of that Act) could not be enforced in an action by an assignee of the reversion since the repeal of the *Grantees of Reversions Act 1540* (Imp)⁴⁹ by the *Imperial Law Application Act 1969* (NSW). The *Grantees of Reversions Act* enabled assignees of former monastic lands to enforce covenants in leases granted before the dissolution of the monasteries by Henry VIII.⁵⁰ The consequence of the decision in this case was that common law actions on express covenants to repair, to yield up in repair, and to insure did not lie in respect of such a lease. An assignee would be, however, entitled to enforce an implied term to yield up possession at the expiry of the term. The Law Reform Commission of New South Wales had assumed that the *Grantees of Reversion Act* was ‘superseded by the *Conveyancing Act 1919-1967*, ss 117 and 118’.⁵¹ In *Lamp Finance Pty Ltd v Tooth & Co Ltd*⁵² Carruthers J observed that this statement was incorrect as the *Grantees of Reversion Act* continued to have application to leases made before the enactment of the *Conveyancing Act*.

Statute of Westminster II, cXXII

Another example from property law which may be cited concerns the right of a co-owner to maintain an action for voluntary waste. An action for waste by one co-owner would apparently not lie at common law against another co-owner, but was conferred upon a tenant in common by ch XXII of the *Statute of Westminster II* 1285,⁵³ and later extended to joint tenants.⁵⁴ The liability of a co-owner for voluntary waste is, it would seem, statutory in nature and originated in this ancient statute.⁵⁵ However, this statute has been successively repealed in Victoria, New South Wales and Queensland. The Law Reform Commissions of New South Wales, and the Australian Capital Territory considered that the statute is ‘obsolete’.⁵⁶ However, despite these recommendations this ancient statute has been re-enacted in the Australian Capital Territory.⁵⁷ The Law Reform Commission of Queensland has recommended that the liability of a co-owner for waste should be reimposed by statute.⁵⁸ It would seem that similar legislation is also necessary in New South Wales. In Victoria the presence of a “Westbury savings” in s7 of the *Imperial Laws Application Act 1922* (Vic) would preserve the liability of a co-owner in that jurisdiction for waste.⁵⁹ It might be mentioned that the

48 No 6, 1969 (NSW).

49 32 Hen VIII c34 (Imp).

50 See, Megarry & Wade ‘The Law of Real Property’ (5th edn, 1984), p753. See also, *Re King (decd)*, *Robinson v Gray* [1963] ch 459, 479.

51 See, n37 (*ante*), p87.

52 Above (transcript of judgment, p12).

53 13 Ed I Stat 1 (Imp).

54 *Co Litt* (18th edn, 1823) s323 [220b].

55 See, Mendes da Costa ‘Co-ownership under Victorian Land Law’, (1961) 3 Melb ULR 137, 140.

56 See, n23 (*ante*), p73; n32.

57 See, *Imperial Acts Application Ordinance 1986* (ACT), Third Schedule (pt 1).

58 See, *Property Law Act* (QLRC, R37, 1987), pp3, 21.

59 See, Mendes da Costa, n45 (*ante*), p141.

Statute of Marlborough 1267,⁶⁰ which imposed liability upon a life tenant for voluntary waste, has been re-enacted in most jurisdictions.⁶¹

Savings

It has already been mentioned that the precedent for the repeal in Australia of Imperial statutes is the *Imperial Acts Application Act* 1922 (Vic). The explanatory paper which accompanied the Bill in respect of the Act contained a table⁶² setting out 'all the enactments which might, by the Bill, be said to be repealed in Victoria'.⁶³ Included in the table are the Imperial statutes which have been discussed, viz, *Statute of Westminster II* 1285 ch XXII, the *Grantee of Reversion Act* 1540, and the *Statutes of Set-Off*. The repeal of these statutes in England is noted in the table, but no notation appears in the table which suggests that the statutes still have some utility. However, the fact that the Victorian statute, like English statute law revision statutes, contains a "Westbury savings" ensures the preservation of any principle of law established under any repealed statute.

The absence of a "Westbury savings" in the New South Wales statute has caused difficulties which were envisaged by the Law Reform Commission of New South Wales. To obviate such occurrences the Commission proposed the insertion in the repealing statute of a clause to 'preserve the case law which may be originally based wholly or partly on any of the repealed Imperial enactments'.⁶⁴ The relevant provision in the New South Wales Act provides, *inter alia*, that the repeal of an 'Imperial enactment does not affect any rules of law or equity not enacted by the repealed enactment'.⁶⁵ However, it is quite clear that this provision does not preserve a principle of law which is established by a repealed enactment. In *Southern Textile Converters Pty Ltd v Stehar Knitting Mills Pty Ltd*⁶⁶ Sheppard J remarked:

What I think the legislature was concerned to do by the provision was to ensure that any rules of law or equity, not enacted by the repealed enactment, but recognised or assumed to exist by that enactment, were not by the repeal themselves repealed.⁶⁷

New Zealand

In 1981 and 1986 Bills for the repeal of unnecessary Imperial legislation in New Zealand were tabled for comment. The Law Commission of New Zealand later reported on this matter and prepared a further draft Bill.⁶⁸ The Bill was entitled the *Imperial Legislation Act*. The Schedule to the

60 52 HenIII c23.

61 See, eg *Imperial Acts Application Act* 1922 (Vic), s9, Div 15; *Imperial Acts Application Act*, 1969 (NSW), s32; *Property Law Act* 1974 (Qld), s24.

62 See, Vol II *Victorian Statutes* (1929), p1228.

63 See, eg, *Imperial Acts Application Act* 1922 (Vic), s9, Div 15; *Imperial Acts Application Act* 1969 (NSW) s32; *Property Law Act* 1974 (Qld), s24.

64 See, n23 (*ante*), p34.

65 See, *Imperial Acts Application Act* 1969, s9(2)(c) (NSW).

66 [1979] 1 NSWLR 692.

67 [1979] 1 NSWLR 629, 698.

68 *Imperial Legislation in Force in New Zealand* (Report No 1, 1987).

draft Bill enumerates Imperial statutes that are preserved by the Bill, cl 3. Included in the schedule are such important statutes as the *Grantees of Reversion Act* 1540, and the *Statutes of Set-Off*. Any Imperial statute that is not enumerated in the Schedule is not preserved, cl 4. The report of the Law Commission is comprehensive. However, it is suggested that one omission that is apparent from the report is that the Law Commission did not recommend the preservation of the *Statute of Westminster II* Chapter XXII. The Law Commission relied upon the conclusion of the Law Reform Commissions of New South Wales and the Australian Capital Territory that the Statute is obsolete.⁶⁹ The Law Commission proposed that s2 of the *Chancery Amendment Act* 1858 (Lord Cairns' Act)⁷⁰ be listed in the draft schedule to the Bill.⁷¹ *Lord Cairns' Act* is, by virtue of local legislation, in force in New Zealand.⁷² The original proposal under the 1986 Bill was that *Lord Cairns' Act* would be repealed and replaced by a provision derived from s50 of the *Supreme Court Act* 1981 (Eng)⁷³ which would be inserted in the *Judicature Act* 1908:⁷⁴ see, cl 25-27.⁷⁵ The Law Commission commented that the 'proposed provision is in much the same form as the 1858 Act'.⁷⁶ However, the proposed provision did not contain terms such as 'injured' or 'wrongful act' which are contained in *Lord Cairns' Act*. These terms may, in a particular case, impose jurisdictional constraints upon a court.⁷⁷ The need for reform of *Lord Cairns' Act* by the removal of these jurisdictional constraints has been elsewhere commented upon.⁷⁸ The time was opportune for reform to *Lord Cairns' Act*. This matter was attended to by an amendment to the *Judicature Act* 1908 which inserted a provision which was derived from s50 of the *Supreme Court Act* 1981 (Eng).⁷⁹

In New Zealand the *Imperial Laws Application Act* 1988⁸⁰ declares that the Imperial enactments listed in the First Schedule to the Act, and the Imperial subordinate legislation listed in the Second Schedule to the Act, are part of the laws of New Zealand (s3(1)). The Act also provides that after the commencement of the Act, no Imperial enactments or subordinate legislation, not listed in the Schedules, shall be part of the laws of New Zealand (s4(1)). The Act provides that the common law of England (including the principles and rules of equity), so far as it was part of the laws of New Zealand immediately before the commencement of the Act, shall continue to be part of the laws of New Zealand (s5). The Act confers upon the Governor-General in Council the power to make subordinate legislation under Imperial enactments which are part

69 Ibid, pp20-22.

70 21 & 22 Vic c27 (Imp).

71 See, n58 (*ante*), pp 11, 29

72 See, *Ryder v Hall* (1905) 27 NZLR 385, 393.

73 1981 c54.

74 1908, No 89 (NZ).

75 See, n58 (*ante*), pp156-157.

76 Ibid, p29 (para 95).

77 See, eg, *Attorney-General v Birkenhead Borough* [1968] NZLR 383, 393; *Talbot v General Television Corp Pty Ltd* [1980] VR 224, 241, 243.

78 See, Starke, 'Date for Assessment of Damages under *Lord Cairns' Act*', (1983) 57 ALJ 537, 538.

79 *Judicature Act* 1908 (NZ), s16A.

80 1988, No. 112 (NZ).

of the laws of New Zealand (s6). The First Schedule is divided into separate parts:

- i. constitutional enactments;
- ii. enactments relating to habeas corpus;
- iii. enactments relating to property;
- iv. enactments relating to boundaries;
- v. enactments relating to the Judicial Committee of the Privy Council;
- vi. enactments relating to prize; and
- vii. other enactments (viz, set-off, new style calendar, *Fires Prevention (Metropolis) Act 1774*, wills, fugitive offenders, etc).

The Second Schedule lists:

- i. Imperial subordinate legislation relating to boundaries;
- ii. Orders in Council relating to the Privy Council;
- iii. *The Prize Court Rules 1939*;
- iv. *The Merchant Shipping (Registration of New Zealand Government Ships) Order 1948*; and
- v. The Order in Council applying Part II of the *Fugitive Offenders Act 1881* to New Zealand.

The *Imperial Laws Application Act* was recently applied in *Professional Promotion & Services Ltd v Attorney-General*⁸¹ in which it was held that it was unlawful of the Government to not implement a statutory broadcast licensing system pending legislative amendment. This is because Article 1 of the *Bill of Rights* declares that the pretended power of suspension of laws or the execution of laws by regal authority without consent of Parliament is illegal.

CONCLUSION

The task of statute law revision involving Imperial legislation is a difficult task involving much research. One difficulty is that the repeal of an Imperial statute, particularly an ancient statute, may extinguish the substratum upon which the law has evolved. The number of different law reform agencies which have been engaged in this task can only be of assistance in bringing different viewpoints to this exacting task. The repeal of Imperial statutes that has already taken place has occurred before the *Australia Act 1986*.⁸² The removal of restrictions imposed by the *Colonial Laws Validity Act 1865*⁸³ may provide the impetus for the further repeal of Imperial statutes. This matter has already been comprehensively examined by the Law Reform Committee of South Australia⁸⁴ and may possibly be the subject of references to other law

81 [1990] 1 NZLR 501.

82 1986 c2 (UK). The *Australia Act* repealed the *Australian Courts Act 1828*, s15; the *Judicial Committee Act 1833*; the *Judicial Committee Act 1844*; the *Australian Constitutions Act 1850*, s28; and the *Colonial Courts of Admiralty Act 1890*, s6.

83 28 & 29 Vic c63 (Imp).

84 *Inherited Imperial Law* (102nd report, 1986).

reform agencies. One reform which is very worthwhile is the Australian Capital Territory reform whereby important Imperial statutes are expressed in modern language. This reform would assist in making the statute law accessible to practitioners, and would enable our heritage to be more accessible to citizens.