

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

PASHA S. ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendant.

Master File No. 09-cv-118 (VM)

This Document Relates To: All Actions

Affidavit of Mark A C Diel

Tab 3

HALSBURY'S Laws of England

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LORD MACKAY OF CLASHFERN
Lord High Chancellor of Great Britain
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- 8 Rights as against the Crown as the new sovereign power therefore exist only to the extent allowed and recognised by the Crown (the onus of proving such recognition resting on the subject), in as much as the courts have no jurisdiction over or in respect of transactions of the Crown with other sovereigns or acts of the Crown intended as extra-legal manifestations of power in the course of conducting its foreign affairs: *Secretary of State for India v Kamachee Boye Sahaba* (1859) 13 Moo PCC 22; *Rajah Salig Ram v Secretary of State for India* [1872] LR 1nd App Supp 119, PC; *Cook v Sprigg* [1899] AC 572, PC; *Nireaha Tamaki v Baker* [1901] AC 561 at 576, PC; *West Rand Central Gold Mining Co v R* [1905] 2 KB 391, DC; *Secretary of State for India v Bai Rajbai* (1915) LR 42 1nd App 229 at 237, PC [as to onus of proof]; *Vajesingji Joravarsingji v Secretary of State for India* [1924] LR 51 1nd App 357 at 360, 367, PC; *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 at 324, [1941] 2 All ER 93 at 98, PC; *Secretary of State for India v Sardar Rustam Khan* [1941] AC 356 at 371, [1941] 2 All ER 606 at 611, PC; *Administration of the Territory of Papua and New Guinea v Guba and Doriga* (1972) 47 ALJR 621 at 656, Aust HC; *Winfat Enterprise (HK) Co Ltd v A-G of Hong Kong* [1985] AC 733, [1985] 3 All ER 17, PC (no municipal court has authority to require the government to give effect to promises of continued recognition of existing private titles of inhabitants of ceded territories). Contrast *Amodu Tijani v Secretary for Southern Nigeria* [1921] 2 AC 399 at 407, 410, PC; *Oyekan v Adele* [1957] 2 All ER 785 at 788, [1957] 1 WLR 876 at 880, PC; cf *Re Southern Rhodesia* [1919] AC 211 at 234, 240, PC; *A-G v Nissan* [1970] AC 179 at 210-211, [1969] 1 All ER 629 at 637, HL, per Lord Reid, at 226 and 649-650 per Lord Pearce, at 232 and 654-655 per Lord Wilberforce, and at 238 and 660 per Lord Pearson.
- 9 *Kodeeswaran v A-G of Ceylon* [1970] AC 1111 at 1118, PC; *Union Government Minister of Lands v Whittaker's Estate* [1916] App D 203, SA App Div; *Madzimbamuto v Lardner-Burke and George* [1969] 1 AC 645 at 721, [1968] 3 All ER 561 at 572, PC. Cf, as to the Crown's minor prerogatives, *Colonial Government v Laborde* [1902] Mauritius Reports 19, Mauritius SC. See also *Sammut v Strickland* [1938] AC 678 at 697, [1938] 3 All ER 693 at 699, PC; *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, [1964] 2 All ER 348, HL.
- 10 *Campbell v Hall* (1774) 20 State Tr 239.
- 11 *Kodeeswaran v A-G of Ceylon* [1970] AC 1111 at 1119, 1122, PC.

868. Introduction of English law in conquered or ceded colonies. Where the law of England has been applied to the conquered or ceded country the effect has been to apply both the common law¹ and the statute law so far as they: (1) were in force, either at the date of the application or at some other specified date; and (2) were not merely in the nature of law of local policy adapted solely to England, but were general regulations equally applicable to any country governed by English law². Statute law thus introduced will not override or prevail against the enactments of the local legislature unless contained in an Act of Parliament which is made applicable to the colony by the express words or necessary intendment of any Act of Parliament³. Statutes enacted subsequently to the application of English law have no force in the colony, except in cases in which it is expressly or by necessary implication provided that they are to apply⁴.

- 1 Where provisions for the application of English law refer to 'the principles and rules of common law' in force in England from time to time or at a specified date, the reference is to the whole law of England including English statutory modifications to the principles and rules of common law and equity: *Booth v Booth* [1935] 53 CLR 1 at 30, 32, Aust HC; *Re Johns* [1971-72] P & NGLR 110 at 119, Papua and New Guinea SC.
- 2 *A-G v Stewart* [1817] 2 Mer 143 at 160.
- 3 Colonial Laws Validity Act 1865 ss 1-3 [s 1 amended by the Burma Independence Act 1947 Sch 2; the Statute Law (Revision) Act 1976].
- 4 *R v Vaughan* (1769) 4 Burr 2494.

(2) INTRODUCTION OF ENGLISH LAW TO SETTLED COLONIES

869. Introduction and development of English law in settled colonies. The common law of England and the statute law existing at the date of the formation

of the colony applied to colonies acquired by settlement¹, but statutes subsequently enacted do not apply unless they are expressly applied². This principle of introduction or reception is, however, subject to this restriction, that so much only of the law of England was carried with them by the colonists³ as was applicable⁴ to their situation and the condition of an infant colony⁵.

The law of England introduced on settlement is open to local development, for on the one hand, statute law thus introduced will not override or prevail against the enactments of the local legislature unless contained in an Act of Parliament which is made applicable to the colony by the express words or necessary intendment of any Act of Parliament⁶, and on the other hand, the common law thus introduced not only is subject to local legislation⁷ but also develops by the practice of the courts⁸; such development will not always be uniform with the development of the common law in England⁹, unless it is provided that the common law in force is to be that in force in England for the time being rather than as at a specified date.

- 1 *Memorandum* (1722) 2 P Wms 74; *The Landenbale Peerage* (1885) 10 App Cas 692 at 744, HL., per Lord Macburn; *Catterall v Catterall* (1847) 1 Rob Eccl 580; *Countess of Limerick v Earl of Limerick* (1863) 4 Siv & Tr 252; *Falkland Islands Cn v R* (1864) 2 Min PCC NS 266; *R v De Bann* (1911) 3 WALR 1, W Aust; *Wollbank v Ellis* (1853) 3 Nfld LR 400 (Newfoundland); *Umacke v Dickson* (1853) James 287 (Nova Scotia); *Keenatin Pinner Cn v Kemura* (1906) 16 OLR 184 (Ont) (ownership of bed of navigable river); *Penhas v Tan Swo Eng* [1953] AC 304, PC; *R v Wedge* [1976] 1 NSWLR 581, NSW SC. See also *Mahni v Queensland* [1992] 107 ALR 1, 22-25, 58-60, 93, 140-142, Aust HC; *Wik Peoples v Queensland* (1996) 141 ALR 129, [1997] 3 LRC 513, Aust HC. The date on which the law of England is to be ascertained as applying to the settled colony (often called the date of reception) has generally been fixed by local enactment.
- 2 *Penley v Watson Assurance Co* [1864] 10 Gr 422 at 428, Upper Canada (Ont) Court of Chancery; *Pitt v Lord Ducre* [1876] 3 Ch 1 295.
- 3 The time of introduction may be held to be the date for deciding suitability (particularly, perhaps, in relation to statutes); cf *Quinn York v Hinds* [1905] 2 CLR 145, Aust HC. Bar attention has on various occasions been paid, particularly in relation to common law rules and principles, to consideration of the position at the time when the issue of application is raised (more particularly, perhaps, the time of the events giving rise to the litigation); see *Cooper v Stuart* (1889) 14 App Cas 286 at 292, PC; *Nichols v Anglo-Australian Investment, Finance and Land Co* (1890) 11 NSWLR 114, NSW SC; *Debsbery v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283 at 291, Aust HC; cf *Shelby v Edwards, Pimby & Co* (1897) 13 WN NSW 166, NSW SC.
- 4 Applicability depends not upon whether the court considers the rule suitable or beneficial for the colony but upon whether it is capable of application in the colony; *State Government Insurance Commission v Trignell* (1978) 26 ALR 67, Aust HC; *Debsbery v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283 at 300-311, Aust HC. See further note 5.
- 5 1 Bl Com 107. See, however, *Whicker v Hume* (1858) 7 HL Cas 124 at 161 per Lord Cranworth; *Garrett v Chery* [1968] 69 SR NSW 281, NSW CA. Cf *A-G v Stewart* (1817) 2 Mer 143 at 160 per Grant MR; *Debsbery v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283, Aust HC; *Winterbottom v Vothum & Sims* [1921] SASR 364, S Aust SC; *Belibis v Ng Li Shi* (1893) (Hong Kong SC), appended to report of *Re Tse Lai-chin* [1969] HKLR 159, Hong Kong SC; *Garrett v Chery* [1968] 69 SR NSW 281, NSW CA; *R v Cyr* (1917) 13 Alta LR 320, 38 DLR 601, Alta CA, considering the general condition of public affairs and the attitude of the community on the issue. See also *Moranwell v Moranwell* [1941] 49 Man R 26, [1941] 2 DLR 655, Man CA.
- 6 Colonial Laws Validity Act 1865 ss 1-3 (s 1 amended by the Burma Independence Act 1947 Sch 2; the Statute Law (Revison) Act 1976); *Phillips v Eyre* (1870) 1 R 6 QB 1 at 20-21, Ex Ch, per Willes J. As to the legislative competence of the Crown in settled colonies see PARA 807. See also PARA 871.
- 7 Colonial Laws Validity Act 1865 s 3.
- 8 See *Konleswaran v A-G of Ceylon* [1970] AC 1111 at 1119, 1122, PC.
- 9 See *Lange v Australian Consolidated Press NZ* [2000] 2 LRC 802, PC; *Lange v Atkinson* [2000] 4 LRC 596, NZ CA; *Invercargill City Council v Hamlin* [1996] AC 624, [1996] 1 All ER 756, [1996] 1 LRC 440, PC; *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 at 641, 644,

[1967] 3 All ER 523 at 536, 538, PC; *Brisbane City Council v A-G for Queensland* [1979] AC 411, [1978] 3 All ER 30 at 33, PC; *de Lasala v de Lasala* [1980] AC 546, [1979] 2 All ER 1146 at 1152–1153, PC. It has been held that where local enactments use the same terms as English statutes the colonial courts should follow the construction which English courts have put upon those terms: see *Trimble v Hill* (1879) 5 App Cas 342 at 344–345, PC; *Cooray v R* [1953] AC 407 at 419, PC; but contrast *National and Grindlays Bank Ltd v Dharamshi Vallabhji* [1967] 1 AC 207 at 229, [1966] 2 All ER 626 at 636, PC; cf *Nadarajan Chettiar v Waluwa Mahatma* [1950] AC 481 at 492, PC.

870. Customary, native or indigenous law in settled colonies. The applicability of native or indigenous law in a settled colony is not automatic, but depends on express enactment or on political concession amounting to a course of practice¹. Native or indigenous law will only be permitted to continue in existence (if at all) in so far as it is not repugnant to justice and general principles of humanity. Subject to that principle, it may prevail, in the event of inconsistency, over the common law that has been introduced or received into the colony, in as much as common law rules are introduced subject to such qualifications as local circumstances render necessary².

1 *Re Ninety-Mile Beach* [1963] NZLR 461 at 468, NZ CA; *Milirrpum v Nabalco Pty Ltd* [1972–73] ALR 65 at 139, 17 FLR 141 at 223, Northern Territory Aust SC. The historic legal doctrine is set aside by *Mabo v Queensland* [1992] 107 ALR 1, [1993] 1 LRC 194, Aust HC, which overrules *Milirrpum v Nabalco Pty Ltd* [1972–73] ALR 65, 17 FLR 141 at least in so far as that case is inconsistent with the propositions: (1) that antecedent rights and interests in land possessed by the indigenous inhabitants at the time of the Crown's acquisition of the territory are not extinguished by that acquisition but continue so as to constitute a burden on the Crown's radical title to all land within the territory; and (2) that the nature and incidents of that native title are to be ascertained, as a matter of fact, by reference to the traditional laws and customs acknowledged and observed by those indigenous inhabitants. As to such native title see also *Te Runanganui o Te Ika Whenua Inc Society v A-G of New Zealand* [1994] 1 LRC 31, NZ CA; *Wik Peoples v Queensland* [1996] 141 ALR 129, [1997] 3 LRC 513, Aust HC.

2 See *Kabaka's Government v Kitonto* [1965] EA 278, East Africa CA; *R v Dabat* [1963] P & NGLR 113 at 114, Papua and New Guinea SC; cf *R v Murrell* (1836) 1 Legge 72, New South Wales SC.

(3) EXTENSION OF UNITED KINGDOM STATUTES

871. Principles governing extension of United Kingdom enactments. United Kingdom enactments may 'apply to' or 'extend to' a dependent or other territory as part of the law only of the United Kingdom, in that the operation of the law in the United Kingdom is predicated on some event, circumstance, person or thing identified by relation to that dependent or other territory¹. Alternatively such enactments may 'apply to' or 'extend to' a dependent territory as part of the law of that territory rather than, or as well as², of the law of the United Kingdom. Although this distinction is clearly recognised in law and in legislative practice³, it is not always drawn terminologically, particularly in older statutes⁴. Some enactments apply and extend in both senses to dependent territories⁵.

It is a general principle that legislation of the United Kingdom will not lightly be held to extend to British overseas territories⁶, or to the Channel Islands or the Isle of Man⁷, as part of their law. Where an Act is so extended by its own terms or by Order in Council or proclamation authorised by the Act, its repeal does not extend to British overseas territories, or to the Channel Islands or the Isle of Man, unless the repealing Act so provides⁸.

- 1 Thus the operation of, eg, the Hong Kong 1 repeal of the Extradition Act 1989 by th provisions see SI 2003/3103), is limited to of Man: see art 6.
- 2 Thus the phrase 'apply for the purposes of' (Savings) Order 2003, SI 2003/3103, art 5:
- 3 See eg the Statute of Westminster 1931, pr many independence Acts, eg the Nigeria 11
- 4 Eg in the Foreign Jurisdiction Act 1890 : mentioned in the text; which of these is thr on the intention of the particular enactm Act 1890.
- 5 Eg the Extradition Act 1989 (repealed wit
- 6 *Al Sabah v Grupo Torras SA* [2005] UKP 3 LRC 771; *Lawson v Serco Ltd, Botha UKHL 3 at [1]*, [2006] 1 All ER 823 at | *al-Skeini*) *v Secretary of State for Defence* [2007] 3 All ER 685 at [86]; *New Zealand AC 349 at 357*, PC; *Re Vocalion (Foreign Reproduction Society Ltd v EMI (Australi Rokov* (1976) 11 ALR 129, Aust HC; *Uk cited in PARA 869 note 2.*
- 7 See cases cited in PARA 799 note 10.
- 8 See *Al Sabah v Grupo Torras SA* [2005] U [2005] 1 All ER 871 at [31]–[34], [2005]