*Ian Holloway**

A FRAGMENT ON RECEPTION

> We must not suppose that, because we find a rule or an idea in a Year Book or in an old writer, we must at once accept the law as so stated without comment and without criticism.[1]

"HISTORY", Judge Richard Posner once wrote, "has not dealt kindly with Blackstone".[2] In Posner's view, Blackstone's intellectual reputation was deeply marred by the vitriol of Bentham's *Fragment on Government*, and has never quite recovered. "Bentham's denunciation of the *Commentaries*", Posner suggested, "placed Blackstone's admirers on the defensive ever after. Blackstone was damned with uncommon violence by Bentham and with faint praise by most later commentators."[3] Indeed, Blackstone himself made plain just how wounding was the attack on his project. In some subsequent editions of the *Commentaries*, he added a postscript to his Preface, which has a quite revealing, and decidedly petulant, tone about it. "Notwithstanding the diffidence expressed [in the original Preface]", he wrote,

> no sooner was the work completed, but many of its positions were vehemently attacked by zealots of all (even opposite) denominations, religious as well as civil. ... To such of these animadverters as have fallen within the author's notice (for he doubts not but some have escaped it) he owes at least this obligation; that they have occasioned him from time to time to revise his work, in respect of the particulars objected to; to retract or expunge from it what appeared to be really erroneous; to amend or supply it when

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1 Holdsworth, *Some Lessons From Our Legal History* (McMillan and Co, New York 1928) p7.

2 Posner, "Blackstone and Bentham" (1976) 19 *JL & Ec* 569 at 570.

3 As above.

> inaccurate or defective; to illustrate and explain it when obscure.[4]

Viewed from an academic standpoint more than two centuries later, the initial reception of the *Commentaries* seems a pity, for it has meant that Blackstone's work has not been subjected to the same level of close scrutiny as has, say, the work of Dicey, or even that of Bentham. As Posner noted, a substantial part of the commentary on Blackstone has been of a quasi-apologetic nature.[5] Much of the rest has been historical or archival, having to do with details of the publication of the *Commentaries*[6] or extant notes of Blackstone's lectures.[7] In sum, Blackstone survives today largely as an icon, as a figure to be mocked or revered, more than one to be studied. While he remains a significant figure as the first university professor of common law and as an organiser of common law principles,[8] to most common lawyers, the *Commentaries* sit with things like Coke's *Institutes*[9] and Littleton's *Tenures*,[10] as something chiefly of antiquarian interest. And, in this respect, Blackstone was just one of a progression of many, including both Coke and Littleton, who were embarked on the same task, namely to bring rationality and order to the "artificial reason and judgment of law".[11]

One perfectly understandable explanation, of course, for a lack of present-day substantive interest in Blackstone is that much of the common law has

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4 Blackstone, *Commentaries on the Laws of England* (T Cadell, London, 11th ed 1791) p*iii*.

5 Posner refers in this respect to Holdsworth, *A History of English Law* (Methuen, London 1938) Vol 12 pp728-729; Dicey, "Blackstone's Commentaries" (1932) 4 *Cam LJ* 286 and Jones, *The Sovereignty of the Law: Selections from Blackstone's Commentaries* (McMillan, London 1974).

6 See, for example, Pollock, "The Pagination of Blackstone's *Commentaries*" (1906) 22 *LQR* 356.

7 See, for example, Baker, "A Sixth Copy of Blackstone's Lectures" (1968) 84 *LQR* 465.

8 A brief sketch of Blackstone's career might be of interest. Born in London in 1723, he was educated at Pembroke College, Oxford, and elected a Fellow of All Souls in 1743. He published his first book, *Elements of Architecture*, that same year. Three years later, he went to the Bar. In 1750, he was awarded the BCL, and in 1758 appointed the first Vinerian Professor. Elected to Parliament in 1761, he sat in the House of Commons until 1770. In 1770, Blackstone was appointed briefly to the King's Bench, and then to the Common Pleas, where he sat until his death in 1780. For a more detailed summary of his life, see Holdsworth, *A History of English Law* Vol 12 pp702-37.

9 Coke, *The Institutes of the Laws of England* (E&R Brooke, London 1794-1797).

10 Littleton, *Tenures* (Russell and Russell, New York 1970).

11 *Case of Prohibitions del Roy* (1607) 12 Co Rep 63 at 65 per Coke CJ.

changed since his time. Few, if any, of the rules of common law expounded by Blackstone can possibly survive today in their original form. And it scarcely needs saying that Blackstone wrote at a time when the law remained preoccupied with the procedural complexities associated with the old forms of action. Yet there is still one area of the law in which Blackstone remains the governing authority. That is the common law doctrine of reception.

It might not be thought that the process by which the common law came to be transplanted throughout the Empire should be a live issue today, but in places like Australia, Canada and (to a lesser extent) New Zealand "reception" underlies the debate over Aboriginal title, which is among the most pressing and sensitive political issues facing these older members of the Commonwealth. And, in the common law context, "reception" for most intents and purposes equals Blackstone. It is no exaggeration to say that the portions of the *Commentaries* dealing with reception have come to occupy an almost constitutional position in the legal order. That this is so ought not to be especially surprising. To the English Blackstone was describing what had been, but to the Empire he was ordaining what was to come, *what was to be*. In light of this, a close examination of the foundation of Blackstone's formulation of the doctrine need not seem at all out of place.

BLACKSTONE'S COMMENTARIES AND THE DOCTRINE OF RECEPTION

The passage, now having become infamous in the eyes of many, from which the doctrine of reception arose is to be found in the Introduction to the first volume of the *Commentaries*. In describing which countries were subject to the laws of England, Blackstone wrote:

> For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony. ... But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless

> such as are against the law of God, as in the case of an infidel country.[12]

It is trite that the basis of the understanding by which the so-called settled colonies received English law was a literal reading of Blackstone. Generations of law teachers throughout the Commonwealth have recounted how instantly, without even the need for a stroke of a pen, upon the formal establishment of a permanent settlement, parts of the globe came to be governed by the English common law. As Brennan J (as he then was) of the High Court of Australia put it in *Mabo v Queensland (No 2)*,[13] the landmark case in which the concept of Aboriginal title was recognised for the first time as existing in Australian common law, "English colonists were, in the eye of the common law, entitled to live under the common law of England which Blackstone described as their 'birthright'".[14]

This notion that Blackstone's dictum was accurately descriptive of the contemporary state of the common law has never been seriously disputed.[15] In *R v The Magistrates of Sydney*,[16] one of the earliest judgments of the Supreme Court of New South Wales, Forbes CJ is reported as having made specific reference to Blackstone, and as having said that "the nature of the original settlement of the colony brings it within that class to which I have assigned it; namely, a colony in which the English law prevails, as the birthright of the subject, and the bond of allegiance between the colonists and their sovereign."[17] Similarly, regarding Newfoundland, the Privy Council held in 1841 that English law had been received by virtue of its settlement:

> Newfoundland is a settled, not a conquered colony, and to such colony there is no doubt that the settlers from the

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12 Blackstone, *Commentaries on the Laws of England* p108. As is well known, however, in *Campbell v Hall* (1774) 1 Cowp 204, the King's Bench (speaking through Lord Mansfield) held that, in the case of a conquered colony in which a legislative assembly had been promised, the Crown lost its right to alter the law by the prerogative.

13 (1992) 175 CLR 1.

14 At 35.

15 Whether or not places like Australia and Canada ought in the eyes of international law to have been deemed "settled" has, to be sure, been the subject of much debate, particularly latterly. But the correctness of Blackstone's summation of the law is scarcely mentioned in today's debate.

16 Reported in *The Australian*, 21 October 1824.

17 As above.

> mother country carried with them such portion of its Common and Statute Law as was applicable to their new situation, and also the rights and immunities of British Subjects.[18]

And in *Cooper v Stuart*,[19] the case in which the Judicial Committee of the Privy Council held conclusively that New South Wales was also a settled colony, it was accepted that Blackstone's prescription about the reception of English law was governing. Speaking through Lord Watson, the Board stated:

> The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. ... The Colony of New South Wales belongs to [the class of settled colony]. ... In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute. The often-quoted observations of Sir William Blackstone appear to their Lordships to have a direct bearing upon the present case.[20]

Even in *Mabo* itself, which seems especially curious given the nature of the matters in dispute, the judges either implicitly accepted without

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18 *Kielley v Carson* (1842) 4 Moo PC 63 at 84-85.

19 (1889) 14 App Cas 286.

20 At 291. It is worthwhile to note that the status of settled colonies did not arise in *Campbell v Hall*, though, even if it did, one doubts that Blackstone's dictum would expressly have been mentioned. An interesting manifestation of the old rule that living authors could not be cited in court occurred with respect to Blackstone and Mansfield themselves. In the *Lloyd's Evening Post* of 18 May 1770, it was reported:

> A few days ago, as Sir William Blackstone was on the Bench, in the Court of King's Bench, Counsellor Impey availed himself of applying to that Gentleman's Commentaries on the Laws of England, and was entering into some observations upon that head, when Lord Chief Justice Mansfield stopped him short, and said, "he would suffer no such references in that Court; for though the work alluded to was of much utility to the public, and would be remembered and applied to when the Author was no more, yet, while living, he thought it unnecessary, as well as improper.

(quoted also in Oldham, "From Blackstone to Bentham: Common Law Versus Legislation in Eighteenth-Century Britain" (1991) 89 *Mich L Rev* 1637 at 1643).

question that Blackstone's formulation was correct in law,[21] or apparently did not consider the issue worthy of mention.[22]

For his proposition that English law followed the settlers, Blackstone cited two authorities. The first was *Blankard v Galdy*,[23] a decision of the King's Bench from 1693, in which there was general agreement that in the case of an uninhabited country, newly found out by English subjects, all laws in force in England were in force there. The second was the wonderfully entitled *Re Anonymous (No 15)*[24] from 1722, a Privy Council Memorandum concerning the application of the *Statute of Frauds* to Barbados. In it the Privy Council is reported as having determined that

> if there be a new and uninhabited country found out by *English* subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them ... though, after such country is inhabited by the *English*, acts of parliament made in *England*, without naming the foreign plantations, will not bind them. ...
>
> Where the King of *England* conquers a country, it is a different consideration: for there the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases.[25]

On their face, these positions, however offensive they may seem to some today, are scarcely controversial in terms of their exposition of the principles of seventeenth and eighteenth century jus gentium. They represent the standard line of thought expounded by Vattel in his classic treatise on international law:

> When a nation takes possession of a distant country, and settles a colony there, that country, though separated from the principal establishment, or mother-country, naturally becomes part of the state, equally with its ancient

21 See at 34 per Brennan J, at 79 per Deane and Gaudron JJ.

22 See at 15-16 per Mason CJ and McHugh J, at 138 per Dawson J, at 180-181 per Toohey J.

23 (1693) 2 Salk 411. Slightly different reports of the case are found at Holt KB 341 and Comb 228 (under the name *Blancard v Galdy*). The fullest report is at 4 Mod 222.

24 (1722) 2 P Wms 75.

25 At 75-76 (emphasis original).

> possessions. Whenever, therefore, the political laws, or treaties, make no distinction between them, every thing said of the territory of a nation, must also extend to its colonies.[26]

The problem is that both the judgment in the latter of the two cases *and consequently Blackstone's famous passage* were per incuriam; made in ignorance of the legal consequences of the union between Scotland and England of 1707. Simply put, there was no such person in the eyes of the law as the "King of England" in 1722. Nor did the law recognise such a thing as an "English subject". Hence, there was no English "birthright" which settlers could claim as their lawful due. In a nutshell, Blackstone was wrong in law. Based upon a correct application of the principles accepted in international law at the time, and which he espoused in the *Commentaries*, English common law should *not* automatically have been received in British colonies settled after 1707.

THE ACT OF UNION AND THE DEMISE OF THE ENGLISH CROWN

The current political union between Scotland and England came into effect on May Day, 1707. It took place pursuant to a Treaty of Union negotiated between the two states in 1706, and duly ratified by both the Scottish and English parliaments in the same year.[27] Prior to the union, Scotland and England were separate kingdoms. The two countries had shared a monarch since the accession to the English Throne of James VI of Scotland in 1603, but this did not affect their status as independent states. To use a modern analogy, the relationship that existed between Scotland and England during the seventeenth century was not unlike the relationship which came to exist between Great Britain and the Dominions following the Balfour Declaration.

The very first article of the Treaty of Union[28] makes clear the point that England and Scotland as separate states would cease to exist upon its coming into force:

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26 Vattel, *The Law of Nations* (Sweet and Maxwell, London 1834) Book 1, p100.

27 The *Act of Union* 1706 (Scot) and the *Union of England and Scotland Act* 1706 (UK), respectively.

28 The Treaty is set out in full in the *Union of England and Scotland Act* 1706 (UK).

> The two Kingdoms of England and Scotland shall upon the first day of May which shall be in the Year one thousand seven hundred and seven, and for ever after, be united into one Kingdom by the Name of Great Britain.

The Treaty also makes it clear that, from 1 May 1707, both executive and legislative authority were to be united in a new political entity. Article II, for example, provides for the succession "to the monarchy of the united Kingdom of Great Britain and of the dominions thereto belonging". Similarly, Article III requires that "the united Kingdom of Great Britain be represented by one and the same Parliament to be stiled [sic] The Parliament of Great Britain". By virtue of Article XXII, sixteen Scottish peers were to be given seats in the House of Lords of "the Parliament of Great Britain".[29] Moreover, Article IV speaks of "subjects of the united Kingdom of Great Britain". The sole concession to formal difference between Scotland and England came in the recognition that Scots law, and the Scottish court system, would continue after the union.[30]

Based on any approach to interpretation, the indisputable meaning of the Treaty of Union is that Scotland and England ceased to exist as entities sui juris after April 1707. Following the union, Scotland and England were two realms,[31] and the Scots and the English two peoples, living in a single country. Paradoxically, this is a point that Blackstone himself noted, moreover, with considerable vigour. In a footnote to subsequent editions he described the Treaty of Union in the following manner:

> The truth seems to be, that in such an incorporate union (which is well distinguished by a very learned prelate from a federal alliance ...) the two contracting states are totally annihilated, without any power of revival; and a third arises from their conjunction, in which all the rights of

29 This has since been repealed. All Scottish peers may now take seats in the upper house. Note, however, that no Scottish or English peers have been created since the union. All peerages created since 1707 have been either peerages of Great Britain, or of the United Kingdom (after 1801, following the union with Ireland).

30 Art XIX.

31 Though England and Scotland ceased to exist as entities sui juris, they did remain separate realms. But the legal definition of realm appears to be something of a circular one. For example Cockburn CJ stated in *R v Keyn* (1876) 2 Ex D 63 at 197: "When it is used as synonymous with territory, I take the true meaning of the term 'realm of England' to be the territory to and over which the common law of England extends".

> sovereignty, and particularly that of legislation, must of necessity reside.[32]

This point of British constitutional law is also of considerable constitutional importance for those parts of the Commonwealth settled after 1707, whose received law is dependent on it. This is because Blackstone's dictum about the reception of *English* law was made in ignorance of it. So, too, was the holding of the Privy Council in *Re Anonymous*. The correct constitutional position was that there was no such monarch as the King of England in either 1722 (in the case of *Re Anonymous*) or 1765 (when Blackstone first published the first volume of his *Commentaries*). Nor were there English subjects, for whom "the common law of England" could be a birthright. There were only *British* subjects, and a Crown of *Great Britain*. The position is different in the case of colonies settled before the Union. Both New Brunswick and Nova Scotia, for example, date their reception at the Restoration.[33] In these cases, the newly settled territories were Dominions of the English Crown, in which English law could properly be said to have been received.[34] But after 1707 the constitutional identity of the settlers changed. To overlook

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32 See, for example, Blackstone, *Commentaries* Vol I p98.

33 *R v McLaughlin* (1830) 1 NBR 218 and *Uniacke v Dickson* (1848) 2 NSR 287. In *R v McLaughlin* at 222 Chipman J held:

> The period of the restoration of Charles II, it is understood, was in practice adopted by the General Assembly of this Province at its first session, as the period anterior to which all acts of Parliament should be considered as extending, and the reason which has been given for this is that it was about that period that the plantations began to be specially mentioned in acts of Parliament, and the inference therefore was that if any act after that period was intended to extend to the plantations, it would be so expressed.

34 Though there is some question that Nova Scotia (which then included most of what is now New Brunswick and Prince Edward Island) ought not to have been viewed as a Scottish colony. In 1621, King James VI granted Sir William Alexander the territory between New England and Newfoundland, which was named Nova Scotia. The order of Baronets of Nova Scotia was created, in part to encourage settlement. Since under Scots Law, Baronets took seisin by receiving symbolic "earth and stone" on the actual land, the parade ground outside Edinburgh Castle was deemed also to have been granted to Alexander as part of Nova Scotia. The original Scots left, however, in 1632, when Nova Scotia was re-granted to the French. Given that it was not until 1713 that what is now mainland Nova Scotia was returned to the British (by the Treaty of Utrecht), it seems curious that the Province chose to date its reception from the Restoration, or alternatively that, if it did, it did not claim to have received Scots law. Perhaps the situation might have been different had the large-scale Scottish migration to Nova Scotia begun a few decades earlier!

this point was a fundamental error by the Privy Council in *Cooper v Stuart*. And it was a significant omission in analysis by the High Court of Australia in *Mabo v Queensland (No 2)*.[35] Yet it is an error that seems to have escaped all mention. Whatever else they may have said, Blackstone's animadverters apparently did not trouble to point out his constitutional muddle on the reception issue. One can only assume that the *Commentaries* were not much read north of the Tweed.

THE RECEPTION RULES CONSIDERED IN A PURPOSIVE LIGHT

One of the things which becomes very clear upon reading any of the old authorities on the law of nations is that the rules relating to reception were what we would call today "purposive" in nature. We might today hold the view that it was in fact the lack of sociological sophistication amongst the *Europeans* that allowed them to say that a place inhabited by nomadic peoples was "owned" by no one. But, viewed in its own context, the doctrine of reception in terra nullius as it was understood in the eighteenth century was intended to ensure that some form of law and order was taken to the new lands. Law abhors a legal vacuum, and, regardless of how incongruous its substance may seem to succeeding generations, it will provide a means of self-propagation. The reception rules were aimed to help the new colony take root and flourish. Their purpose, to state it in modern terms, was to help ease the adjustment to social life amidst the "wilderness".

This was a point noted in the Nova Scotian reception case of *Uniacke v Dickson*.[36] In a very modern-reading passage, Halliburton CJ argued that the willingness of courts to deem statute law to have been received ought to decline over time:

> In the early settlement of a colony, when the local legislature has been just called into existence, and has its attention engrossed by the immediate wants of the members of the infant community in their new situation; the courts of judicature would naturally look for guidance, in deciding

35 Though, to be fair, it is an oversight which seems to have been made by everybody else, too. As Professor Alex Castles put it in *An Australian Legal History* (Law Book Co, Sydney 1982) p378: "Virtually without question, it was assumed from the beginning that transplanted English laws would form a substantial part of the legal regime."

36 (1848) 2 NSR 287.

> upon the claims of litigants, to the general laws of the mother country; and would exercise greater latitude, in the adoption of them, than they would be entitled to do, as their local legislature, in the gradual development of its powers, assumed its proper position. Every year should render the Courts more cautious in the adoption of laws that had never been previously introduced into the colony, for prudent judges would remember that it is the province of the Courts to declare what *is* the law, and of the legislature to decide what it *shall be*.[37]

Further, it is significant to note that the reception rules were personal in nature. The received law was lex personi. As RTE Latham put it in his famous essay, "The Law and the Commonwealth", "[t]he process ... by which the English law was extended to English settlements was primarily personal, not territorial, and it is always so treated in the authorities."[38] Through its prescription that settlers' lex personi was to be applied to the wilderness, the reception doctrine was intended to ensure that the instrumental needs of a transplanted society could be satisfied in a manner most conducive to the propagation of the "mother" civilisation.

With this in mind, the gravity of Blackstone's error of formulation becomes even more apparent. By referring as he did to the received law in a settled colony as a "birthright", Blackstone was engaging in a purposive exercise. His prescription was intended to ensure that the laws which would apply in a colony like New South Wales would "fit with" the needs of the new society. It was for this reason that he was so careful to add his words of limitation that the colonists carried with them "only so much of the English law, as is applicable to their own situation and the condition of an infant colony".[39] In this respect, Blackstone was simply echoing the classic point made by Montesquieu. "Political and civil laws",

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37 At 291 (emphasis added).

38 Latham, "The Law and the Commonwealth" in Hancock (ed), *Survey of British Commonwealth Affairs* (Oxford University Press, London 1937) pp516-517.

39 Though it is interesting to contrast this formulation with the passage as it appeared in the first edition:

> For it is held, that if an uninhabited country be discovered and planted by English subject, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go, they carry their laws with them.

Blackstone, *Commentaries* (Clarendon Press, Oxford, lst ed 1765) p105. As to the breadth of the corpus of received law, there were none of the qualifications featured in later editions.

Montesquieu wrote in *De L'Esprit des Lois*, "should be relative to the nature and principle of the actual, or intended government".[40]

It must be remembered that, in many cases in the British Empire, the majority of settlers were not English, but Scottish or Irish; people whose "birthright", whose lex personi, was not the common law of England, but either Scots law or the common law of Ireland. One wonders whether the law of the time could feasibly have accommodated such a formal level of plurality,[41] but to take a socially accurate, purposive approach to the question of reception, to apply, in other words, Blackstone's underlying premise that settlers in terra nullius ought to take their law with them, one would have concluded that the law which would apply in a settled colony could have been *either* English, Scots or Irish law, depending upon the demographic makeup of the new settlement.

Alternatively, one could have "read down" Blackstone so as to exclude his mistake of constitutional identity. Such an approach would have had the advantage of being in conformity with the line taken by contemporary writers on international law.[42] Under this approach, the law that ought to have been received was the law of the settlers' nationality, viz the law of Great Britain. Unfortunately, of course, there neither was, nor is, such a thing as "British" law.

The only solution that would have been both workable and lawful would have been to engage in a positivistic exercise; formally to ordain that one or another body of law would apply to the conditions of the new colony. And this, in fact, is what eventually happened in most places. In the case of New South Wales, for instance, the Imperial Parliament in 1828 passed the *Australian Courts Act* which provided:

> That all laws and statutes in force within the realm of England at the time of the passing of this Act (not being

40 Montesquieu, *De L'Esprit des Lois* (G&Ewing, Dublin 1751) p8.

41 Though there *were* British precedents for this sort of thing. The Canadian province of Quebec, for instance, was and is governed by civil law, and in India different religious communities were governed by aspects of their own religious laws. As John McLaren and Hamar Foster have argued in the case of western Canada, English law was received only patchily in the early days. And the part which *was* received was refracted through the prism of local conditions and prejudices: Foster & McLaren, "Introduction" in Foster & McLaren (eds), *Essays in the History of Canadian Law, Vol VI: British Columbia and the Yukon* (Osgoode Society, Toronto 1995).

42 See, for example, Vattel, *The Law of Nations*.

> inconsistent herewith, or with any charter or letters patent or order in council which may be issued in pursuance hereof) shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies.[43]

In a purely formal sense, this erased any doubt about the applicability of English law in New South Wales (at least until Boothby J took his seat on the judicial bench in South Australia).[44] But the problem from a *principled* perspective is that the Act merely reflected the pre-existing, yet constitutionally doubtful, assumptions about the applicability of English laws to non-English people. As many have noted, the *Australian Courts Act* 1828 was among other things designed to erase doubts about reception in New South Wales.[45] But, in so doing, it was building on an error of historical interpretation that had first been made a century before in *Re Anonymous*, and which had been cast into quasi-constitutional stone by Blackstone forty-odd years later.

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43 Section 24. It is worthwhile to note that in none of the commissioning documents with which Governor Philip assumed office did it prescribe that the substantive law of the new colony was to be the English common law. As has already been noted, in *An Australian Legal History* p378, Professor Castles wrote that it was just "assumed that transplanted English laws would form a substantial part of the legal regime".

44 Justice Benjamin Boothby of the Supreme Court of South Australia was the "wild colonial judge", whose indiscriminate application of the repugnancy doctrine to strike down colonial legislation led to the enactment by the Imperial Parliament of the *Colonial Laws Validity Act* 1865. For a discussion of his tenure on the Supreme Court of South Australia, see Castles, *Australian Legal History* pp407-408, 411.

45 See for example Parkinson, *Tradition and Change in Australian Law* (Law Book Co, Sydney 1994) p142, and generally, Castles, *An Australian Legal History* Ch14.