

INTRODUCING ENGLISH STATUTE LAW INTO THE PROVINCES: TIME FOR A CHANGE?

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Introduction

From Ontario west, the provinces and the two territories have legislation giving a set date for the reception of English law as part of provincial or territorial law. The Maritime provinces are different. Instead the date for their acquisition of English law was established by the courts of the provinces as the issue arose in various cases brought before them.¹

Generally speaking English statutes passed by the Imperial Parliament before these dates may be held applicable to the provinces or territories while those enacted later do not. Whether they do or do not is up to the courts to decide as the situation arises.

English common law on the other hand has received more flexible treatment. Those common law principles enunciated by the English courts after the dates for the reception of English law may be brought into Canadian law as they arise during litigation if they appeal to our reason. However, for example, no matter how reasonable a 1938 English statute may be, it can never be part of provincial law. As well those rules of the English common law articulated prior to the cut-off dates are accepted or rejected in Canada on the basis of reason.

This article is mainly devoted to the experience in British Columbia, partly to reduce the time for telling and partly because it is best known to the writer. Nevertheless, other provinces seem to have similar inconsistencies in their case law and so what follows has a Canadian common law texture to it.

Between approximately 1941 and 1970 it was the law of this province that the Poor Laws enacted by the Imperial Parliament in 1601 were part of the law of British Columbia.²

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¹ Newfoundland, Dec. 31st, 1832; Nova Scotia, Oct. 3rd, 1758; New Brunswick, Oct. 3rd, 1758; Prince Edward Island, Oct. 7th, 1763; Ontario, Oct. 15th, 1792; Manitoba, July 15th, 1870; Saskatchewan, Feb. 18th, 1887; Alberta, Feb. 18th, 1887; British Columbia, Nov. 19th, 1858; North West Territories, July 15th, 1870. Quebec acquired English criminal law by the Quebec Act of 1774 but in the main the civil law of Quebec is French and not English. See J.E. Côté, *The Introduction of English Law Into Alberta* (1964), 3 Alta L.Rev. 262, at pp. 263-265. Clement, *The Law of the Canadian Constitution* (3rd ed., 1916), pp. 271-297.

² The English system of poor laws began with the Poor Relief Act, 1601, 43

In 1969 it was judicially decided that a civil action for assault could not be brought if the defendant had already been convicted by a court exercising criminal jurisdiction and the defendant had suffered the penalty imposed.³ Again the law cited was an English statute of 1828.⁴

Until May 30th, 1974 a successful plaintiff in British Columbia had many hurdles to overcome before he could recover interest on monies withheld from him by a defendant from the date of the cause of action until the time of judgment. This was primarily because of a statute of the English Parliament passed in 1833 commonly known as Lord Tenterden's Act.⁵

In 1979 one might ask why should the laws of this province be afflicted by English legislation enacted centuries ago? What other English Acts or indeed sections of Acts lie undiscovered in these ancient statute books? Is a community such as British Columbia with its own legislature, its own court system and a modern economy bound to accept the inconvenience of these types of statutes popping up from time to time and disrupting the orderly development of the law? I suggest not.

In the following pages I intend to propose some ideas indicating there may be a few arguments not yet advanced which the courts may still find persuasive when they come to decide whether a particular statute of the Imperial Parliament is part of the law of British

Eliz. 1, c. 2. It was declared applicable to British Columbia in a judgment of Ellis C.C.J. in *R. v. Hall*, [1941] 2 W.W.R. 245, 56 B.C.R. 309, 76 C.C.C. 311, aff'ing [1941] 1 W.W.R. 618; *Dedek v. Mantyka* (1960), 32 W.W.R. 361, 25 D.L.R. (2d) 393 (B.C.). In 1970 this concept was overruled by a decision of the Court of Appeal and the poor laws of England were found not to be part of the law of British Columbia: *McKenzie v. McKenzie* (1970), 73 W.W.R. 206, at p. 214 (B.C.C.A.).

³ *Sharkey v. Robertson* (1969), 67 W.W.R. 712, at p. 721 (B.C.S.C.); see also *McIntyre v. Moon*, [1971] 4 W.W.R. 148 (B.C.S.C.) and *Sindaco v. Stupka* (1977), 2 B.C.L.R. 289 (B.C.S.C.).

⁴ Offences Against the Person Act, 1828, 9 Geo. 4, c. 31, s. 28. See also British Columbia Law Reform Commission, Report on Offences Against the Person Act, 1828, Section 28, No. 35 (1977), which recommends repeal of s. 28.

⁵ Its official title is An Act for the further Amendment of the Law, and the better Advancement of Justice, 1833, 3 & 4 Will. IV, c. 42, s. 28. This section has often been interpreted as being the *only* way interest could be awarded to a successful plaintiff should he recover judgment. It does not use the word *only* in its provisions. See *McKinnon and McKillop v. Campbell River Lumber Company, Limited*, [1922] 2 W.W.R. 556 (B.C.C.A.) as the first reported case declaring Lord Tenterden's Act to be part of the law of British Columbia. On May 30th, 1974 the Prejudgment Interest Act, S.B.C., 1974, c. 65 became law in British Columbia. The statute compels a court to add interest to a pecuniary judgment at the appropriate rate from the date of the cause of action arose to the date of judgment. It seems to have been conceded the passage of this law had the effect of removing Lord Tenterden's Act from the law of British Columbia.

Columbia. I will also suggest there is no reason for the continued existence of early English legislation which has been declared part of British Columbia law if later circumstances indicate it is inapplicable. Lastly I will argue the British Columbia statute, which is relied upon to determine whether an English Act is part of the law of British Columbia, ought to be repealed.

I. Historical Review.

To begin let us take a brief look at history. The first part of British Columbia to experience colonization was Vancouver Island. It is interesting to note that no Imperial statute was passed to establish the colony such as was the case for the mainland in 1858.⁶ However, in 1849 the English Parliament did enact legislation to provide for the administration of justice on Vancouver Island.⁷

Since there were settlers on Vancouver Island in the early 1840's one might inquire what system of law was then in force? Was it Russian or English or Spanish or some other?

The colony of Vancouver Island did not unite with the mainland colony of British Columbia until 1866.⁸ Until then Vancouver Island had no English Law Ordinance and so the adoption of a system of law was a product of the common law. The most widely accepted authority on the principle of inheritance of English law comes from Blackstone:⁹

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; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force.

This common law principle was codified in the English Law Ordinance proclaimed by Governor Douglas on November 19th, 1858 at the birth of the mainland colony of British Columbia

⁶ The colony of British Columbia came into being under the authority of An Act to provide for the Government of British Columbia, 1858, 21 & 22 Vict., c. 99.

⁷ An Act to provide for the Administration of Justice in Vancouver's Island, 1849, 12 & 13 Vict., c. 48.

⁸ An Act for the Union of the Colony of Vancouver Island with the Colony of British Columbia, 1866, 29 & 30 Vict., c. 67.

⁹ Commentaries, i, 107; see also Holdsworth, A History of English Law, Vol. 11 (1938), pp. 241-244.

following the Imperial statute authorizing the establishment of the colony. I repeat the applicable provisions of the Ordinance.¹⁰

. . . the Civil and Criminal Laws of England, as the same existed at the date of the said Proclamation of the said Act, and so far as they are not, from local circumstances, inapplicable to the Colony of British Columbia, are and will remain in full force within the said Colony. . . .

Similar language has since been accepted by the legislatures of the province from time to time since British Columbia joined Confederation in 1871. There has been little change in the wording over the years and today it exists as Chapter 129, of the 1960 Revised Statutes of British Columbia. For clarity I set out all of its sections:

1. This Act may be cited as the *English Law Act*. R.S. 1948, c. 111, s. 1.
2. The Civil and Criminal Laws of England, as the same existed on the nineteenth day of November, 1858, and so far as the same are not from local circumstances inapplicable, are in force in all parts of the Province; but the said laws shall be held to be modified and altered by all legislation having the force of law in the Province, or in any former Colony comprised within the geographical limits thereof. R.S. 1948, c. 111, s. 2.

Returning now to the colony of Vancouver Island: Blackstone's common law rule on the introduction of English law to a colony was taken as the basis for its legal system because the majority of the settlers were English associated with the Hudson's Bay Company.¹¹ But the precise date when the English law was to be determined remains somewhat obscure. Was it in 1843 when work first commenced on the erection of Fort Victoria, or August 27th, 1850 when the first Executive Council was established, or August 12th, 1856 when the first House of Assembly met?¹² Alternatively was it 1849 when the courts of Vancouver Island were first authorized by the Imperial Parliament?¹³

Assuming it was no later than 1849 this means that Vancouver Island took its English law from that date. Any ordinances or proclamations having the force of law which were signed by the

¹⁰ Proclamation, having the Force of Law to declare that English Law is in force in British Columbia, Nov. 19th, 1858, James Douglas, Governor at Fort Langley, B.C.

¹¹ Vancouver Island was granted by the Crown to the Hudson's Bay Company in 1849 through a document in the nature of a lease or licence. The Crown reserved the right to re-acquire the island at the end of the term on May 30th, 1859. M.A. Ormsby, *British Columbia A History* (1971 Reprint), pp. 97-98 and Holdsworth, *op. cit.*, footnote 9, Vol. 14 (1964), p. 293.

¹² Ormsby, *op. cit. ibid.*, pp. 84-85. In March 1843 Douglas ordered a small force to begin construction of Fort Victoria. The first Governor of Vancouver Island, Governor Blanshard, established the first council on August 27th, 1850 and appointed Douglas the soon to be Governor, its senior member. *Ibid.*, p. 105. The first Houses of Assembly met on August 12th, 1856. *Ibid.*, p. 122.

¹³ See *supra*, footnote 7.

Governor or enacted by the colonial Assembly from then until 1866 could have altered pre-1849 English law.

Unfortunately the ordinances of the colony of Vancouver Island are very difficult to trace, but from what follows the matter is more or less academic because in 1868 shortly after the union of the two colonies as the colony of British Columbia, an ordinance of the united colonies was enacted similar to the English Law Ordinance of the mainland colony of 1858.¹⁴ It made English law applicable both to the former colony of Vancouver Island and to the mainland colony of British Columbia from November 19th, 1858. Therefore, the inhabitants of the colony of Vancouver Island had the date for the adoption of English law advanced from approximately 1849 to 1858 when they became united with British Columbia in 1866.

This rather tedious examination of history is recited for two purposes:

- (a) To show that the early colonists of Vancouver Island lived under English law without the benefit of any English Law Ordinance, from about 1849 to 1868, and
- (b) To illustrate that the English Law Ordinances and English Law Acts are simply codifications of the common law principle *except that they establish a fixed and certain cut-off date, that is November 19th, 1858.*

II. *Selecting a Date for the Introduction of Pre-1858 English Statutes.*

At the beginning of this article I mentioned several instances where British Columbia courts recognized the applicability of English statutes enacted in 1601, 1828 and 1833 when these statutes came before the courts for consideration in 1941, 1969 and 1922. The reason such recognition seems to have been given is because our courts tend to ask themselves three basic questions in deciding whether an English statute should be applied:

1. Was the English statute part of the law of England on November 19th, 1858?

¹⁴ Some of these ordinances and proclamations can be found in the appendix to the Revised Statutes of British Columbia 1871. At the time of the revision of the statutes in 1911 the commissioners responsible for the project also collected various Imperial statutes, Orders in Council and proclamations for ease of reference in an appendix entitled Volume 4, R.S.B.C. 1911. The preface to this volume illustrates that in publishing these laws the commissioners were only expressing an opinion as to their applicability in British Columbia because they said "the judicial tribunal of the country can alone determine" which statute should be introduced and which should not.

2. If so, were local circumstances in British Columbia on November 19th, 1858 applicable to the adoption of the statute?¹⁵
3. If they were so applicable have these English statutes been modified or altered by any colonial or provincial legislation of British Columbia having the force of law passed since November 19th, 1858?

One main point I wish to argue is that the date of November 19th, 1858 posed as part of the second question is not correct. Instead it should be the date the particular dispute arose between the parties who are then before the court. There are several reasons for suggesting this later date.

Firstly, neither Blackstone nor the English Law Act suggest that statute law should receive any different treatment from the common law. When a British Columbia court is called upon to decide whether an English common law principle affects a dispute which occurred in 1977 for example, it does not usually go back and see if that common law principle was part of the law of England in 1858. Instead the court consciously or unconsciously inquires if the common law rule was in existence when the dispute arose in 1977. The particular English common law principle could have been enunciated in say 1850, accepted as part of the law of British Columbia in a case decided in 1930 but later rejected by our courts when considered in 1960.

Consequently the essential date for common law purposes is the date when the cause of action arose or the dispute occurred and not November 19th, 1858.

To demonstrate more precisely how different this method of reasoning is from the three steps set out above relating to English statute law I will compare the questions arising from the common law inquiry. If for example a disagreement between parties took place in 1977 and came on for trial in 1979 the questions a court would usually put to itself in deciding whether an English common law principle applied runs something as follows:

1. Is the common law principle supported by sound reasoning?
2. Do the facts of the English judgment from which the rule is derived indicate a comparable kind of society with similar circumstances and customs to those in British Columbia in 1977?
3. Has there been any provincial or federal statute altering or modifying the English common law rule since its pronouncement?

¹⁵ *McKenzie v. McKenzie* (1970), 73 W.W.R. 206 (B.C.C.A.).

If the answers to questions 1 and 2 are yes, it does not seem to matter whether the common law principle was articulated in 1838 or 1938. It will be applied so long as it has not been altered by a provincial or federal Act.

From this description it is obvious a different kind of reasoning is used to decide the applicability of a pre-1858 English statute than is used to determine the applicability of a pre-1858 English common law rule. Yet the English Law Act does not distinguish between these two main branches of our law.

The second argument against looking at local circumstances in British Columbia as of November 19th, 1858 has to do with the problem of evidence. When a judicial system first began to take shape in British Columbia the judges were often men who had been in the colony from its birth. Usually if not always they were born in Great Britain. From their own personal knowledge of conditions in England before 1858 and their experience of circumstances in British Columbia after 1858 they had some idea which laws of England were suitable to the new land and which were not.

The world and more particularly the colony of British Columbia was just beginning to experience the kind of rapid change which today has become the accepted fashion. For instance there was probably little difference in local circumstances between 1858 and 1877 when the Full Court of British Columbia was called upon to decide whether the Matrimonial Causes Act 1857 applied to the new province.¹⁶

At that time two of the judges apparently needed no evidence whatsoever in deciding what were the local circumstances in the colonies of British Columbia and Vancouver Island in 1858 because they were resident here on that date. It was also natural for them to fall unwittingly into the trap of looking at the situation in British Columbia in 1858 and 1877 as being one and the same thing.

As a consequence a style of expression was used in those early cases which has been unconsciously followed. We have now been driven into the corner where we attempt to grapple with the largely insoluble and frustrating task of discovering what exactly were the local circumstances in the colony of British Columbia in 1858.

¹⁶ 20 & 21 Vict., c. 85. *M. v. Falsely Called S. ————, v. S. ————* (1877), 1 B.C.R. 25. Two of the three judges who decided the case had this English-British Columbia background. Crease J. was born Aug. 20th, 1823 at Newcastle, Plymouth, Cornwall, England. He came to British Columbia in 1858. Begbie J. was born May 9th, 1819 and practised as an English Chancery Barrister. He also came to British Columbia in 1858. David R. Williams, " . . . The Man for a New Country" Sir Matthew Baillie Begbie (1977), pp. 4-5 and 16-18. Alfred Watts, Q.C., *The Honorable Sir Henry Pering Pellow Crease, 1870-1896* (1967), 25th Advocate 5.

However in 1979 there are no judges who have such personal knowledge, nor will there be in the future. While it is not unusual to take judicial notice of local circumstances as they exist at the time of a dispute¹⁷ the use of historical texts to establish facts in issue does not seem to have express approval either by statute or by the common law.¹⁸ The reason is because the initial finder of the facts, that is the author of the historical text, has not only received these facts from other sources but he or she is not available at the trial to be cross-examined. By accepting an author's conclusion of what local circumstances in the colony of British Columbia were on November 19th, 1858 a court is in effect reaching a decision on hearsay evidence which has not even withstood the test of cross-examination.

Furthermore, it would be highly unusual to get precise and detailed facts taken from any text that might conclusively show local circumstances in 1858 were such that a specific English statute applied. In most instances a court would have to *infer* the Act ought to be made part of the law of British Columbia from the facts set out in the text. Again it is an error in law to reach an inference from unproven facts.

By looking at the local circumstances as they existed at the time of the dispute a court avoids this quagmire of evidentiary law. In this way witnesses can be called to give the evidence and be subject to cross-examination. The orderly process of the common law is then observed and justice is more likely to occur.

All of what I have said so far is in many ways a product of our system of law because it illustrates the danger of codifying a common law principle. As common law lawyers we are accustomed to dealing with rules set out in cases. Unlike our Civil Code colleagues we view legislation differently. When a statute is passed which merely codifies a common law rule we tend to lose sight of the idea behind the rule and look at each word in the Act. The reason for this is because legislation is generally thought of as producing a change in the common law. Why bother passing an Act unless there is something wrong with the common law? On the other hand a jurisdiction governed by a Civil Code usually treats the Code as a collection of principles and deals with them in much the same way as we do with case authority.

¹⁷ *R. v. Cyr*, [1917] 3 W.W.R. 849, at p. 857. This case partly involved the question whether a woman could be a magistrate in Alberta. While the Alberta Court of Appeal did not mention the Alberta equivalent of the English Law Act it did go on to consider whether English common law authority prior to 1887 was determinative of the issue. Stuart J. held that the time for deciding whether a common law principle of England was applicable occurs at the time of the decision (1917) and not in 1870 when some English law indicated a woman could not be a Justice of the Peace.

¹⁸ Wigmore on Evidence (3rd ed., 1940), Vol. 9, paras 2565-2583.

Earlier I stated that all the English Law Act did was codify the common law rule and provide a specific date. If we as common law lawyers were simply given Blackstone's idea to work on we would likely use the same process of reasoning in deciding whether an English statute applied to British Columbia as we now do in deciding whether a common law rule is part of our law. Flexibility and acceptance of reason would then replace our natural preoccupation with each word of the legislation.

But one cannot be too smug about the probability that with Blackstone's principle alone the courts would have developed a more rational method of introducing early English statute law. The growth of any system of law is affected by the frailty of human beings. When it takes place in a court much depends upon the quality of counsel and the judge or judges. When it occurs in a legislative assembly the process can be marred by competing political philosophies which may be extraneous to the issue, the character of the advice received by the government from its law officers and the knowledge, competence and power of expression of each elected member.

In the Maritimes where English law was inherited without the benefit of any government or parliamentary ordinance or Act the results have been uneven. For instance in New Brunswick the tendency in the early cases was to accept English statute law unless clearly inapplicable.¹⁹ On the other hand the Nova Scotia courts showed more flexibility.

In *Uniacke v. Dickson*, Chief Justice Halliburton wrote about the possibility of two English statutes applying to the circumstances of that dispute.²⁰ They had been enacted in England in 1541 and 1570 prior to the cut-off date in Nova Scotia of October 3rd, 1758. The litigation came before the Chancery Division of the Nova Scotia Supreme Court in 1848. It seems to have been taken for granted the local circumstances to be looked at were those in 1848 and not 1758 because the present tense is used throughout. Moreover this far-seeing jurist set out a rule which is worth repeating.²¹

Among the colonists themselves there has generally existed a strong disposition to draw a distinction between the common and the statute law. As a code, they have been disposed to adopt the whole of the former, with the exception of such parts only as were obviously inconsistent with their new situations, whilst far from being inclined to adopt the whole body of the statute law, they thought that such parts of them only were in force among them as were *obviously* applicable to, and necessary for them.

¹⁹ Clement, *op. cit.*, footnote 1, p. 282.

²⁰ *Uniacke v. Dickson* (1848), 2 N.S.R. 287.

²¹ *Ibid.*, at pp. 289 and 291.

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

Now, although this view of the subject leads us to nothing very precise, yet, if we adopt it, and I think it wise and safe to do so, we must hold it to be quite clear that an English statute is applicable and necessary for us before we decide that it is in force here. . . .

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*.

Even if one is compelled to look at the English Law Act by itself and apply its provisions according to the rules of statutory interpretation I suggest the same result can be achieved. In the British Columbia Act the present tense is specifically used, that is "*are* not from local circumstances inapplicable" instead of "*were* not from local circumstances inapplicable". The Interpretation Act of this province states:²²

7. (1) Every enactment shall be construed as always speaking.

(2) *Where a provision in an enactment is expressed in the present tense, the provision applies to the circumstances as they arise.*

Therefore the local circumstances mentioned in the English Law Act are to be looked at "*as they arise*", not "*as they were in 1858*".²³

III. *Removing a Pre-1858 English Statute from the Law Once it Has Been Introduced.*

The second part of this article has to do with the removal of pre-1858 English statutes from our law although they have once been declared a part of the law of this province. In the first place, it is obvious these statutes were enacted by a parliament representing other voters than those in British Columbia in another era for purposes necessary in that society at that time. Nor were they drafted and debated on the premise they might apply to an English colony at some future time.

The statutes themselves do not usually explain why they were passed. One must examine the preceding common law and any parliamentary debates to determine why the Act was necessary. What was it trying to cure? Sometimes it was a fault which history shows is not something we acquired as part of our custom in Canada.

Lord Tenterden's Act is a good example. For many years in England the loaning of money at interest was considered illegal primarily because of religious beliefs.²⁴ Many devices were invented

²² Interpretation Act, S.B.C., 1974, c. 42, s. 7. Italics added.

²³ Côté, *op. cit.*, footnote 1, at pp. 269-270. *Horse and Carriage Inn Ltd v. Baron* (1975), 53 D.L.R. (3d) 426, at pp. 435-436.

²⁴ Holdsworth, *op. cit.*, footnote 9, Vol. 8, pp. 100-113.

to get around the rule and no doubt at common law in those days when the beliefs prevailed, it was a problem to persuade any court that interest should be awarded on money unlawfully withheld until judgment. Since Lord Tenterden's Act is entitled "An Act for the Further Amendment of the Law and the Better Advancement of Justice" one might argue section 28 that has been applied in British Columbia was intended to be remedial. Support for this can be found in the recital to the statute and in the other sections which seem to be changes in the common law intended to make the process more equitable. As well, the statute was enacted during the great reform period of the early 1800's inspired in part by the works of Jeremy Bentham. At the time of its passage in 1833 Parliament was in the throws of ridding the English common and statute law of many of its anachronisms. It was not until 1854 that the English laws relating to usury were repealed.²⁵

Instead of treating Lord Tenterden's Act as if it were part of the reform of the law, section 28 has generally been interpreted as being the *only* way in which interest can be recovered if a defendant fails to pay as promised.²⁶ It can just as easily be argued it was the first step towards allowing a creditor in England to receive interest at common law but in most other instances interest could not be recovered because of the common law rule and the various statutes on usury restricting the taking of interest.

Allowing interest on unpaid debts was one of the early matters considered by Governor Douglas in British Columbia in 1864. He signed An Ordinance to Declare the Lawful Rate of Interest in the Colony which set the rate of interest at not exceeding one per cent per month instead of four per cent per annum.²⁷ The latter sum was

²⁵ An Act to repeal the laws relating to Usury, and to the enrolment of Annuities, 1854, 17 & 18 Vict., c. 90.

²⁶ See *supra*, footnote 5. Unless there is a provincial statute or rule of court the authorities seem to say some form of contract between the parties to pay interest must be found before it can be awarded from the time the cause of action arose until judgment. The simple withholding of a lawful debt is insufficient. *Triangle Storage Limited v. Porter*, [1941] 3 W.W.R. 892, at pp. 895-897 (B.C.C.A.).

²⁷ The preamble to the Ordinance is worth examining. It reads: "Whereas by the Statute of the Imperial Parliament, passed in the third and fourth years of King William the Fourth, Chapter forty two, Section twenty eight, the Jury is in certain cases empowered, on the trial of any issue or inquisition of damages, to allow interest at a rate not exceeding the current rate of interest from the times therein specified;

And whereas by certain rules of the High Court of Chancery, interest upon amounts payable under a decree or order in Chancery is in general to be allowed only at the rate of four per cent per annum, which rate it is apprehended has been established in England, by reference to the ordinary mercantile current rate of interest there being five per cent per annum;

And whereas the ordinary mercantile current rate of interest in this Colony (where any contract for interest is entered into) is seldom less than two percent per

then allowed by the courts of equity in England. The law went on to give the courts in British Columbia authority to award this interest "either at law or in equity". The same ordinance was adopted by the united colonies in 1868.²⁸

Because these ordinances modified the common law against awarding interest it can be suggested they had the effect of making Lord Tenterden's Act inapplicable after their pronouncement. Alternatively they indicate the religious beliefs against charging interest on money loaned were not part of the custom of British Columbia and so interest could be awarded where it was reasonable to do so. There does not appear to be any reported case which has commented upon these two ordinances although there are many decisions relating to the application of Lord Tenterden's Act to various fact patterns in this province as well as others.²⁹

The purpose of dealing with the subject is to show how dangerous it is to go back and look at local circumstances in and around 1858. Not only do we lack direct evidence of these circumstances but all the various laws composed of proclamations, regulations and ordinances of that time are not collected in any organized way.

month; but it is apprehended that only the rates current in England are (in the absence of any specific authority) recoverable either at law or in equity here;

And whereas this circumstance has in some cases operated to induce debtors to delay payment of just demands, and to defend actions vexatiously with a view merely to delay;"

This seems to indicate that in British Columbia it was intended a defendant pay interest on monies "improperly withheld". To that extent it "modified or altered" Lord Tenterden's Act (assuming the latter was part of the law of British Columbia).

²⁸ Ordinance No. 71, An Ordinance to declare the Laws relating to Interest, March 6th, 1867. The colony of Vancouver Island in 1859 also dealt with the problems of interest in An Act to Remove Doubts as to the Interest of Money in the Colony of Vancouver Island, and its dependencies. On October 29th, 1859 the House of Assembly passed the following statute: "Whereas, doubts have arisen as to the legal rate of interest in the Colony, since the abolition of the Usury Laws in England, and it is expedient that such doubts should be removed;

Therefore, be it enacted, by the Governor on behalf of the Queen, by and with the advice and consent of the Legislative Council and House of Assembly, as follows:

That, the Act of Parliament made and passed in the seventeenth and eighteenth years of the reign of Her Majesty Queen Victoria, chapter ninety, and entitled 'An Act to repeal the laws relating to Usury, and to the enrolment of Annuities,' shall be taken as having been in full force and effect in Vancouver Island and its dependencies from the date thereof." See B.C. Archives, Victoria, B.C.

²⁹ The writer must accept some responsibility for the current state of the law because as counsel in *Re Northwest Electric Ltd.*, [1973] 4 W.W.R. 232, the argument was put that Lord Tenterden's Act did not apply but the ideas in this article were not articulated in the same way to the court. See also the cases collected in the Canadian Abridgement (2nd ed., 1969), Vol. 12, Creditors & Debtors, paras. 96-247.

But I have digressed from my theme. Because the English statutes became part of the law of British Columbia through the process of the common law, I submit they can be removed using the same method when it is shown they no longer serve our society. It should not necessarily require an Act of the provincial legislature to remedy the defect. For example, if a decision of our courts in 1920 held a pre-1858 English statute applied to the circumstances of a case decided in that year, then there is nothing particularly wrong for a British Columbia court to conclude in 1979 that circumstances have changed in this province since 1920 and so the pre-1858 English statute is no longer part of the law of British Columbia. Such a process is frequently followed with respect to common law principles and it makes equal sense to use it when looking at pre-1858 English legislation.

While it is true that in some ways the early English statutes achieve the status of law in British Columbia through the vehicle of the English Law Act, that statute is merely a codification of the common law. The same result would have obtained if we were only left with Blackstone's rule. And so in reality, the English Law Act is not the reason for their adoption. They were brought into the law by court order and not by legislative debate and subsequent Royal Assent.

Therefore the common law method of modifying, deleting or adding to the law is just as applicable to this older English statute law as it is to common law principles.

IV. Repeal of the English Law Act.

Lastly, I propose the time has come to repeal the English Law Act and any trace of the common law rule giving authority to the courts to accept or reject pre-1858 English statutes. What we have now can remain subject always to change by either the legislature or the courts as I have mentioned. What we do not know about we probably do not need.

As far as anyone can reasonably tell this province now has a complete system of law based upon common law authorities and validly enacted legislation of our own provincial legislature. At one time the early settlers needed to borrow a system of law from England so as to start the colony and maintain order amongst themselves. That time has long since passed.

All the English Law Act now does is create a nagging uncertainty. When counsel or a court has to consider a particular problem in 1979 there remains the wonder as to whether an English statute or section of an English statute lies hidden in the jumbled maze of Imperial statute books existing prior to 1858. This

uncertainty could be resolved and the doubt cast aside if the English Law Act is repealed because it no longer serves the purpose for which it was intended but in fact operates in a contrary way. One could hardly argue that the inclusion in the laws of British Columbia of the "Act for the Relief of the Poor 1601" or "The Offences Against the Person Act 1828" or "Lord Tenterden's Act 1833" were glorious chapters in the growth of our legal system.

The idea enunciated by Blackstone was reasonable for its time. English statute law was meant to be a well of law from which the colonists could draw when the need arose. There was no intention that either it or the common law should impede the orderly growth of a legal system in the colonies, and now in the provinces. Nor was there any intention that the rule should acquire its present characteristic as a legal millstone. The successor to Blackstone's maxim in the form of the English Law Act could have been repealed years ago, and ought to be repealed now.

Conclusion

What has been said about British Columbia probably applies in varying degrees to other provinces including the Maritimes since a reading of a number of cases from these jurisdictions indicates their courts have been involved in much the same kind of struggle. In summary:

1. The date for determining whether a pre-1858 English statute should be introduced as part of the law of British Columbia is the date when the circumstances arise involving the particular dispute before the court and not November 19th, 1858.
2. Even though a pre-1858 English statute has been declared part of the law of British Columbia it may be found no longer applicable in a future case due to changed circumstances. An Act of the provincial legislature is not the only way to remove it from our law.
3. The English Law Act ought to be repealed as having outlived its usefulness.

These alternatives hardly rank with the great reform ideas coming from our various law reform institutions, yet they are a step in the process of inching the law forward and so enable it to properly serve our society.
