ENGLISH LAW BUT BRITISH JUSTICE

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"As is so often the case where symbols are disputed, a point of real political and constitutional substance under[lies] the action."

NEIL MACCORMICK[1]

Introduction

The Blackstonian account of the expansion of English common law to the colonies, whereby English settlers carried their birthright of English common law with them, will rarely if ever convince the Scots. In the first place Scotsmen have always had and still continue to have their own common law and legal system. In the second place it is the Scots who have been responsible for a great deal of British colonisation.[2]

Even without raising the Irish question, the explanation attributed to Blackstone of the expansion of English common law to the colonies immediately loses conviction in the context of British colonisation. The last thing that any Scots settler would think of bringing with him, even if he were able, would be the English common law. These difficulties which detract from the persuasiveness of the so-called Blackstonian doctrine especially perplex any account of it used to explain the expansion of the common law to New Zealand.[3] Everything in New Zealand's legal history confirms that the Scots—not only those who embarked directly for Otago and those who indirectly came to Waipu from Nova Scotia, but those also who settled more diffusely throughout New Zealand, had very little if any commitment to English law and custom.

By 1850 when the English Settlement of Canterbury began, the Scots were already firmly established, not only in Otago, but in the South Island generally, and even in Canterbury itself. Indeed it was from Canterbury that the first shipment of butter and cheese had been exported to Sydney by the Scotsmen Manson and Gebbie in 1847. The English settlement in Canterbury had been forerun by the Scots families of Hay, Sinclair, Cullen, Wallace, McIntosh, Deans, Manson, Gebbie, Heriot, McGillivray and others.[4]

From this wider point of view the Scots settlements of Otago and Waipu, however distinctive, are only among the more institutionalised and thus obvious instances of Scots influence in colonising New Zealand. It is true that the Otago Settlement was supremely Scottish, in 1849 having no more than 161 Anglican (and a further 92 persons whose religious

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1 "Does the United Kingdom Have a Constitution?: Reflections on *MacCormick* v *Lord Advocate*" (1978) 29 NILQ 1.

2 In this context one cannot go far without mentioning also the Irish, who were in any case, and however Irish it may sound to the English, the origin of the Scots in Scotland by their Christian settlement of Dalriada in the sixth century: Hume Brown, *History of Scotland* (1909) Vol 1, 13-21.

3 Eg Foden, *Constitutional Development of New Zealand in the First Decade (1839-1849)* (1938) 26-27, 40, who advances this doctrine for New Zealand quite oblivious to the fact that a great many British settlers coming here could not possibly bring English common law with them.

4 Pearce, *The Scots of New Zealand* (1976) 50.

affiliations, if any, were unknown) out of its total of 745 persons[5] of otherwise Presbyterian persuasion. As so well parodied by the goldfield balladeer Charles Thatcher, Scots settlements such as those of Otago had no inclination to lose "the old identity".[6] This is only the most obvious exposure of Scots influence in New Zealand, however. An ethnic account of surnames, religious persuasions, moral outlooks, language traits, music and dancing manifests a grim determination throughout New Zealand to maintain Scots roots more underground where they belong than perilously exposed to the air.[7] In more quantitative terms the census of 1861, for example, discloses almost one third of the European population of New Zealand to be then of Scottish birth. Of others, there were those born in New Zealand of Scottish parents, and those too of more remote extraction, not forgetting the Irish, who in the same census comprised even as much as fifteen percent of such a predominantly Scottish settlement as Otago.[8]

Blackstone's Doctrine in Abstract

This paper does not pretend to explain how English law expanded to New Zealand. Instead it attempts only to demonstrate certain difficulties which beset the application of the Blackstonian doctrine to the facts of New Zealand settlement. In one sense the application of the doctrine is self-referential: the existence of English common law in New Zealand is to be explained itself by English common law. In another sense the doctrine is quite inadequate for it ignores those British people whose birthright is other than that of English law.

It is true that Blackstone's account of the expansion of English common law is more complex than is usually related, and that there are other difficulties than those now being discussed in the application of the doctrine to explain the expansion of English common law to New Zealand. In Blackstone's own words:[9]

5 Ross, "Scots in the South" *New Zealand's Heritage* (1971) Vol 2, Pt 19 at 525.

6 Hoskins, *Goldfield Balladeer* (1977) 20-22. Of Cargill's election address, Thatcher sang—

> Does he wish each brother Scotchman
> To come out in a kilt—
> To kittle up the chanter
> And go in for a lilt?
> With bare legs in Otago
> How very cold 'twould be!
> But it's one way of preserving
> The Old Identity.

So too, in *Paddy's Trip to Dunedin,* Joe Small sang—

> . . . Whin I ax'd for a job from an ould
> scottish Turk,
> You'll scarcely belave me, here's the
> answer he gave me,
> "You're nae frae oor parts, sae ye
> canna get wurrk."

7 Pearce, supra n 4.

8 One third of the popu'ation of the West Coast in the 1860s was Irish and ". . . some boom towns were republics in miniature, even running to weekly newspapers where green, not gold, was the dominant colour of the news. Indeed the editor of one, the *Celt*—and the local priest—were jailed after an armed demonstration of protest at the execution in Britain of three Fenians, the 'Manchester Martyrs' " Scott, *Inheritors of a Dream* (1962) 53.

9 *Commentaries on the Laws of England* (15th ed 1809) Vol 1, 107.

> [I]t 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 authorities for this proposition of law to which Blackstone refers are first *Blankard* v *Galdy*,[10] and secondly an anonymous case in 1722.[11] Both decisions on the point are quite obiter, as was also the case of *Cooper* v *Stuart*[12] in 1889 which is usually cited by way of confirming Blackstone's doctrine. The earlier cases on which Blackstone relied, and to which the later case of *Cooper* v *Stuart* referred, were nevertheless decided before the establishment of the United Kingdom in 1707. The facts and law of this union are of some consequence in relating prior and subsequent relationships of Scots and English law—however wryly we may recall in passing that it was a Scotsman who in the person of Lord Mansfield suggested to counsel in *Campbell* v *Hall*[13] that "no colony can be settled without authority from the Crown." In the making of New Zealand's legal history, however, the several concepts of occupation, settlement, and possession have often been conflated, and the several claims to colonisation by occupation, discovery, and annexation on this account confused. The result has been to cloud the course of British sovereignty and English law in the New Zealand legal system.[14]

These are only some of the more abstract issues still outstanding which affect the origin of New Zealand's legal system. Other issues may appear subordinate, but are really philosophically prior to the more usual subjects of debate.

The first of these prior issues is that of determining what constitutes a country. This issue arises from 1642-1840 not only of New Zealand as a whole, but also, as Captain Hobson's instructions implied and the Treaty of Waitangi and Hobson's Proclamation confirmed,[15] in distinguishing between New Zealand's North and South Islands. Any argument as to the efficacy of the Treaty of Waitangi, either as creative of international obligations or in favour of its incorporation into municipal law, is applicable only to New Zealand's North Island. On the strength of Hobson's Proclamation it never had any status for the South.

What constitutes a country is of ethnic significance in explaining the development of our legal system. It is a significance which has been rarely if ever considered. This is because instead of emphasising the

10 2 Salkeld 412; 91 ER 356.
11 2 P Wms 77; 24 ER 646.
12 (1889) 14 LR 286, 291.
13 (1774) Lofft 655, 708; 98 ER 848, 878. Note that Lord Mansfield went on to say what is consistently overlooked: "As to the doctrine of those cases in Salkeld, I do not think much of it; it is very loose."
14 McLintock, *Crown Colony Government in New Zealand* (1958) 63 concludes that colonisation was achieved by occupation. Hobson proclaimed sovereignty over the North Island on the ground of cession under the Treaty of Waitangi and over the South Island on the ground of discovery. Robson, *New Zealand—the Development of its Laws and Constitution* (1967) 4 upholds the view of annexation. Attorney-General Swainson in 1842 took no chances in concluding that Great Britain's title rested ". . . partly upon discovery, partly upon cession, partly upon assertion, and partly upon occupation": see Foden, *New Zealand Legal History (1642-1842)* (1965) 89.
15 See McLintock, supra n 14 at 61, and Robson, supra n 14 at 3.

differences between Maori and European, as the colonisation and even more so the development of New Zealand's national identity has done since 1840, an ethnic account of early European culture in New Zealand shows Maori and European to be much the same. In abstract terms this is the issue of European tribalism.

More than a century of being taught to distinguish between Maori and European culture has led us away from cultural integration to separation. Strange as it may seem to us today, the early European settlement of New Zealand was distinctly tribal—indeed almost every bit as tribal as that of the Maori inhabitation. There were the Scots settlements represented by Otago and Waipu, the English represented by Petone, Nelson, and Canterbury, and the Irish representation on the West Coast. Even Otago and Waipu (although both Scottish), and Petone and Canterbury (although both English) were vastly different from each other, being settled by different kinds of people, for different reasons, under different circumstances, and with different aims and aspirations; but it was differences between the extremes that were most unhesitatingly described:[16]

> Wellington and Otago were in truth during this time in bitter antagonism: Otago being simply the industrious beehive of willing workers, anxious to conserve their rights; Wellington the retreat of weakling scions of poor gentility who form the official class, and thoroughly despise work-a-day people.

The most tribal of all the settlements, as we may expect of their origins, and the most influential in communicating tribal characteristics to early New Zealand European settlement were the Scots. The provincialism which came by way of government out of and which for a while perpetuated this diversity was a form of institutionalised tribalism.

Just as English legal history has evolved from, and in many ways still bears evidence to, the process of integrating what were once separate Anglo-Saxon states, New Zealand's legal history demonstrates the same course of development from its early tribal settlements through provincial to central government. Indeed had he lived the requisite intervening centuries to know of Haeckel, Aristotle might have gone on to postulate in consequence of man being a political animal, that ontogeny (or individual development) recapitulates phylogeny (or development of the species) also in law and government.

Secondly, there is the issue of whether in 1840 the country we now take for granted as New Zealand was inhabited, and if so in what legally significant sense this was the case. Such parts of it as could be considered (and obviously were so considered between 1642-1840) to be separate, independent, and uninhabited countries might be differently construed as being amenable in different ways than the rest to British sovereignty. It is also conceivable that whatever status might be accorded to whatever inhabitants existed could differ either then or now at English common law from international law. Thirdly it can be asked in what sense as "inheritors of a dream"[17] our country was, or what parts of it were, discovered and could be re-discovered, and in what right and to what outcome by British subjects? At this point the Scot is apt to cock a snook at the English, remember his ancient affinity with the Dutch,[18] his "auld

16 *The Old Identities* (1879) 136.
17 Scott, supra n 8 at 5.
18 See eg Walker, *The Scottish Legal System* (3rd rev ed 1969) 49, 172, on the influence of Dutch on Scottish law.

alliance" with the French,[19] and chuckle over the fact that in being sired by a farm labourer from Roxburghshire, Captain James Cook albeit born in England would by his own law have been a Scot. Fourthly, as already raised by that other Scot Lord Mansfield[20] in *Campbell* v *Hall*,[21] there are the interrelated questions of occupation, possession, settlement, authority to colonize, sovereignty, sometimes simply as matters of fact but more often as intricate issues of law. Some but by no means all of these matters are necessarily interrelated. The first task is for analytic jurisprudence to devise a logic for British colonization, and the second task is for the legal historian to apply it to the facts, so far as they are known, of our New Zealand inheritance.

Blackstone's Doctrine in the Context of the New Zealand Legal System

What has been demonstrated so far, aside from a partial account of the Blackstonian doctrine, is no more than an interesting incongruity of facts—namely that there were far fewer and less influential English settlers in New Zealand than is adequate to account for the introduction of English law to New Zealand in terms of Blackstone's doctrine. What remains is to examine the implications of this factual incongruity in the context of determining the origins of the New Zealand legal system.

Some but by no means all of the abstract issues earlier discussed have been raised elsewhere. They all still await further explication, however, both by means of historical research and analytic jurisprudence.[22] This is needed before any attempt may be profitably made to resolve these issues of New Zealand's legal history. Indeed, whatever success may attend this paper will be to compound the complexity of issues surrounding the expansion of English common law to New Zealand. This complexity is seen to result, as a matter of fact from the degree to which New Zealand was settled by Scots, Irish, and others, as a matter of values in so far as the aims and aspirations of these British peoples would not countenance any sacrifice of their individuality, as a matter of politics in terms of what actually happened in the colonial organisation of government, as a matter of substantive law to account for its legality, and lastly but not least as a case study in legal theory. The expansion of English common law to New Zealand has too long been over-simplified as a Maori-European conflict in terms of the Treaty of Waitangi. Any reduction of a multi-valued to two-valued logic is likely to be at the expense of justice to all concerned. A multi-valued account may well demonstrate that the acceptance of English law in New Zealand, however achieved, has done more to secure an equitable middle path for the advance of all concerned than would have been possible by any other way of beginning our legal system.

19 Ibid at 143.

20 That Lord Mansfield, although an English judge, was imbued with the Scottish legal tradition is evidenced first by his attempt to do away completely with the English doctrine of consideration by *Pillans* v *Van Mierop* (1765) 3 Burr 1663; 97 ER 135; and then when that attempt was defeated by *Rann* v *Hughes* (1778) 4 Bro PC 27; 2 ER 18 to continue with typica'ly Scots stubbornness to equate the English doctrine with moral obligation by holding in *Hawkes* v *Saunders* (1782) 1 Cowp 289; 98 ER 1091 that "[t]he ties of conscience upon an upright mind are sufficient consideration."

21 Supra n 13.

22 Some account of the integrative jurisprudence required for this task is given by my article "Status to Contract—Refuted or Refined" (forthcoming in the Cambridge Law Journal) which attempts to integrate the historical work of Maine with the analytic work of Hohfeld.

Until some such wider account than a self-referential and inadequate English common law doctrine is explored for the origins of the New Zealand legal system, the present *impasse* remains. All its slovenliness of thought is typified by talk of English occupation and all its logical inconsistency is reflected, as we shall see, by ignorance of the fundamental law of the United Kingdom Parliament through which the Scots continue to maintain their own legal system.

This *impasse* in accounting for New Zealand's legal history continues almost entirely unrecognised in both New Zealand and afield. Writers on the origin of New Zealand's legal system such as Tarring,[23] Hight and Bamford,[24] McLintock,[25] Foden, [26] and Robson,[27] make no mention of it. In turn this difficulty in applying the Blackstonian doctrine tends to throw reliance on legislation, and to gloss over the difficulties in doing so, in one's resultant extremity to explain the expansion of English common law to New Zealand. It is interesting, in view of the very early and radical fusion of equity with common law in New Zealand, to contemplate whether it is not equity as a Mainian instrument of legal innovation which accounts for the expansion of English common law. So far, the early place of equity in New Zealand's legal history has not, to the writer's knowledge, even been considered to account in any way for the introduction of English common law. It is not possible in this paper to do more than draw attention, albeit cryptically, to what has been ignored as a virgin field of enquiry in "the grand experiment" of English jurisprudence promoted by Busby in New Zealand.

The question of how English common law came to be applied and enforced not just generally throughout New Zealand, but more particularly on both the predominantly Scots settlements as well as on the existing Maori inhabitants[28] is one of the most vexatious yet intellectually stimulating and rewarding questions in the field of jurisprudence constituted by New Zealand's most fertile legal history.

It is this sort of question, in one sense trifling and in another sense troubling, that tends to be ignored to the detriment of New Zealand jurisprudence. It appears to be trifling when viewed from afar, as this may happen in either space or time. Thus under the imprimatur of the Oxford University Press the *Oxford New Zealand Encyclopaedia* has this to say about such antipodean affairs as law and justice in New Zealand:[29]

> The English colonists brought to New Zealand the law that existed in England at the time. So, at least, it was established by the English Laws Act, 1858 . . .

It is of course eminently arguable that the English Laws Act 1858 refers to and re-expresses something other than the Blackstonian doctrine of English common law; but here in the *Oxford New Zealand Encyclopaedia* we have the English Laws Act imbued with no more than its

23 *Chapters on the Law Relating to the Colonies* (1882) 5.
24 *The Constitutional History and Law of New Zealand* (1914).
25 Supra n 14.
26 Ibid.
27 Ibid.
28 It is doubtful whether any Maori-European question can be resolved without cognisance of Scots-English-Irish questions. The logic required is wider than the duality first thought.
29 *Oxford New Zealand Encyclopaedia* (1965) 210.

Blackstonian common law significance—which makes of the English Laws Act 1858 a declaratory rather than an innovative piece of legislation—and declaratory, at that, of common law.

Again the writer Windeyer, removed in time but not in space from these antipodean affairs, begs the question of English common law when he writes about British subjects carrying with them to the colonies the law of their homeland in force at the time of the original colonisation:[30]

> The common law is the inheritance of all the subjects of the realm. It follows from this that, when British subjects, by occupation or settlement, found a colony in a new land, they carry with them that law in force in the homeland at the time of the original colonisation, except such parts of it as are not applicable to their new situation.

When in Dunedin in 1966 the same author in person chose to deal with the issue in what must seem to any Scotsman to be a typically English, by being both high- as well as heavy-handed, and also grossly inaccurate way:[31]

> What we call the common law of England is not the law of the land but the law of a people—the British peoples, for Scotsmen perforce must accept it when they are overseas. It is not the law of a place, but the customs of our race.

With all due respect to the learned author, whose eminent works from which these quotations are made are still prescribed by the present writer in his teaching as being the best for any Commonwealth student of legal history, the relationship of Scots to English law as therein described by an Australian is quite erroneous. English law many centuries before ceased to be personal and became territorial; but even if it had not so changed, the customs, civilisation, culture, and laws too, of all British subjects are by no means the same. To say that English law is still the law of a people rather than a land would mean that an Englishman would carry with him into Scotland the English common law. This, as many Englishmen have learned to their cost, is not the case. To say that the Scots *must* accept English law is by no means a statement calculated to evoke northern tolerance, nor in the context of the statute law constituting the United Kingdom go towards inspiring any respect for English law.

More factually explained, yet with explicit surprise expressed at his own similar conclusion, is the commentary of R T E Latham:[32]

> It is remarkable that after the legislative union with Scotland in 1707, when England and Scotland merged into a single kingdom of Great Britain having two territorially limited systems of private law, equal in status, the law that followed citizens of the united realm to colonies subsequently founded was invariably the law of England. There is nothing in the Acts of Union or elsewhere expressly prescribing this.

The explanation given by Latham for this remarkable state of affairs is factual and political but not legal:[33]

> In fact, Scotland had just failed to establish a Scottish colony in Darien, and her consent to the union with England amounted to a final adoption of the English colonies instead of an empire of her own as the domain of her future trade. Scotsmen accordingly did not question the reflection of this policy in law, and were content to be Englishmen overseas.

30 *Lectures on Legal History* (2nd rev ed 1957) 303.
31 "Unity, Disunity and Harmony in the Common Law" [1966] NZLJ 193 at 199.
32 *The Law and the Commonwealth* (1949) 517.
33 Ibid.

Whether this be true or not, and the last sentence would provoke every exiled Scot to repudiate that he could ever be content—whether overseas or under his ain roof—to be an Englishman, it accounts only for colonies established by England up to the time of the union in 1707. That union was more of kingdoms than legislatures. Consequently the expansion of English law to those colonies established by Great Britain after the union is not explained by the Darien disaster or by abortive attempts at Scottish colonization in Nova Scotia.

The depopulation of Scotland and British colonisation are not just coincident in time but correlative in explanation. It is doubtful whether New Zealand would have acquired the status of a British colony but by the force of numbers which filled the white-sailed ships to clear the glens. The histories of both Scotland and New Zealand time and again correlate with each other in the most brutal terms of cause and effect. Highland feelings of betrayal and broken promises, unsuccessful revolution, famine, religious schism and dispossession of tenantry manifest themselves in New Zealand leanings towards provincialism, a distrust of central government, a unique concern for land legislation and labour law, the lack of an established church, an urge to reform and an uneasy acceptance of tradition. In the context of root values, that the massacre of Glencoe,[34] the prior grievances and aftermath of Culloden,[35] the continuing disgraces meted to the Highland Regiments,[36] the introduction of patronage to Scottish Church Government,[37] the Highland Clearances,[38] the Common Market,[39] and the Scottish Referendum,[40] could happen with[41] or take place after 1707, makes it hardly likely that Scotsmen driven from their own country (and few Scotsmen leave their own country but feel driven) would ever be content (unless it be by the will of the Almighty that they thus atone for their sins) to be Englishmen. It may be that the Irish are even less moderate by way of response to Windeyer's and Latham's suggestions, so how can the facts of New Zealand settlement account for the introduction of English common law?

Antipodean writers other than Windeyer, who is, after all, an Australian and cannot be expected to comprehend the subtle nuances of New Zealand origins, express more diffidence. "When British sovereignty was proclaimed," concludes Robson,[42] "New Zealand apparently became

34 See Prebble, *Glencoe* (Penguin Books: 1968).
35 For an account of the legal grievances against England contravening the Act of Union before Culloden see Walker, supra n 18 at 164-170; and otherwise see Prebble, *Culloden* (Penguin Books: 1967).
36 Prebble, *Mutiny: Highland Regiments in Revolt 1743-1804* (Penguin Books: 1977).
37 Walker, supra n 18 at 173; Pearce, supra n 4 at 24-29.
38 Prebble, *The Highland Clearances* (Penguin Books: 1969).
39 See Dike, "The Case Against Parliamentary Sovereignty" [1976] Public Law 283. All the arguments on the limitation of parliamentary sovereignty are but secondary to the issue of fundamental law under the Act of Union. See *Gibson* v *Lord Advocate* 1975 SLT 134, however unsuccessful in ratio.
40 Murray, "Devolution in the UK—A Scottish Perspective" (1980) 96 LQR 35.
41 Glencoe occurred in 1692, but the person responsible for the massacre, Sir John Dalrymple (second Viscount Stair and first Earl of Stair), was the principal supporter of the Act of Union 1707. (Two remaining Scots Commissioners negotiating the Treaty were close relatives of Stair. It was a Dalrymple affair.) The responsibility of Stair for the murder of the MacDonalds, and later for what his opponents termed the murder of Scotland is hard to forget—even by supporters of the union.
42 Supra n 14 at 5.

subject to the laws of England." With all due respect to that learned editor, however, this conclusion is less pertinent than first appears, because it is by no means a foregone conclusion that British sovereignty entails British law. Indeed this issue was recognised by the Colonial Office to be an open issue at least as early as 1843 when in threatening Attorney-General Swainson with dismissal the Secretary of State Lord Stanley drew to the New Zealand Attorney's attention that there was no difficulty either in legal theory or practice of maintaining under the same British sovereignty different laws for the government of different races of men. British India, Ceylon, the Cape of Good Hope, and Canada could all be cited in this connection.[43]

Not only was this the position in 1843, but in an oft-overlooked provision of the United Kingdom Parliament in 1852 granting a representative constitution to the colony of New Zealand, it was not only provided but re-enacted[44] from earlier legislation as follows:[45]

> And after reciting that it may be expedient that the laws, customs, and usages of the aboriginal or native inhabitants of *New Zealand*, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed: It is Enacted, LXXI. It shall be lawful for Her Majesty, by any letters patent to be issued under the great seal of the United Kingdom from time to time to make provision for the purposes aforesaid, any repugnancy of any such native laws, customs, or usages to the law of England, or to any law, statute, or usage in force in New Zealand, or in any part thereof, in anywise notwithstanding.

Despite this view of there being no necessary relationship between British sovereignty and English law the issue has been generally glossed over, sometimes by an oversight of substantive law, more often by a misuse of language from which is inferred an otherwise impermissible conclusion. This is done most often by equating British subjects with what is in reality non-existent, though referred to as, British law. Not perhaps first, but most significantly in New Zealand's legal history there was Attorney-General Swainson himself who had reported to the Colonial Office ". . . . that those only who have acknowledged the Queen's authority by becoming parties to the Treaty [of Waitangi] or otherwise can be considered British subjects and amenable to British laws."[46] As mentioned, this view was expressly contradicted by the Colonial Office.

It is not possible now to debate the respective arguments in favour of common law, statute, or international law, or to introduce equity in so far as each affords, or all afford some measure of authority for the establishment of British sovereignty and either independently or in turn have some effect on the extension of English law to New Zealand. Whether ". . . the title of Great Britain to the sovereignty of New Zealand rests partly upon discovery, partly upon cession, partly upon assertion, and

43 Foden, supra n 14 at 100.
44 (1846) 9 & 10 Vict c 103, ss 9, 10.
45 (1852) 15 & 16 Vict c 72 [Emphasis added]. There is no mention of this provision, for example in Robson, supra n 14; but see Tarring, supra n 23 at 5.
46 Foden, supra n 14 at 98. In writing of "the principles of British law" the Australian viewpoint is no better: Castles, *An Introduction to Australian Legal History* (1971) 14.

partly upon occupation . . ." as Attorney-General Swainson wrote[47] will, however, have considerable bearing on whether the common law of England can be held to account for its own extension to New Zealand by the occupation of Englishmen not only on their own behalf but on account of Scots and Irish.

In the same way but for different reasons it is not possible in this paper to account for the Scottish legal tradition which is one of the fundamental distinctions between Scotland and England. That account may be begun by a studious reading of such treatises as Tytler's four-volumed *History of Scotland* (1864)[48] and Walker's *Scottish Legal System*[49] as well as the latter's two hefty tomes on *Principles of Scots Private Law* (1970).[50] There are both semantic issues involved in the New Zealand lawyer's use of words, and more substantively legal as well as abstractly jurisprudential issues involved in differentiating between English and Scots law, however, if the New Zealand lawyer is not to mistake his roots. The United Kingdom is something between a dual and triple, rather than being a unitary state. To mistake one's real roots is in turn to over-simplify the issues attending the expansion of English common law to New Zealand. Explication is one means of avoiding this over-simplification. We shall deal first with the issues of substantive law and jurisprudence, leaving the semantic question of what words the New Zealand lawyer chooses to use till last.

The British Constitution from Both Sides of the Border

It is taken as axiomatic that the British Constitution, resulting as it does in its most recent form from the free union of equal kingdoms in 1707, must be that which remains to be seen from not just one but both sides of the Border. Indeed, this border between the two kingdoms is not old, obsolete, or repealed, but rather entrenched in the fundamental provisions continuing to bind both of them. It is not just part of the written constitution of the United Kingdom of Great Britain but the explicit expression of that fundamental law operative within it.[51]

It is true that the English often forget how much this is the case, so that it behoves Scotsmen to explain to Englishmen in the context of common markets, devolution, or parliamentary sovereignty the principles of their common and, in these days it appears, much endangered constitution.

In consequence of the two Acts passed respectively by the English and Scottish Parliaments leading to the United Kingdom in 1707, the two kingdoms were to be "forever after united into one kingdom by the name of Great Britain . . . to be represented by one and the same Parliament . . ." with succession to the monarchy settled pursuant to the Act of

47 Foden, supra n 14 at 97.

48 This work does not account beyond 1603. See also Hume Brown, supra n 2 and Lang, *History of Scotland* (3rd ed 1903).

49 Supra n 18.

50 See also Gloag and Henderson's *Introduction to the Law of Scotland* (7th ed 1969).

51 This border continued to be reflected, for instance, in the tribal values of the Otago Settlement which provided two separate sets of accommodation or barracks for newly disembarked immigrants. These were not severally for males and females as may be first thought to be their obvious function but severally for English and Scots: Edmund Smith, quoted by Ross, supra n 5 at 524.

Settlement (1700).[52] For all this fundamental law, and all that has happened in history and purportedly in law since, the border between the two kingdoms is entrenched by such provisions as declare the treaty and agreement for union to be forever a fundamental condition of union, to uphold the Scottish Court of Session and prohibit Scottish causes being cognisable by Chancery, Queen's Bench, or Common Pleas, to safeguard the Scottish Universities and to support Presbyterian Church government, worship and discipline.[53]

It is not possible in this short paper to enquire deeper into this matter of fundamental law. Those who would do so are referred to the long history of scholarship in which the recent commentaries of Professor MacCormick[54] and Lord Advocate Murray[55] carry the responsibility of enlightening the present. In the intellectually restricted but geographically extended context of this paper two matters are of principal relevance to New Zealand. The first is the union's assurance of the continuity of Scots law. The second is the confirmation of Presbyterian Church government. These are both fundamental conditions underlying the constitution of the United Kingdom of Great Britain set up in 1707. In legal theory the continuity of Scots law as assured by the union is the principal obstacle to the operation in New Zealand of the so-called Blackstonian doctrine. On the other hand, it was the breach of the fundamental condition of the union confirming Presbyterian Church government which in fact led to much Scots settlement in New Zealand.

How the Force of the Border as Fundamental Law comes to be Confused and Overlooked both in England and Abroad

It will now be apparent in a New Zealand context that English and Scots notions of the operation of the Rule of Law in the United Kingdom are fundamentally different. The reality of this appearance has been partly demonstrated by showing how the different notions come about. Sure proof of this reality and of its relevance to New Zealand law requires us to account for the way in which such different notions become confused. It is by a misuse of language that the clarity of these different notions is confused, and the conflict in legal values left unresolved.

It may be safely said that the majority of Englishmen finds the "Celtic faction"[56] most pedantic. That the Rector of Glasgow University should seek a declaratory order from the Lord Advocate[57] that the use of the numeral II in the Royal title of Elizabeth II is not only inconsistent with historical fact and political reality but in contravention of the Act of Union, is difficult for an Englishman to regard with any degree of seriousness whatever. That the use of the numeral II in the Royal title provoked fierce debate throughout the world among Scots from Helsinki to the Bluff is further evidence to most Englishmen of the fundamental

52 6 Anne, c 11 (5 & 6 Anne, c 8 in the common printed editions, as in *Statutes at Large*).
53 Idem.
54 Supra n 1.
55 Supra n 40.
56 This expression owes its origin to White, *The Once and Future King* (1958).
57 *MacCormick & Hamilton* v *Lord Advocate* 1953 SC 396. (For an account of John MacCormick's tireless endeavours see Mackie, *A History of Scotland* (Penguin Books: 1978) 368-372).

crankiness of the "Celtic faction". It is not possible in what began as a short paper to expound these radically different Scots and English views of language so as to explain the confusion over English and Scots law in its wider context. To do so would lead to some pretty paradoxes by showing Boswell's Dr Johnson to be more of a Scot than an Englishman in his linguistic attitudes, and to explicate also those who view some new translations of scripture as atheists' bibles.[58] These interesting asides must be foregone, but it is not possible to forego the particular instance of confusing English law with British justice if the way in which this has come about is to make sense of the New Zealand legal system.

Consider that anonymously written but now classic account in legal history of *British Liberties* published in 1766. By one of its sub-titles, "Of the British Constitution", it purports to deal comprehensively with the constitution of Great Britain, yet it omits all mention of the union of crowns and parliaments. Apart from a brief mention[59] that there are half as many papists in Scotland as England, *British Liberties* may be taken to be the privilege entirely of Englishmen. Its treatment of *Magna Carta* takes no account of that statute's lack of extra-territorial jurisdiction north of the Border.

In a similar fashion England now takes a perverse pride in the domestic character of her seventeenth century Civil Wars. They have been called by a recent English historian *This War Without An Enemy*.[60] Ironically these wars began in Scotland, and their outcome, at least of the First Civil War, was determined by the Scots (and the Eastern Association of Cambridgeshire, Essex and Suffolk). New Zealand youngsters may not now play Cavaliers and Roundheads, not even Dunedin youngsters remember much of the Covenanters, but Naseby is not far from Dunedin, and considerable excitement recently attended what appeared to be the written refusal of the summons of Montrose to the City of Aberdeen in our Otago Early Settlers Museum.[61]

This propensity of the English to call "English" those things which they value that are really British is not just an antique phenomenon. It has another form of expression, however, and this is to innocently acclaim, ignorantly ignore, and sometimes purposely denigrate that which is Scots by terming "British" that which is exclusively English.[62] The depth of this instance of confusion is particularly insidious in its impact on our understanding of constitutional law and legal system.

Among the more particular examples of this misuse of the word "British" by which English attitudes and institutions acquire exclusive-

58 See Prickitt, "What Do the Translators Think They Are Up To?" (1979) 33 New Universities Quarterly 259.

59 At xxix.

60 Ollard (1976).

61 This has since proved to be an early facsimile of the original.

62 One of the earliest and most entrenched instances of misusing the notion of what is British, concerns the so-called coming of Christianity to Britain. What is meant by this is in reality the landing of St Augustine in Kent and the conversion of the pagan English to the Church of Rome. The conversion of Ireland and Scotland had been long in hand, however, and the British Church established: Alexander, *The Ancient British Church* (1799). Of course to make Augustine's mission the paramount if not original godspell makes the English Reformation much more rational. How ironic it would be for the English to find that their reformation, instead of being an original advance, was a retreat to an older Celtic consciousness of Christianity long before Augustine, and perhaps even the Church of Rome itself?

ness is a misstatement by the modern historian Thomson that "the United Kingdom universities were preserved as an Anglican monopoly for another generation."[63] Nothing could be further from the truth in both fact and law as to the ancient Scottish universities of St Andrews, Glasgow, Edinburgh, and Aberdeen, whose identity was preserved by specific mention in the Act of Union. Even in *British Government,* being written so obviously by one of the "Celtic faction" as Glyn Parry, what is meant both in law and ethnic attitudes is exclusively English. In this work of 332 pages purportedly on *British Government* the author puts forward a lack of space as both reason and excuse for failure to mention the legal systems of Scotland and Northern Ireland.[64] His detailed account of the English legal system thus raises the question whether British Government can be thought to operate at the expense of British Justice.

As the last and most recent example of this linguistic confusion we may consider the example pointed out by Professor Neil MacCormick (son of the law student who conjoined with the Rector of Glasgow University to take issue in the *Royal Titles* case). Professor MacCormick takes the writer A R Babbington to task for the temerity to write on *The Rule of Law in Britain from the Roman Occupation to the Present Day* and yet ignore the Scottish contribution to British justice:[65]

> The trouble with [Babbington's] work is that it bears a misleading title. It is not about the "rule of law" in any exact or defined sense. . . . Nor is it about Britain. It is about England only. At no point in the book that I could discover is any hint dropped that there are within the United Kingdom two—two and a half—legal traditions and legal systems, which indeed own different rules and practices in areas vital to an appreciation of "the rule of law" *stricto sensu*. Indeed, at no point is there any reference to the actual historical foundation of the United Kingdom, although there is a Chronological Table which falsely asserts that the Union of England with Scotland occurred in 1603.

In the fullness of this context of confusion over English and Scottish legal systems is it in any way surprising that so much would be taken for granted in attributing the Blackstonian doctrine to account for Scottish settlers, or English settlers on account of Scottish settlers, introducing English law to New Zealand? When we look at the New Zealand statute book we find every indication that this confusion had a part to play. Our first Supreme Court Ordinance, for example, describes the Lord High Chancellor of England as being Chancellor of Great Britain.[66]

It may be thought that the constitutional manifestation of this semantic confusion in England and New Zealand is attributable to Blackstone, but such is not the case. The mistake over Blackstone's doctrine in accounting for the expansion of the English common law is made by those who persistently misquote him out of context. Now, at the conclusion of this paper giving essentially a Scots view of the British Constitution and an indication of the difficulties for the New Zealand Constitution made by those who overlook it, is a quotation from the *Commentaries* of that eminent English writer. The context from which

63 *England in the Nineteenth Century* (Penguin Books: 1950) 62.
64 *British Government* (1969) 279.
65 Book Review (1980) 96 LQR 149, 151.
66 S 3 Supreme Court Ordinance 1841. The confusion was corrected by a s 5 Supreme Court Ordinance 1860.

Blackstone's doctrine is most often rudely exterpolated constitutes some seventeen pages. These begin by his first drawing and then elaborating at length on the following distinctions:[67]

> The kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only . . .

It is towards the end of this seventeen page account of the municipal law of England as it exists in context with the other municipal laws of the United Kingdom that Blackstone distinguishes between colonies which have been obtained by cession or treaty on the one hand, and those discovered ab initio by English subjects on the other. We have already seen how future commentaries have surreptitiously extended the latter from English to British subjects. A re-reading of Blackstone's famous passage in context will show this to be quite unwarranted.

It will be recalled that Lord Mansfield thought the doctrine as reported in Salkeld and now identified with Blackstone to be "very loose". Indeed Blackstone concludes his seventeen page account of English municipal law in context with these words:[68]

> These are the several parts of the dominions of the crown of Great Britain, in which the municipal laws of England are not of force or authority, merely as the municipal laws of England. Most of them have probably copied the spirit of their own law from this original; but then it receives its obligation, and authoritative force, from being the law of the country.

Notwithstanding the evaluative force of the word "birthright" used of English subjects in Salkeld's reports, the effects of Blackstone's conclusion is to make a great deal less of his account of the expansion of English common law than has been attributed to it. At the most one might discover a legal fiction whereby all British colonists are presumed to be Englishmen—but that suffers from the fault of self-reference for it is a legal fiction of English common law. At the least Blackstone's account is not a doctrine of law at all but a sociological explanation and one, at that, which does not always accord with the facts. Blackstone's conclusion suggests that what has been mistaken all along for a proposition of law has never attempted more than to describe facts. This is because the prescriptive force of the colonial law is admitted to be its own, and does not derive from the original English common law from which it was borrowed or copied.

Every Scot who has suffered enough to appreciate the intricacy of confusing English with British, in turn comes not just to tolerate but sympathise with the English who make this confusion. It is not just a retributive justice that the English tongue is now thus more often misused by those who are born to it than by those on whom it was once enforced. The responsive Englishman who on being taught by the Scot how much more than he had previously thought to be English is really British, is then corrected by the Scot for describing a lot more things as British than the Scot will allow.[69] This is particularly true of English law which cannot be described as British without an inaccuracy causing severe hurt to the Scot, just as it would also hurt the Scot to have British

67 Supra n 9 at 93.
68 Ibid at 108.
69 See Smith, *British Justice: The Scottish Contribution* (Hamlyn Lectures 1961).

justice inaccurately described as English. It must be a sore trial for the English to have such pedantic next-door neighbours. Perhaps that explains where the recent move for Scots devolution originated, and how the Scots, when it came to a referendum, failed to support it. At present in Otago, just as we might expect from the closeness of Scots and New Zealand legal history, there is a correlative parallel by way of a movement for secession of the South Island.[70] That one can have too much of a good thing is seen by most Scots to be especially true of independence. Whether New Zealanders will see it the same way will be interesting to find out. The question in each case is not only how little of independence is too little, but how much is too much.

70 See "South Island Movement: Referendum and Fair Deal But Not a Revolution" *Otago Daily Times*, May 15, 1980.