CASE NOTE

The Ship "Federal Huron" v Ok Tedi Mining Limited, SC313, 20 January 1986. Kidu CJ, Pratt and Woods JJ.

One of the more difficult questions concerning the reception of non-indigenous law into Papua New Guinea has been the extent to which statutes of foreign originl have been received. The pre-Independence Papua New Guinea and Australian courts reached differing conclusions regarding the extent to which such statutes had been received into the Territories of Papua and New Guinea.2 Eleven years after Independence, the Papua New Guinea Supreme Court has finally addressed, but not completely resolved, the scope of adoption of statutes of foreign origin by post-Independence Papua New Guinea. In The Ship "Federal Huron" v Ok Tedi Mining Limited,3 the Supreme Court, inter alia,4 developed the underlying law5 pertaining to the admiralty jurisdiction of the National Court.6 This note examines only that aspect Supreme Court's decision which considered the adoption of statutes of foreign origin by Papua New Guinea before and after Independence.

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1. See Constitution schs 2.2(3), 2.6 and 5.

2. See Booth v Booth (1935) 53 CLR 1; Murray v Brown River Timber Company Limited [1964] PNGLR 167; Timbu-Kolian v The Queen [1967-68] PNGLR 320; Re Johns [1971-72] PNGLR 110; and The Queen v Ulel [1973] PNGLR 254, all discussed infra.

3. SC313, 20 January 1986 (hereafter referred to as The "Federal Huron").

4. The Supreme Court also decided the circumstances under which an order is final and appealable as of right or interlocutory and appealable only by leave of court. For a discussion of the previously unsatisfactory state of the law, see B Brunton and A Sawyerr, 'Concerning the Classification of Judgments as "Final" or "Interlocutory" A Fragment on Judicial Lawmaking in Papua New Guinea', (1982) 10 MLJ 110.

5. A duty placed on the court by Constitution sch 2.4.

6. That part of the court's decision has now been superseded by an Act of Parliament. Admiralty Act 1987, Act No 2 of 1987.

The Pre-Independence Situation[7]

Before Independence, statutes of foreign origin in force in the Territories of Papua and/or New Guinea fell into three categories: English, Commonwealth and Queensland statutes adopted by virtue of The Courts and Laws Adopting Ordinance 1889 (Papua) or the Laws Repeal and Adopting Act 1921 (New Guinea) or by the legislative bodies of the two territories; English statutes which appeared to have been adopted in the Territory of New Guinea as part of the received English common law and equity[8]; and those which were received directly in the Territory of Papua by virtue of its status as a British Possession.[9]

Statutes particularly adopted. Before Independence, The Courts and Laws Adopting Ordinance 1889 (Papua) and the Laws Repeal and Adopting Act 1921 (New Guinea) adopted for each Territory certain statutes of foreign origin. Section 3 of The Courts and Laws Adopting Ordinance 1889, enacted by the Legislative Council in Papua, adopted

> those portions of the Acts Statutes and Laws of England that were in force in the Colony of Queensland on the 17th day of September 1888 and that can be put in force and become law in the Possession by being adopted by an Ordinance of the Possession....

so far as they were applicable to the circumstances of the Possession and repugnant to or inconsistent with the provisions of any laws that had been or might in the future be made in Papua. Specific Queensland enactments were also adopted.[10]

Section 15 of the Laws Repeal and Adopting Act 1921 (New Guinea), an Ordinance made by the Governor-General of Australia in Council "in pursuance of the powers con-

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7. A good discussion of the reception of foreign statute law into the former Territories of Papua and New Guinea may be found in R.S O'Regan, The Common Law in Papua New Guinea (Sydney : Law Book Co Ltd 1971).

8. See the discussion of Booth v Booth (1935) 53 CLR 1, infra.

9. Letters patent issued on 8 June 1888 establishing British New Guinea as a separate possession effective from 4 September 1888. The Supreme Court ruled in The "Federal Huron" that this status was not affected by the transfer of administrative control from England to Australia by Order-in-Council on 6 March 1902 or any later document.

10. The Courts and Laws Adopting Ordinance (Amended) of 1889, s2.

ferred by the New Guinea Act 1920", adopted those "portions of the Acts, Statutes and laws of England that are in force in the State of Queensland" on 9 May 1921, with the same restrictions that applied to those statutes adopted for Papua. A variety of Commonwealth statutes,11 Queensland statutes12 and Papuan Ordinances13 were also adopted, and some enactments from the military occupation from 1914 to 1921 were kept in force.14 There are numerous examples of foreign statutes adopted by local legislative bodies, the most significant of which is probably the adoption in Papua in 1902 of the Queensland Criminal Code.15

Statutes adopted as part of the common law and equity. The principles of common law and equity of England were adopted into both Papua16 and in New Guinea17, although at different times and in different terms. In Booth v Booth18, an oft-criticized judgment of the High

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11. Laws Repeal and Adopting Ordinance 1921, s11.

12. s13.

13. s15.

14. s12.

15. Now Criminal Code, c262, Revised Laws.

16. Section 4 of The Courts and Laws Adopting Ordinance (Amended) of 1889 states:
    > The principles and rules of common law and equity that for the time being shall be in force and prevail in England shall so far as the same shall be applicable to the circumstances of the Possession be likewise the principles and rules of common law and equity that shall for the time being be in force and prevail in British New Guinea.

17. Section 16 of the Laws Repeal and Adopting Ordinance 1921 (New Guinea) as amended by the Laws Repeal and Adopting Ordinance 1923 states:
    > The principles and rules of common law and equity that were in force in England on the ninth day of May, One thousand nine hundred and twenty-one, shall be in force in the Territory so far as the same are applicable to the circumstances of the Territory, and are not repugnant to or inconsistent with the provisions of any Act, Ordinance, law, regulation, rule, order or proclamation having the force of law that is expressed to extend to or applied to or made or promulgated in the Territory.

18. (1935) 53 CLR 1.

Court of Australia19, the Court stated that the "principles and rules of common law and equity" in s 16 of the Laws Repeal and Adopting Ordinance 1921 (New Guinea) included statutory provisions which have contributed to the development of the general law. Although obiter dicta, this statement was taken to be the law in the Territory of New Guinea at Independence.20

The decision in Booth v Booth was never used to interpret s4 of The Courts and Laws Adopting Ordinance 1889 (Papua). In Murray v Brown River Timber Company21, Chief Justice Mann held that the Papua Ordinance would be unworkable if the decision in Booth v Booth were applied to it because of the differences in adoption date in the two ordinances. He considered, however, that the same result could be achieved by developing the common law to include the content of English statutes which were suitable to the Territory of Papua. In Re Johns,22 Kelly J considered that the common law received in Papua included a particular statutory modification, but found it unnecessary to determine how this had happened.

Imperial Acts applying of their own force. Because the Territory of Papua remained a British Possession until Independence,23, there were differences in the way in which Imperial Acts were received into the Territories of Papua and New Guinea. Imperial Acts passed after 17 September 1888 were received into Papua of their own force, and not pursuant to s 3 of The Courts and Laws Adopting Ordinance (Amended) 1889. Imperial Acts were received into New Guinea, however, only under s 14 of the Laws Repeal and Adopting Ordinance 1921 or by local adoption, since New Guinea was never a British Possession.

Consequently, immediately before Independence, there were significant differences between the legislation in force in Papua and that which was and which appeared to be24 in force in New Guinea.

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19. By, among others, Mann CJ in Murray v Brown River Timber Co Ltd [1964] PNGLR 167, the Supreme Court in The "Federal Huron" and RS O'Regan, in The Common Law in Papua New Guinea (Sydney : Law Book Co Ltd 1971).

20. By Windeyer J, in Timbu-Kolian v The Queen, supra, and by Clarkson J in The Queen v Ulei, supra.

21. [1964] PNGLR 167.

22. [1971-72] PNGLR 110.

23. The "Federal Huron" v Ok Tedi Mining Co Ltd, SC313 at p13.

24. "Appeared to be" because Windeyer J treated it as of precedential value in Timbu-Kolian v The Queen, supra.

The Effect of Independence on the Statutory Law of Papua New Guinea

Legislation brought down in Papua New Guinea and in Canberra on the 15th-16th September 1975 severed Papua New Guinea from Australia, wiped clean Papua New Guinea's legislative slate, created an Independent Papua New Guinea, and adopted laws for the newly independent state.25

The Repeal Provisions. The Statute Law Revision (Independence) Act 197526 and the Laws Repeal Act 197527 repealed all "enactments, subordinate legislative enactments and all other legislation and subordinate legislation...applying to, adopted by, extending to, continued in existence in relation to or existing in Papua New Guinea or any part of Papua New Guinea".28 The term "enactment" excluded from its scope "any Act of England which extends of its own force"29 to the Territories of Papua, New Guinea, or Papua New Guinea. Imperial Acts which applied directly to Papua were therefore not repealed by the Law Repeal Act 197530. However, once Papua ceased to be a British Possession at midnight on 15 September 1975, all Imperial Acts which applied of their own force to Papua were no longer in effect there.31

The Courts and Laws Adopting (Papua) Act 1975 repealed all pre-1828 Imperial statutes in force in the Territory of Papua, and the Laws Repeal and Adopting (New Guinea) Act 1975 achieved the same result for the former

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25. Courts and Laws Adopting (Papua) Act 1975 (No 38 of 1975); Imperial Laws Replacement Act 1975 (No 39 of 1975); Laws Repeal and Adopting (New Guinea) Act 1975 (No 41 of 1975); Wills, Probate and Administration (Powers) Act 1975 (No 42 of 1975); Statute Law Revision (Repeals) Act 1975 (No 65 of 1975); Statute Law Revision (Independence) Act 1975 (No 92 of 1975); Laws Repeal Act 1975 (No 93 of 1975);

26. Act No 92 of 1975.

27. Act No 93 of 1975.

28. Laws Repeal Act 1975, s3. The Statute Law Revision (Independence) Act 1975, which came into operation on 15 September 1975 immediately before the coming into operation of the Laws Repeal Act 1975, repealed certain specified statutes, including the Supreme Court Act 1949.

29. Laws Repeal Act 1975, s2.

30. The "Federal Huron" v Ok Tedi Mining Co Ltd, SC313, at 19.

31. Ibid.

Territory of New Guinea. These Imperial Acts would have been brought into force in Papua through the Courts and Laws Adopting Act (Amended) of 1889 and were therefore, unlike post-1889 Imperial Acts, local legislation capable of being repealed by the Papua New Guinea Parliament. The same Acts would have entered New Guinea through the Laws Repeal and Adopting Act 1921 (New Guinea).

The Re-enactment Provisions. Schedule 2.6 of the Constitution adopted at Independence all pre-Independence laws32 repealed by the Laws Repeal Act 1975 as Acts of the Parliament to "apply to the extent which they applied, or purported to apply, immediately before Independence Day..."33 Schedule 2.6 also provided for the adoption of specified Australian and English Acts listed in sch.5 of the Constitution.34 A few pre-1828 Imperial Acts, repealed under the Courts and Laws Adopting (Papua) Act 1975 and the Laws Repeal and Adopting (New Guinea) Act 1975 were re-enacted by the Imperial Laws Replacement Act 1975.35 Other Imperial Acts which applied of their own force to the former Territory of Papua were not reenacted under those provisions: they were incapable of being repealed by either the Statute Law Revision (Independence) Act 1975 or the Law Repeal Act 1975 (and hence reenacted under sch 2.6), they were not specifically adopted by sch.5 of the Constitution, and they were not part of the received English common law and equity.

The Court raised but did not resolve an issue created by the imprecise language of Constitution sch2.6. Pre-Independence Acts adopted under sch 2.6 were to "apply to the extent to which they applied, or purported to apply immediately before the repeal referred to in sub.s.(1)(a) or immediately before Independence Day as the case may be." The Court decided that these words included "geographical extent" and that an Act could be adopted at Independence for only part of Papua New Guinea. Counsel did not, however, address the Court on the geographical scope

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32. Defined in sch2.6 of the Constitution as "a law... that was repealed by the Law Repeal Act 1975 made by the pre-Independence House of Assembly of Papua New Guinea". In The "Federal Huron" the term "law...made by the pre-Independence House of Assembly" was interpreted to mean "all laws passed by previous legislative bodies of the country, be they the Legislative Councils before or after the two Great Wars or by the House of Assembly itself"(p20).

33. Constitution sch2.6(2).

34. Constitution sch2.6(1)(b) and (c).

35. Act No 39 of 1975. Re-enacted were 14 George II c48 (insurance); 11 George II c19, 4 Anne c16 (c3) and Henry VIII c34 (landlord and tenant) and 24 George II c23 (calendar).

of adoption of sch 2.6 and the Court has left the matter open for argument in later cases. Legislative Counsel adopted the position in the Laws Adoption and Adaptation Act, c 20, that the word "extent" does mean "geographical extent".36 The Court resolved its immediate problem by developing the underlying law for the former Territory of Papua so that it became identical to the legislation in force in the former Territory of New Guinea.

The contents of s 3 of The Courts and Laws Adopting Ordinance 1889 and s 15 of the Laws Repeal and Adopting Ordinance 1921 (adopted under sch2.6 of the Constitution) were reenacted as s 2(3)37 and s 3(3)38 of the Laws Adoption and Adaptation Act, c 20, Revised Laws, respectively. Legislative Counsel used as the "dates of adoption" in ss 2(3) and 3(3) 17 September 1888 and 9 May 1921 respec-tively. Although it was unnecessary for the Supreme Court in The "Federal Huron" to decide whether these adoption dates were correct, it considered the issue and concluded, in contrast to the decision of the legislative draftsman, that:

> On 16th September 1975 what occurred under sch2.6(2) of the Constitution was not a continuation of the old laws but a re-enactment by way of adoption. It seems to us therefore that where s 14 of "the 1921 Act" speaks of "those portions of the Acts...of Eng-

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36. Section 2(3) of the Laws Adoption and Adaptation Act, c20, Revised Laws, states:

> Subject to Section 4, those portions of the Acts, statutes and laws of England (other than principles and rules of the common law and equity) that were in force in Queensland on the date of adoption and that can be put in force and be law in the area in respect of which this section applies are, to the extent to which they were in force in Queensland on the date of adoption, in force in that area as written laws.

Section 2(1) states that the area to which s2 applies is the former Territory of Papua and s2(2) states that "the date of adoption" means 17 September 1888.

37. Section 3(3) of the Laws Adoption and Adaptation Act, c20, Revised Laws, states:

> Subject to Section 4, those portions of the Acts, statutes and laws of England (other than principles and rules of the common law and equity) that were in force in Queensland on the date of adoption and that are applicable to and can be applied to the area in respect of which this section applies are, to the extent to which they were in force in Queensland on the date of adoption, in force in that area as written laws.

Section 3(1) states that the area to which s3 applies is the former Territory of New Guinea, and s3(2) states that "the date of adoption" means 9 May 1921.

> land that are in force in the State of Queensland at the commencement of this Ordinance...", the reference to the commencing date will no longer be 9 May 1921 but 16 September 1975. The Colonial Courts of Admiralty Act was in operation in Queensland on both dates, and is thus re-enacted as a piece of legislation of the National Parliament on the later date. It would also seem to us that where certain Acts ceased to be applicable in Queensland between 1921 and 1975 then they have not come across into this jurisdiction. However no submissions were necessary on this aspect so we say no more than that.

The powers of the legislative draftsman to create law have yet to be fully considered by the Court, and a discussion of those powers would be out of place in this note. The Court indicated its attitude to the work of the legislative draftsman by stating that "the revision of laws is essentially a cosmetic and house keeping matter"38 (although it did comment later in its decision that the powers of the First Legislative Counsel given under the Revision of Laws Act 1973 was not an area under which it was addressed by counsel).39 The issue created by the Court will have to be resolved eventually but is of limited importance, there being only a handful of Imperial Acts, other than the Colonial Courts of Admiralty Act 1890, in force in Queensland in 1889 or 192140 which might be appropriately adopted.

The Booth v Booth Problem after Independence. One issue the Court did resolve in The "Federal Huron" was the inapplicability of Booth v Booth to sch.2.2(3) of the Constitution, which adopted "the principles and rules of common law and equity...notwithstanding any revision of them by any statute of England that does not apply in the country by virtue of Section Sch.2.6..." "After very anxious thought" the Court "formed the firm view that it was not the intention of the Constituent Assembly to introduce statute law into this country by means of modification thereby to the principles of common law and equity."41

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38. SC313, at p30.

39. Ibid. at p39.

40. Much of the legislation is within the admiralty jurisdiction and pertains to such matters as prize courts. Other areas such as extradition and evidence are now the subject of Papua New Guinea legislation.

41. The Ship "Federal Huron" v Ok Tedi Mining Ltd, SC313, at p23. The same view had been taken previously by Kapi J (as he then was) in Wahgi Savings and Loan Society Ltd v Bank of South Pacific Ltd, SC185, Unpublished judgment 25 November 1980.

The Court's reasons for deciding that statute law did not form part of the English common law and equity adopted at Independence fall into three categories. First, the words of sch.2.2(3) in need of interpretation have ordinary and natural meanings which do not suggest the inclusion of statutory matter: the word "notwithstanding" in its most natural meaning means "irrespective of any modification by Statute Law",42 while the term "common law" usually refers to "unwritten law, whether legal or equitable in its origin, which does not derive its authority from any expressed declaration of will of the legislature..."43

The Court's second group of reasons was addressed to Parliament's "deliberate plan executed to wipe the legislative slate clean at Independence"44 and thereafter re-adopt most, but not all, of the previously existing statute law. At Independence specific ancient statutes of the United Kingdom45, a 1927 Papuan Act46 and other English statutes47 were repealed and reenacted in whole or in part and this would not have been necessary had sch.2.2(3) included statute law within its scope. It would have been inconsistent with this approach for Parliament to have also imported "a large number of statutes of completely foreign origin which were never specifically enacted in its own pre-Independence legislation",48 particularly since specific provision was made under schs.2.3 and 2.4 to fill gaps and develop the law.49

Finally, the Court observed that the High Court of Australia's decision of Booth v Booth was "certainly not a convincing authority...It does not form a strong

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42. The Ship "Federal Huron" v Ok Tedi Mining Ltd, SC313, at p24.

43. Jowitt's Dictionary of English Law (2nd edn), quoted in The Ship "Federal Huron" v Ok Tedi Mining Ltd, SC313, at p24.

44. The Ship "Federal Huron" v Ok Tedi Mining Ltd, SC313, at p24.

45. Ibid, at pp26-27. The Court notes, for example, that 32 Henry VIII c34 was reenacted in the Imperial Laws Replacement Act, No 39 of 1975.

46. Ibid, at p27.

47. Ibid. Constitution sch2.6(2) re-adopted the Courts and Laws Adopting Ordinance (Amended) of 1889 and other specific statutes.

48. The Ship "Federal Huron" v Ok Tedi Mining Ltd, SC313, at p28.

49. Ibid.

fortress upon which to base one's attack on the ordinary accepted meaning of the term 'common law'."50 Whatever statute law of foreign origin was in force in Papua New Guinea after Independence, it did not enter through the adopted English common law and equity.

Conclusion

After The "Federal Huron", it is clear that the statute law of foreign origin in force in Papua New Guinea after Independence includes that legislation specifically adopted under Constitution sch.2.6 and the Acts of Parliament passed at and after Independence,51 but does not include statutory modifications of the English common law and equity. What is still unclear is the scope of adoption of unnamed Acts under sch.2.6(1)(a) of the Constitution, most of which would be adopted under the Laws Adoption and Adaptation Act, c.20, Revised Laws. As noted earlier, few Queensland statutes of English origin in force from 1889 to 1921 fill the criteria set out in that Act, whether the Court chooses 1889 and 1921 or Independence as the adoption date(s). The decision of the Court in The "Federal Huron" may, therefore, leave a few questions unanswered, but has resolved the important issues surrounding the adoption of statutes of foreign origin in Papua New Guinea before and after Independence.

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50. Ibid.

51. See note 25, supra and Act No 10 of 1976.

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