[HIGH COURT OF AUSTRALIA.]

MITCHELL . . . . . APPELLANT;
COMPLAINANT,

AND

SCALES . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1907.

SYDNEY, *Dec.* 9, 10, 11.

Griffith C.J., Barton and Isaacs JJ.

Applicability of English law in New South Wales—Vagrancy Act, 5 *Geo. IV.* c. 83 *—Effect of Ordinance*, 6 *Wm. IV. No.* 6 (*N.S.W.*)*—Repeal by implication—* 9 *Geo. IV.* c. 83.

The provisions of the Imperial *Vagrancy Act*, 5 Geo. IV. c. 83, were never capable "of being applied in the administration of Justice" in New South Wales, within the meaning of 9 Geo. IV. c. 83, sec. 24.

Even if any of its provisions were ever in force in New South Wales, the Ordinance 6 Wm. IV. No. 6, which dealt comprehensively with the subject of vagrancy in New South Wales, had the effect of either repealing by implication those provisions of the English Statute which dealt with the same subject matter, or of a legislative declaration that they were not in force.

Quan Yick v. *Hinds*, 2 C.L.R., 345, considered and approved.

Per Griffith C.J. and *Barton* J.—In considering whether an English Statute was introduced into New South Wales by 9 Geo. IV. c. 83, regard must be had to the suitability of the Statute as a whole to local conditions, and, so regarded, 5 Geo. IV. c. 83 as a whole was inapplicable, and therefore never in force in New South Wales.

Per Isaacs J.—*Quære*, whether before 6 Wm. IV. No. 6 was passed such portions of 5 Geo. IV. c. 83, as dealt with offences against society in general, were not in force in New South Wales by virtue of 9 Geo. IV. c. 83.

Decision of *Sly* Acting J., 19th July 1907, affirmed.

H. C. OF A. 1907.

MITCHELL v. SCALES.

APPEAL from a decision of *Sly* Acting J. on a special case stated under the *Justices Act* 1902.

The respondent, Mary Scales, was proceeded against by the appellant, before a magistrate, upon an information which alleged that she "did unlawfully pretend to one L.H.C. to tell the fortune of him the said L.H.C. by clairvoyancy to deceive and impose upon the said L.H.C.," &c. At the conclusion of the evidence the point was taken on behalf of the respondent that the acts alleged and proved in evidence did not constitute an offence, inasmuch as the Imperial *Vagrancy Act*, 5 Geo. IV. c. 83, which makes it an offence to pretend to tell fortunes, was not in force in New South Wales, and there was no local Act under which the respondent was liable to prosecution. It was contended for the prosecution, that, notwithstanding the decision of the High Court in *Quan Yick* v. *Hinds* (1), the Act 5 Geo. IV. c. 83 was in force in New South Wales, and that the evidence supported the charge stated in the information. The magistrate, following the decision of the High Court, dismissed the information, and stated a case for the opinion of the Supreme Court, whether his determination was erroneous in point of law.

The special case came on for hearing before *Sly* Acting J. sitting in Chambers, who held that he was bound to follow the decision in *Quan Yick* v. *Hinds* (1), and dismissed the appeal with costs, 19th July, 1907.

From this decision the present appeal was brought by special leave.

Piddington, for the appellant. The case of *Quan Yick* v. *Hinds* (1), if it rests upon the ground that, at the date of 9 Geo. IV. c. 83, there were no Courts of Quarter Sessions in New South Wales, should be reconsidered. The Act 4 Geo. IV. c. 96, sec. 19 gave power to the Governor to establish Courts of Quarter Sessions in New South Wales, and the power was exercised by proclamation in 6 Geo. IV. No. 18. The first local Statute on the subject of rogues and vagabonds was 9 Geo. IV. No. 14, secs. 1, 2, by which persons found in unlicensed houses of entertainment were deemed to be rogues and vagabonds, but the punishment was under 5 Geo. IV.

(1) 2 C.L.R., 345.

c. 83. The law under 9 Geo. IV. No. 14 continued in force until 14 Vict. No. 23, which repealed and, in the main, re-enacted its provisions. The 14 Vict. No. 23 was consolidated by No. 26 of 1897. Some portions therefore of 5 Geo. IV. c. 83 have always been in force here. It was practically a consolidation of the law of vagrancy, and those portions of it which were not expressly repealed by subsequent local Statutes have remained in force to the present time. The 6 Wm. IV. No. 6, which was repealed by 15 Vict. No. 4, covered part of the same ground, but did not operate as a repeal of the provisions left untouched. It increased the punishment, but did not create new offences, and did not purport to be a codification. The English law of vagrancy with unimportant modifications, as to punishment and machinery, has always been in force in New South Wales. The adoption of a great part of it in 6 Wm. IV. No. 6 is some evidence that it was suitable to the conditions of the Colony, at any rate so far as the classification of offences is concerned. Fortune telling was held to be an offence here under sec. 4 of 9 Geo. II. c. 5, though the procedure and punishment were different: *R.* v. *Colan* (1). An offence may be within the general law and the provisions of the Poor Law also. The Vagrancy Acts are mainly directed to making offences punishable summarily which otherwise would require an indictment. [He referred to *R.* v. *Giles* (2); *Monck* v. *Hilton* (3).] The omission to provide for this offence in 6 Wm. IV. No. 6 is more consistent with its having been deemed unnecessary to do so owing to there being already adequate provision for it. [He referred to the preamble of 6 Wm. IV. No. 6.] It should not be read as impliedly repealing Statutes that create and provide for specific offences: *Attorney-General for New South Wales* v. *Edgley* (4); *Aarons* v. *Rees* (5). No reason can be suggested why fortune telling should not be treated as an offence in this country. Even if some of the provisions of 5 Geo. IV. c. 83 are unsuitable, the whole Statute should not be discarded. Fortune telling is in a different branch of the law from the offences dealt with in *Quan Yick* v. *Hinds* (6). There is, and always has been,

(1) 1 S.C.R. N.S. (N.S.W.), 1.
(2) 10 Cox Cr. Ca., 44.
(3) 2 Ex. D., 268.
(4) 9 N.S.W.L.R., 157.
(5) 15 N.S.W.W.N., 88.
(6) 2 C.L.R., 345.

H. C. OF A. 1907.

MITCHELL v. SCALES.

adequate machinery for dealing with the offence here. [He referred to *Jex* v. *McKinney* (1); *MacDonald* v. *Levy* (2); 5 Wm. IV. No. 10; 4 Vict. No. 29; 30 Vict. No. 13; 15 Vict. No. 11, sec. 10; 17 Vict. No. 21, sec. 88; 31 Vict. No. 25, sec. 5.]

[GRIFFITH C.J. referred to *Michell* v. *Brown* (3); *Youle* v. *Mappin* (4).

ISAACS J. referred to *Fortescue* v. *Vestry of St. Matthew, Bethnal Green* (5).]

Hammond, for the respondent. 5 Geo. IV., c. 83 was a mere police provision and would not be introduced on the settlement of the Colony under the common rule law: 1 *Blac. Comm.*, p. 107; *Quan Yick* v. *Hinds* (6). Even if it had been a law capable of general application, it was not passed until 1824, *i.e.*, after the date of the settlement of the Colony. It was not introduced here by 9 Geo. IV. c. 83, sec. 24 because it was not capable of being applied here within the meaning of that section. Its provisions are in most cases dependent for their efficacy upon the English Poor Laws and the law as to gaols and houses of correction, which were never in force in New South Wales. The machinery for its enforcement never existed here. The local Statutes dealing with offences of a similar kind omit all reference to the machinery of the English Act, and establish machinery of their own. [He referred to 5 Geo. IV. c. 83, secs. 1-22; 4 Geo. IV. No. 28; 9 Geo. IV. No. 5, sec. 3; 4 Vict. No. 29; *Slapp* v. *Webb* (7); *Ryan* v. *Howell* (8); *Reg.* v. *Maloney* (9).]

Even if 5 Geo. IV. c. 83 was ever in force here, it was impliedly repealed by 6 Wm. IV. No. 6. The fact that that Act dealt with the subject of vagrancy in a comprehensive manner, and made provisions totally dissimilar to those of the English Statute, both as to machinery, classification of offences, and punishment, raises a strong presumption that the legislature either intended to repeal any existing Statutes that may have been in force, or deemed the English Statutes not to be in force

(1) 14 App. Cas., 77.
(2) 1 Legge, 39.
(3) 1 El. & E., 267.
(4) 30 L.J.M.C., 234, at p. 237.
(5) (1891) 2 Q.B., 170.
(6) 2 C.L.R., 345, at pp. 363, 372.
(7) 1 S.C.R. (N.S.W.), app. p. 54.
(8) 1 Legge, 470, at p. 473.
(9) 1 Legge, 74, at p. 80.

here as being unsuitable to local conditions, more especially when, as in this case, the local Statute was passed within seven years of 9 Geo. IV. c. 33, which is said to have introduced the English law to the Colony. This presumption is strengthened by the language of the preamble which recites that it is expedient "to make provision," not "to make better provision" for the subject of vagrancy. In 15 Vict. No. 4, which amends 6 Wm. IV. No. 6, the intention of the legislature is stated to be "to make more effectual provision" &c. [He referred to *Quan Yick* v. *Hinds* (1); *Rex* v. *Hilaire* (2); *Harris* v. *Davies* (3); *Glasson* v. *Egan* (4).]

Piddington in reply, referred to 1 Jac. I. c. 12; 9 Geo. II. c. 5, sec. 4; *Attorney-General for New South Wales* v. *Love* (5).

GRIFFITH C.J. In this case the Court is invited to review the considered judgment of the Court in *Quan Yick* v. *Hinds* (6), delivered on 10th April 1905. In that case the Court held that the Act 5 Geo. IV. c. 83, passed in 1823, commonly called the *Vagrancy Act*, was not one of the laws introduced into New South Wales by the New South Wales Act, 9 Geo. IV. c. 83, which came into operation on 1st March 1829.

The reason why the Court held that the Act was not in force was that there were provisions in it, essential to its operation, which could not be applied at that time in New South Wales. The particular point upon which all the members of the Court were agreed was that the right of appeal to the Quarter Sessions, which was a right expressly given to a person convicted before justices under the Act, was not available. The Court was informed by counsel that at that time there was no law as to Courts of Quarter Sessions in force in New South Wales. Since then it has been discovered that that was a mistake, and that there was such a law in force. Therefore that particular reason for holding that the Act was not in force fails. We are asked now to come to the conclusion that the Act was in force.

(1) 2 C.L.R., 345, at pp. 362, 364, 372, 381.
(2) (1903) 3 S.R. (N.S.W.), 228.
(3) 10 App. Cas., 279.
(4) 6 S.C.R., (N.S.W.), 85.
(5) (1898) A.C., 679, at p. 686.
(6) 2 C.L.R., 345.

H. C. OF A. 1907.

MITCHELL v. SCALES.

Griffith C.J.

For myself, I was of opinion that the Act was not a law which was introduced into New South Wales for other reasons also, which I will state. I was further of opinion that, if it had been introduced, it did not continue in force after 1835, but was repealed by implication in that year by the Ordinance 6 Wm. IV. No. 6, which was the first local law on the subject of vagrants.

The vagrancy laws of England date back to a very early period. I have before me a reference to a Statute of Henry VIII., by which a vagrant, after being whipped, was to take an oath that he would return to the place where he was born, and remain there for a period of three years, and there labour as a clean man ought to do. Persons found a second time in a state of vagrancy were not only to be whipped, but were to have the upper part of the gristle of their right ear cut off. For a third offence the penalty was death. From time to time after that many Acts were passed in England dealing with vagrants, amongst others the Act 17 Geo. II. c. 5 "to amend and make more effectual the laws relating to rogues, vagabonds, and other idle and disorderly persons," &c., the scheme of which was intimately connected with the administration of the Poor Laws. In sec. 2 amongst other persons mentioned were persons pretending to be gipsies, or "wandering in the habit or form of Egyptians," or pretending to have skill in palmistry, or pretending to tell fortunes. That Act was amended by others, and finally, in 1823, the Act 5 Geo. IV. c. 83 was passed, which repealed all existing laws as to rogues and vagabonds, and enacted a series of new provisions. The scheme of that Act was based entirely upon the existing state of things in England at that time—the County organisation and County funds, the organization of parishes and the burdens cast by the Poor Laws upon parishes. Throughout the Act continual reference was made to those provisions. It is true that the Act dealt with many matters that might have been dealt with as substantive parts of the criminal law, but the legislature thought fit to deal with them as part of the law of vagrancy. I referred to several of those provisions in the case of *Quan Yick* v. *Hinds* (1), and came to the conclusion that the Act was not suitable to the circumstances of New South Wales.

(1) 2 C.L.R., 345.

I said (1) what I will now repeat:—"That if the general provisions of a Statute were not unsuitable to the conditions of the Colony, the mere fact that some minor or severable provisions could not come into operation owing to local circumstances is not a sufficient reason for denying the applicability of the Statute as a whole. On the other hand, if the general provisions of a Statute were inapplicable, it would seem to follow that it is not competent to select a particular provision of the Statute which if it stood alone might be applicable, and to say that it is therefore applicable."

I still think that a correct statement of the law. The question to be considered is, not whether such a law might reasonably have been then enacted in New South Wales, but whether the provisions of the Statute, regarded as a whole, were so applicable to New South Wales as to be incorporated in its law. You cannot select one isolated provision and say that that alone is such as might have been made law in New South Wales. That is not the correct doctrine. I adhere to the opinion that the whole structure of the Act shows that it was not applicable to New South Wales.

It was, however, contended that the subject matter of the Act was of such a nature that it was suitable to the conditions of the Colony, and that that was shown conclusively by the fact that in 1835 the Ordinance 6 Wm. IV. No. 6 was passed by the Governor and Legislative Council of New South Wales, which dealt to a very large extent with the same subject. That, it was said, shows that the law was suitable to be applied to New South Wales. In my opinion it shows that the Governor and Legislative Council were of opinion that this subject matter needed to be dealt with by legislation, and, so far from showing that the English law was in force, it seems to me to indicate exactly to the contrary. As I pointed out in *Quan Yick* v. *Hinds* (2), the Act or Ordinance 6 Wm. IV. No. 6 recited that "it is expedient to make provision for the prevention of vagrancy and for the punishment of idle and disorderly persons and rogues and vagabonds in the Colony of New South Wales"—not that it was expedient to make "better" provision for that purpose.

(1) 2 C.L.R., 345, at p. 364.

(2) 2 C.L.R., 345, at p. 363.

H. C. OF A. 1907.

MITCHELL v. SCALES.

Griffith C.J.

That indicates, if anything, that the Governor and Legislative Council thought, not that the English law had been introduced into New South Wales, but that it had not. Apart from that, I think it is a very serious thing to ask this Court, after a lapse of so many years—from 1829 to 1903 or 1904—during which it has never occurred to anybody that this Act was in force, to say that it was. I think that the opinion of the Governor and Legislative Council in 1835 on such a matter is entitled to very great weight. One member was Sir Francis Forbes. There is nothing to indicate that he thought that the Act was in force in New South Wales. If he had, he would probably, as legal adviser to the Government, have caused the Ordinance 6 Wm. IV. No. 6, to be couched in very different language. I adhere, therefore, to the opinion that the English Statute never became part of the law of New South Wales.

In *Quan Yick* v. *Hinds* (1), I expressed the further opinion that the Ordinance 6 Wm. IV. No. 6 ought to be read either as a legislative declaration that it was not in force, or as a codification of the law on the subject, in exercise of the power conferred by sec. 24 of the Act 9 Geo. IV. c. 83 to declare whether a Statute was to "be deemed to extend to New South Wales, or to make and establish such limitations and modifications of its provisions as might be deemed expedient."

It is contended that a law cannot be repealed by silence. I concede that. But it may be repealed by necessary implication, and I think that the cases of *Michell* v. *Brown* (2), *Youle* v. *Mappin* (3), and *Fortescue* v. *Vestry of St. Matthew, Bethnal Green* (4), establish this proposition, that when by a Statute the elements of an offence are re-stated, and a different punishment is indicated for it, that is a repeal by implication of the old law. Both these conditions apply to the present case.

For this purpose I will assume that the Act 5 Geo. IV. c. 83 was in force in New South Wales. The local legislature in 1835 undertook to deal with the subject in the Ordinance which I have already cited. The English Act dealt with three offences—being an idle and disorderly person, being a rogue and a vagabond,

(1) 2 C.L.R., 345.
(2) 1 El. & E., 267; 28 L.J.M.C., 53.
(3) 30 L.J.M.C., 234, at p. 237.
(4) (1891) 2 Q.B., 170.

and being an incorrigible rogue—and defined the elements which constituted each offence. The New South Wales Ordinance did the same, and defined the elements which constituted each offence, modifying the provisions of the English Act to suit the obvious conditions of a new country. The punishments inflicted in the English Statute were, respectively, one month, three months and six months imprisonment. The punishments inflicted by the local Ordinance were three months, six months and one year. One mode of committing the offence of being a rogue and a vagabond under the English Act was this (sec. 4):—"Every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or wagon, not having any visible means of subsistence, and not giving a good account of himself or herself." This was obviously aimed at gipsies.

Such provisions, applied to New South Wales in 1829, would have been, I think, absurd. Persons of that sort in England might be called rogues and vagabonds. They were certainly vagabonds and generally rogues. They might be said to be vagabonds in New South Wales, but not necessarily rogues. But the local legislature in 6 Wm. IV. No. 6, sec. 2, gave a very different definition:—"Every person not being a black native or the child of any black native who being found lodging or wandering in company with any of the black natives of this Colony shall not being thereto required by any justice of the peace give a good account to the satisfaction of such justice that he or she hath a lawful fixed place of residence in this Colony and lawful means of support and that such lodging or wandering hath been for some temporary and lawful occasion only and hath not continued beyond such occasion," &c. And the person who fulfilled those conditions was not declared to be a rogue and vagabond, but to be an idle and disorderly person. I think I have said enough to show that in this Act the elements of the three offences were re-stated, and I have pointed out the difference in the punishment indicated. In my opinion, this is sufficient to establish that, if the Act in question was ever in force in New South Wales, it was repealed by the Ordinance 6 Wm. IV. No. 6.

H. C. OF A. 1907.

MITCHELL v. SCALES.

Barton J.

The appeal, therefore, should be dismissed.

BARTON J. In the case of *Quan Yick* v. *Hinds* (1), I had grave doubts whether the Act 5 Geo. IV. c. 83 could apply to New South Wales. In the additional light which has been cast upon the subject by the researches of Mr. *Hammond* and Mr. *Piddington* I find my doubts entirely removed. I think that, in the first place, the enactment in itself was not applicable in this Colony in a judicial sense. That is to say, it is coupled with machinery that could not well be put in motion in this State without additional legislation, and it has required additional legislation to make the provisions applicable at all. In that legislation the operation of the laws dealing with fortune telling and vagrancy has been left out.

In neither of the Acts 6 Wm. IV. No. 6, and 15 Vict. No. 4, is there any reference to the vagrant laws of England. In these circumstances I entirely agree with the Chief Justice in his exhaustive judgment, to which I think it is quite unnecessary to add anything more. I therefore agree in the opinion that this appeal must be dismissed.

ISAACS J. I also think this appeal must be dismissed. I desire not to express any decided opinion as to whether the Act 5 Geo. IV. c. 83 was in force as to some of its provisions. As to others it clearly never was. But as to certain of its provisions—as, for instance, those regulating certain conduct such as personal indecency, exposing certain indecent pictures in public, public betting, being on premises with burglarious instruments, intent to commit a felony, and other matters which are offences against society at large—if I had to consider that question, I should desire further time in which to do so.

But I am quite clear that, from the moment Ordinance, or Act 6 Wm. IV. No. 6 was passed, there was no valid reason for saying that any part of the Act 5 Geo. IV. c. 83 was in force in New South Wales. The Ordinance in question was passed very shortly after the *Charter of Justice*, 1835. By its title it assumes to make provision which, in the absence of qualifying

(1) 2 C.L.R., 345.

words, I take to be ample provision—such as the New South Wales legislature then thought proper for the circumstances of the Colony. That legislature had before it the Act of Geo. IV., and followed it in most particulars, modifying those particulars to suit existing circumstances, and deliberately omitting from that Act any mention of fortune tellers. There is no doubt that the omission was deliberate. There is no contention that it was not deliberate, but it is urged for the appellant that the omission was deliberate because it was desired to preserve the law in New South Wales with regard to fortune tellers, which was then conceived by the legislature to be already in force, and to leave fortune tellers to the operation of the English Statute, although every other instance of the several groups was dealt with subsequently by the legislature in New South Wales, and a different punishment attached to the two first groups. But I think the punishment of one year and whipping in the case of men was adhered to in the case of incorrigible rogues.

Now, I think, as to the application of the maxim "*Expressio unius est exclusio alterius*," this is a very proper instance to apply it, and it is difficult to think otherwise looking at the Ordinance, which not only enumerated the categories of conduct which might constitute one or other of the three classes of offences—idle and disorderly persons, rogues and vagabonds, and incorrigible rogues,—but set out the charge, and provided a full and complete manner for hearing a case, punishing offenders, allocation of fines, &c., which would have been quite unnecessary if the contention of the appellant was correct, namely, that all that was desired to do was to alter the punishment.

Not only did the legislature assume to make provision—not further provision, or additional provision, but provision—for the class of cases indicated, but a later Act, 15 Vict. No. 4, was passed which was called an Act for the more effectual prevention of vagrancy and the punishment of rogues and vagabonds, &c., in the Colony of New South Wales. It stated that the Act of 6 Wm. IV. No. 6, was repealed. Not a single word is found in that Act about repealing, or altering, or changing the position of fortune tellers in the Act of Geo. IV., and the argument of the appellant, perforce, conveys that the legislature was still deter-

H. C. OF A. 1907.

MITCHELL v. SCALES.

Isaacs J

mining to leave fortune tellers under the operation of the English Statute, and for some reason, which has never been suggested, and I do not think could be suggested, the legislature intended to leave fortune tellers to the same punishment as was allowed by the English Act.

The new Act 15 Vict. No. 4 increased the punishment of idle and disorderly persons to a maximum of two years. That related to rogues and vagabonds; but when it came to deal with incorrigible rogues, it omitted to mention the whipping, so that thenceforth there was no power to administer a whipping as punishment for incorrigible rogues. Up to that point the argument must be that it was intended to be more lenient to fortune tellers than to others. Now the argument must be that it was intended to be more severe, because the legislature must have intended, if the argument was right, to leave them still open to be whipped if men, and to abolish that punishment altogether in other cases now called vagrancy. That seems to me to savour of inconsistency.

When the legislature of 1901 passed the *Vagrant Act* (No. 13) it entitled the Act "an Act to consolidate the Acts for the prevention of vagrancy," and one would imagine that meant the consolidation of the whole of the Statute law relating to vagrancy in force in New South Wales. No mention is made of fortune tellers, and yet the argument still continues that the legislature, as it did in 1835, and intermittently since, persevered in its original intention to leave fortune tellers to the Act 9 Geo. IV. Again, in 1902, in Act No. 74, the same thing was done.

I look upon the Act 6 Wm. IV. No. 6 as an indication by the legislature, then thoroughly well acquainted with the condition of the country, in their reference to the Act 9 Geo. IV. c. 83, either that they did not think that the English Act was in force at all, or that they had determined that it should not thenceforth be in operation here, but that the only law in regard to the subject matter they were dealing with should be their own law. Therefore, *quacunque via*, I should say that the Act 5 Geo. IV. c. 83 could not be said, after that period, to be in force.

It has been urged that there was no implied repeal. It is very hard to formulate a rule which will apply to every case of implied

repeal. Each Act which is relied upon as a repeal must be considered to see whether its necessary implication is to abrogate the former law. See the expressions used in the judgment in *Michell* v. *Brown* (1), and the cases there cited. The principle is stated very well in an American decision which I cite because it expresses my own view perhaps better than I could express it myself.

In *Norris* v. *Crocker* (2), Mr. Justice *Catron* said :—"As a general rule it is not open to controversy, that where a new Statute covers the whole subject matter of an old one, adds offences, and prescribes different penalties for those enumerated in the old law, that then the former Statute is repealed by implication ; as the provisions of both cannot stand together."

Now the subject matter of the Ordinance of 6 Wm. IV. was the three offences, idle and disorderly persons, rogues and vagabonds, and incorrigible rogues. That subject matter was divided into three groups, and what are called vagrancy offences were arranged categorically under the various groups. The Ordinance therefore dealt with precisely the same matter as the Act of 5 Geo. IV., but it added offences and omitted offences, and prescribed different penalties for some of those under the old law. Therefore, looking at the two Acts, I should say that the necessary implication is that one was intended to stand in the place of the other.

In my opinion the inevitable conclusion is, looking at the Act 6 Wm. IV. No. 6, it was intended as a substitute for the provisions which prevailed in England under the Act 5 Geo. IV., and, whether that Act of 5 Geo. IV. c. 83 was to be taken as being in force here or not, the result is the same. It seems to me, therefore, that—without my entering upon the question of the original operation of the Act of 5 Geo. IV. in this State, as to which I offer no opinion, and do not dissent from the observations that have fallen from my learned brothers—this appeal must be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellant, *The Crown Solicitor for New South Wales.*

Solicitors, for the respondent, *Aitken & Aitken.*

C. A. W.

(1) 1 El. & E., 267.

(2) 13 Howard, 429, at p. 438.