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AN INTRODUCTION TO AUSTRALIAN LEGAL HISTORY

TUTORIALS
#
"UNDERSTANDING AUSTRALIAN LAW THROUGH LEGAL HISTORY"

HANDOUT FOR TUTORIAL 1:
AN INTRODUCTION TO AUSTRALIAN LEGAL HISTORY

(5 May 2015)

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THE COLLECTED PAPERS

OF

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DOWNING PROFESSOR OF THE LAWS OF ENGLAND

EDITED BY

H. A. L. FISHER

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Cambridge:
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WHY THE HISTORY OF ENGLISH LAW IS NOT WRITTEN[1]

THOUGH I am speaking for the first time in a new character, though I have before me the difficult task of trying to fill the place of one who was honoured by all who knew him and loved by all who knew him well, I yet have not the disadvantage—or should I say advantage?—of coming as a stranger to the Cambridge Law School. At any rate I mean to excuse myself on this occasion from any survey of the whole of the vast subject that has been committed to my care; rather I will make a few remarks about one particular branch of study, a branch that is very interesting to me, though I hope that I shall never overrate its importance. And if I have to say that it is not flourishing quite as it ought to flourish, believe me that this is said very modestly.

Our patience of centennial celebrations has been somewhat severely tasked this year, nevertheless it may be allowed me to remind you that next year will see the seven-hundredth birthday of English legal memory. The doctrine that our memory goes back to the coronation of Richard I and no further is of course a highly technical doctrine, the outcome of a statute of limitation, capricious as all such statutes

[1] An Inaugural Lecture delivered in the Arts School at Cambridge on 13 October, 1888.

must be; still in a certain sense it is curiously true. If we must fix a date at which English law becomes articulate, begins to speak to us clearly and continuously, the 3rd of September 1189 is perhaps the best date that we can choose. The writer whom we call Glanvill had just finished the first text-book that would become a permanent classic for English lawyers; some clerk was just going to write the earliest plea-roll that would come to our hands; in a superb series of such rolls law was beginning to have a continuous written memory, a memory that we can still take in our hands and handle. I would not for one moment speak slightingly of the memorials of an earlier time, only I would lay stress on the fact that before the end of the twelfth century our law is becoming very clear and well attested. When another century has gone by and we are in Edward I's reign the materials for legal history, materials of the most authoritative and authentic kind, are already an overwhelming mass; perhaps no one man will ever read them all. We might know the law of Edward's time in very minute detail; the more we know the less ready shall we be to say that there is anything unknowable. The practical limit set to our knowledge is not set by any lack of evidence, it is the limit of our leisure, our strength, our studiousness, our curiosity. Seven hundred years of judicial records, six hundred years of law reports; think how long a time seven centuries would be in the history of Roman Law.

Our neighbours on the continent are not so fortunate as we are. True that for some very early ages they have fuller memorials than we can show; but

already in the eleventh century Domesday Book stands out in its unique grandeur, and when our rolls of the King's Court begin in Richard's day, when our manorial rolls begin in Henry III's or John's, and our Year Books in Edward I's, then we become the nation whose law may be intimately known. Owing to the very early centralization of justice in this conquered country we acquired, owing to our subsequent good fortune we have preserved, a series of records which for continuity, catholicity, minute detail and authoritative value has—I believe that we may safely say it—no equal, no rival, in the world. And let those who think the twelfth century too late an age to be interesting, who wish for the law of more primitive times, consider how sound a base for their studies these records are. If once we were certain of our twelfth century we might understand Domesday, if once we understood the state of England on the day when the Confessor was alive and dead, then we might turn with new hopes of success to the Anglo-Saxon dooms and land-books.

I have said that our neighbours are less fortunate than we are; but perhaps that is not so, for hoarded wealth yields no interest. Of what has been done for the history of Roman law it is needless to speak; every shred of evidence seems to have been crushed and thrashed and forced to give up its meaning and perhaps somewhat more than its meaning. But look at the history of French law or of German law; it has been written many times on many different scales from that of the popular handbook to that of the erudite treatise, while the modern literature of mono-

graphs on themes of legal history is enormous, a literature the like of which is almost unknown in England. For our backwardness it is some excuse, though hardly a sufficient excuse, that we are overburdened by our materials, are becoming always better aware at once of their great value and of their unmanageable bulk. A Romanist may be able to say about some historical problem—I know all the first-hand evidence that there is, nay, I know it by heart; the truthful English historian will have to confess that he has but flitted over the surface. On the other hand, if we compare the task of writing English legal history with that which French and German historians have before them, there is a fact which goes far to outbalance any disadvantage occasioned by the heavy weight of our materials. The early centralization of justice gives to our history a wonderful unity; we have not to compare the customs of divers provinces, or the jurisprudences of rival schools; our system is a single system and revolves round Westminster Hall.

Well, I am afraid that it must be allowed that Englishmen have not done all that might have been expected of them by those who do not know them well. I believe that no attempt has ever been made to write the history of English law as a whole. The praiseworthy work of Reeves on the law of the later middle ages was done at a dark time and is long out of date. In some particular departments very excellent work has been done; the constitutional law of the middle ages has been fully explored; the same may be said of the constitutional law of later days if we give to "constitutional" a narrow meaning, and

much has been done for criminal law and real property law. But there are vast provinces which lie unreclaimed, not outlying provinces but the very heart of the country. For instance, take the forms of action, the core of English law; a history of them ought to be a most interesting book, dealing as it would have to deal with the evolution of the great elementary conceptions, ownership, possession, contract, tort and the like. Perhaps there are countries in which the writing of historical monographs has become a nuisance; but surely it is better to have too many than none at all. And then again, look at the state of the raw material, look at the hopeless mass of corruption that passes as a text of the Year Books, then look at Mr Pike's volumes and see what might be done. Then think of the tons of unprinted plea rolls. It is impossible to print them all; but think what ten men might do in ten years, by selecting, copying, indexing, digesting; the gain would be enormous, not merely for the history of English law, but for the history of law in general. There is so much to be done that one hardly knows where to begin. He who would write a general history thinks perhaps that his path should be smoothed by monographs; he who would write a monograph has not the leisure to win his raw material from manuscripts; but then only by efforts at writing a general history will men be persuaded that monographs are wanted, or be brought to spend their time in working at the rolls. And so we go round in a vicious circle.

There is I think some danger lest the history of English law should be better known and better taught

in other countries than in England. As regards the very oldest periods, "the time beyond memory," this is no longer a danger but an accomplished fact. It gives us no surprise when we hear that a new edition of our oldest laws will be published by the Bavarian Academy; who else should publish the stupid things? And the process of annexation is being pushed further and further. Foreigners know that the history of our law has a peculiar interest. I am not speaking merely of political matters, but of our private law, law of procedure, criminal law; a great part of the best work that has been done has not been done by Englishmen. Of what has been done in America we will say nothing, for in this context we cannot treat the Americans as foreigners; our law is their law; at times we can even be cosmopolitan enough to regret an arrangement of the universe which has placed our records in one hemisphere and those who would make the best use of them in another. And all foreigners are welcome, Frenchmen and Germans and Russians; there is room enough and to spare; still we are the children of the kingdom and I do not see why we should cast ourselves out. But we are such a humble nation, we are. It is easy to persuade us that the early history of Roman law is interesting. To know all about the Roman formulary system, that is juristic science; to know anything about our own formulary system, which we only abolished the other day, that would be barbarian pedantry. But foreigners do not take this view.

A good deal, as it seems to me, depends upon our asserting our right, though it be no exclusive right. Think for a moment what lies concealed within the

hard rind of legal history. Legal documents, documents of the most technical kind, are the best, often the only evidence that we have for social and economic history, for the history of morality, for the history of practical religion. Take a broad subject—the condition of the great mass of Englishmen in the later middle ages, the condition of the villagers. That might be pictured for us in all truthful detail; its political, social, economic, moral aspects might all be brought out; every tendency of progress or degradation might be traced; our supply of evidence is inexhaustible: but no one will extract its meaning who has not the patience to master an extremely formal system of pleading and procedure, who is not familiar with a whole scheme of actions with repulsive names. There are large and fertile tracts of history which the historian as a rule has to avoid because they are too legal.

It need hardly be added that the science of comparative jurisprudence "if it ever exists" will involve the most elaborate study of particular systems of law, and among others assuredly of that system which has the most unbroken record. "If it ever exists":—I have used the cautious phrase used thirteen years ago by our Rede Lecturer, Sir Henry Maine. Of the great man who when that science exists will be honoured as its prophet, and its herald, of the great man whom we have lost, may I say this?—His wonderful modesty, his dislike of all that looked like parade or pedantry, the fascination of his beautiful style are apt to conceal the width and depth of his reading. He was much more than learned, but then

he was learned, very learned in law of all sorts and kinds. It is only through learning wide and deep, tough and technical, that we can safely approach those world-wide questions that he raised or criticize the answers that he found for them. What is got more cheaply will be guess-work or a merely curious collection of odds and ends, of precarious odds and questionable ends.

And now why is our history unwritten? In the first place, I think we may say, because of the traditional isolation of the study of English law from every other study, an isolation which is illustrated by the fact that it is only of late years, late years to us who have been dealing in centuries, that English law has had a home in the Universities. In 1850 when my predecessor Professor Amos came to the chair, the class of English law in this University consisted of one M.A., one B.A. and two undergraduates. At another time it may be interesting to account for this, to observe the formation of law schools in London while the Universities are teaching to ever fewer students a kind of law, Roman and Canon Law, which is not the law of the King's Courts, and becomes of ever less and less importance to the bulk of Englishmen. This process had momentous results and, all things considered, we cannot regret them. If the Universities had taught English law, English law would sooner or later have ceased to be English. But as it was, the education of the English lawyer—I speak of the later middle ages and of the Tudor time—was not academic; it was scholastic. It would be a great mistake to suppose that the lawyers of that age

got their law in the haphazard hand-to-mouth fashion that is familiar to us under the name of "reading in chambers." They went through an elaborate scholastic course which if not severe was at least prolonged—ten or twelve years of "readings," "mootings" and "boltings," of hearing and giving lectures, and the path of scholastic success was the path to profit and to place. The law which this school evolved stood us in good stead: it was the bridge which carried us safely from medieval to modern times and we will speak well of it. But one thing it could not do, it could not possibly produce its own historian. History involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history. And when the old scholastic plan of education broke down no other plan took its place. It is hardly too much to say that nobody taught law or attempted to teach it, and that no one studied law save with the most purely practical intentions. Whatever may be the advantages of such a mode of study it will never issue in a written history of English law.

The one great law book of the last century may serve to illustrate two points, though I have some hesitation about mentioning the first of them. Blackstone's work was the firstfruits of a professorship of law; in the presence of that book every professor of law will always feel very small, but there it stands the imperishable monument of what may be done by obliging a lawyer to teach law. But in the second place let us take one of Blackstone's greatest exploits, his statement of our land-law and of its history. Every one

now-a-days can pick holes in "the feudal system" and some great writers can hardly mention it without loss of temper. But the theory of a feudal system it was that enabled Blackstone to paint his great picture, a picture incomplete and with many faults in it, but the first picture ever painted. Whence did he get the theory which made this possible? From Coke? Coke had no such theory and because he had none was utterly unable to give any connected account of the law that he knew so well. No, the feudal system was a very early essay in comparative jurisprudence, and the man who had the chief part in introducing the feudal system into England was Henry Spelman. It was the idea of a law common to all the countries of Western Europe that enabled Blackstone to achieve the task of stating English law in a rational fashion. And so it will be found during the length of our national life; an isolated system cannot explain itself, still less explain its history. When great work has been done some fertilizing germ has been wafted from abroad; now it may be the influence of Azo and now of the Lombard feudists, now of Savigny and now of Brunner. Let me not be misunderstood:—there is not much "comparative jurisprudence" for those who do not know thoroughly well the things to be compared, not much "comparative jurisprudence" for Englishmen who will not slave at their law reports; but still there is nothing that sets a man thinking and writing to such good effect about a system of law and its history as an acquaintance however slight with other systems and their history. One of the causes why so little has been done for our medieval law is I feel sure our very

complete and traditionally consecrated ignorance of French and German law. English lawyers have for the last six centuries exaggerated the uniqueness of our legal history by overrating and antedating the triumphs of Roman law upon the continent. I know just enough to say this with confidence, that there are great masses of medieval law very comparable with our own; a little knowledge of them would send us to our Year Books with new vigour and new intelligence.

In the second place it may seem a paradox, but I think it true, that the earlier ages of English law are so little studied because all English lawyers are expected to know something about them. In his first text-book the student is solemnly warned that he must know the law as it stood in Edward I's day, and unfortunately it is quite impossible to write the simplest book about our land-law without speaking of the *De Donis* and the *Quia Emptores*. Well, a stranger might exclaim, what a race of medievalists you English lawyers ought to be! But on enquiry we shall find that the practical necessity for a little knowledge is a positive obstacle to the attainment of more knowledge and also that what is really required of the practising lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the middle ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts. A lawyer finds on his table a case about rights of common which sends him to the Statute of Merton. But is it really the law of 1236 that he wants to know? No, it is the ultimate result of the interpretations set on the statute by the judges of twenty generations. The more modern the

decision the more valuable for his purpose. That process by which old principles and old phrases are charged with a new content, is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding. Thus we are tempted to mix up two different logics, the logic of authority, and the logic of evidence. What the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better. This when stated is obvious; but often we conceal it from ourselves under some phrase about "the common law." It is possible to find in modern books comparisons between what Bracton says and what Coke says about the law as it stood before the statutes of Edward I, and the writer of course tells us that Coke's is "the better opinion." Now if we want to know the common law of our own day Coke's authority is higher than Bracton's and Coke's own doctrines yield easily to modern decisions. But if we are really looking for the law of Henry III's reign, Bracton's lightest word is infinitely more valuable than all the tomes of Coke. A mixture of legal dogma and legal history is in general an unsatisfactory compound. I do not say that there are not judgments and text-books which have achieved the difficult task of combining the results of deep historical research with luminous and accurate exposition of existing law—neither confounding the dogma nor perverting the history; but the task is difficult. The lawyer must be orthodox otherwise he is no lawyer; an orthodox history seems to me a contradiction in terms. If this

truth is hidden from us by current phrases about "historical methods of legal study," that is another reason why the history of our law is unwritten. If we try to make history the handmaid of dogma she will soon cease to be history.

Macaulay in an amusing passage, amusing because it comes from him, has told us how "the historical literature of England has suffered grievously from a circumstance which has not a little contributed to her prosperity....A Frenchman," he says, "is not now compelled by any strong interest either to exaggerate or to underrate the power of the kings of the house of Valois....The gulph of a great revolution completely separates the new from the old system. No such chasm divides the existence of the English nation into two distinct parts....With us the precedents of the middle ages are still valid precedents and are still cited on the gravest occasions by the most eminent statesmen....In our country the dearest interests of parties have frequently been staked on the researches of antiquaries. The inevitable consequence was that our antiquaries conducted their researches in the spirit of partisans." Well, that reproach has passed away; but the manipulation which was required to make the political precedents of the middle ages serve the turn of Whig or Tory was a coarse and obvious distortion when compared with the subtle process against which the historian of our law will have to be on his guard, the subtle process whereby our common law has gradually accommodated itself to changed circumstances. I make no doubt that it is easier for a Frenchman or a German to study medieval law than

it is for an Englishman; he has not before his mind the fear that he is saying what is not "practically sound," that he may seem to be unsettling the law or usurping the functions of a judge. There are many good reasons for wishing that some parts of our law, notably our land-law, were thoroughly purged of their archaisms; of these reasons it is needless to say anything; but I am sure that the study of legal history would not suffer thereby. I do not ask for "the gulph of a great revolution"; but it is to the interest of the middle ages themselves that they be not brought into court any more.

Are we to say then that the study of modern law and the study of legal history have nothing to do with each other? That would be an exaggeration; but it is true and happily true that a man may be an excellent lawyer and know little of the remoter parts of history. We can not even say that every sound lawyer will find an interest in them; many will; some will not. But we can say this, that a thorough training in modern law is almost indispensable for any one who wishes to do good work on legal history. In whatever form the historian of law may give his results to the world—and the prejudice against beginning at the end is strong if unreasonable—he will often have to work from the modern to the ancient, from the clear to the vague, from the known to the unknown. Of course he must work forwards as well as backwards; the stream must be traced downwards as well as upwards; but the lower reaches are already mapped and by studying the best maps of them he will learn where to look for the sources. Again I do not think that an English-

man will often have the patience to study medieval procedure and conveyancing unless he has had to study modern procedure and modern conveyancing and to study them professionally.

This brings us to the heart of the matter. The only persons in this country who possess very fully one of the great requisites for the work are as a rule very unlikely to attempt it. They are lawyers with abundant practice or hopes of abundant practice; if they have the taste they have not the time, the ample leisure, that is necessary for historical research.

What then can the Universities do? Pardon me if I say that I do not answer this question very cheerfully. In the first place, the object of a law school must be to teach law, and this is not quite the same thing as teaching the history of law. We should not wish to see a professor of law breaking and entering the close of the professor of history, though the result of our scheme of Triposes may be that legal history falls to the ground between two schools. Secondly, I believe that any one who aspires to study legal history should begin by studying modern law. Could we dispose of the time and energies of the young man who is destined—surely he is born by this time—to tell the story of English law, we should advise him to pursue some such course of reading as that prescribed for our Tripos, to go into chambers and into court, even to do what in him lies to acquire some small practice; many other things he should do, but these should not be left undone. Thirdly, the time that we have at our command is exceedingly short. We can not reckon that an undergraduate will give so much as

two years to English law, and what he can learn in two years is not very much, regard being had to the enormous scope of our modern law. Fourthly, our students are many and teachers are few. Thus I have come to the conclusion, reluctantly for I have had my dreams, that in the ordinary teaching of our law school there is very little room for history, hardly any for remote history. At the same time every effort should be made which can possibly have the result of inducing a few students, those who will have taste and leisure for the work, to turn their thoughts towards the great neglected subject. They might at least learn to know where the evidence lies. May I mention my own case? I had not the advantage of studying law at Cambridge, otherwise perhaps I should not have been a barrister of seven years' standing before I had any idea of the whereabouts of the first-hand evidence for the law of the middle ages. It were to be wished that we had more prizes like the Yorke prize; already it has done more for the cause than any Tripos could do. It were to be wished that our doctor's degree had all along been reserved for those who had done some considerable thing for law or legal history:—but then what could we have done for potentates and politicians and such? Impossible to convict them of divinity or medicine, it was convenient to fall back on the legal principle that every one must be taken to know the law sufficiently well to be a doctor thereof.

Where then lies our trust? Perhaps in failure. Failure is not a pleasant word to use in the presence of youth and hope; it would be pleasanter to wish all our law students success in their chosen profession. But

let us look facts in the face. Only a few of the men who choose that profession succeed in it: the qualities which make a man a great lawyer are rare and the space on the wool-sack is strictly limited. The Cambridge law student should be prepared for either fortune. The day may come when in the bitterness of his soul he will confess that he is not going to succeed, when he is weary of waiting for that solicitor who never comes, when the prolonged and costly education seems thrown away. That is the hopeful moment; that is the moment when something that has been said here may bear its fruit. Far be it from us to suggest that there is but one outgo from the dismal situation; there are many things that a man can do the better because he knows some law. But in that day of tribulation may it be remembered that the history of English law has not been written. Perhaps our imaginary student is not he that should come, not the great man for the great book. To be frank with him, this is probable; great historians are at least as rare as great lawyers. But short of the very greatest work, there is good work to be done of many sorts and kinds, large provinces to be reclaimed from the waste, to be settled and cultivated for the use of man. Let him at least know that within a quarter of a mile of the chambers in which he sits lies the most glorious store of material for legal history that has ever been collected in one place, and it is free to all like the air and the sunlight. At least he can copy, at least he can arrange, digest, make serviceable. Not a very splendid occupation and we can not promise him much money or much fame—though let it be confessed that such humble

work has before now been extravagantly rewarded. He may find his reward in the work itself:—one can not promise him even that; but the work ought to be done and the great man when he comes may fling a foot-note of gratitude to those who have smoothed his way, who have saved his eyes and his time.

At the end of this long and dismal discourse let me tell a story. It is said that long ago a certain professor of English law was also the chief justice of an ancient episcopal franchise. It is said that one of his rulings was cited in the court presided over by a chief justice of a more august kind, the Lord Chief Justice of England. "Did he rule that?" said my lord, "why he is only fit to rule a copy-book." Well, I will not say that this pedagogic function is all that should be expected of a professor of law; but still copy-books there ought to be and I would gladly spend much time in ruling them, if I thought that they were to be filled to the greater glory of the history of English law.

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WHY THE HISTORY OF AUSTRALIAN LAW IS NOT ENGLISH: SECOND ALEX CASTLES LECTURE IN LEGAL HISTORY, OCTOBER 2000

BRUCE KERCHER†

In 1888, F W Maitland delivered his inaugural professorial lecture at Cambridge University, called 'Why the History of English Law is not Written'.[1] He tried to explain why no general history of English law had been written at that time. One reason he offered was a general lack of interest in the subject matter. He thought that the few legal academics of the period were interested in the history of Roman law, not English. He also thought there was a serious problem with sources. This was not due to an absence of source material, but the opposite. At the end of the 19th century, he said, there were tons of undigested original material in the basements of government buildings. His hopes for the recovery of this material lay in professional failure. Only a lawyer could write legal history, he thought, and what were needed were failures at the bar who were willing to spend their days selecting, copying, indexing and digesting the vast treasures of old source material. He asked his audience to imagine what 10 men labouring for 10 years could achieve. Only then could a general legal history be attempted, one which was comparative in style, and subject to the historian's logic of evidence, rather than the lawyer's logic of authority.

One hundred and ten years later, another famous legal historian, J H Baker, was appointed to the same Downing Chair at Cambridge. In 1998 he could not deny that the history of English law had been written. Holdsworth had produced his 16 volume history of English law,[2] and, especially from the 1970s onwards, he had been followed by dozens of bright, active legal historians with a fascination for English law. Instead, Professor Baker called his inaugural lecture 'Why the History of English Law Has Not Been Finished'.[3] He pointed out that only one failed barrister had accepted Maitland's

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1 Frederic Maitland, 'Why the History of English Law is Not Written', in Herbert Fisher (ed), *The Collected Papers of Frederic William Maitland* (first published 1911, reprinted 1981) vol 1, 480–97. The author is most grateful to Flinders University for hosting the Lecture, and to two anonymous referees for their comments and generous suggestions concerning sources.

2 William Holdsworth, *A History of English Law* (1932–1966) 16 vols.

3 John Baker, *Why the History of English Law has not been Finished* (1998) (also published in (2000) 59 *Cambridge Law Journal* 62–84).

unflattering invitation. Despite the grand success of the Selden Society's 114 volumes, Baker argued that still not enough of the right kind of material had been edited and published. Some years earlier, Baker said, he had estimated that at the then rate of production, the law reports of Richard II would be printed by the year 2750. That, he subsequently noted in the lecture, was wildly optimistic. Some of the most important law reports of the 16th and 17th century were still only in manuscript, he lamented, and reliance was often placed on inaccurate contemporary printed versions of other important judgments. What legal historians needed, Baker said, was publication of the texts of judgments and their various supporting documents, as well as the materials to make it possible to trace the ways in which the reported judgments acquired their accumulated authoritative gloss over the years. He said that there was also a need for access to vast quantities of non-judicial material.

If Professor Baker's use of the title to his lecture was shameless and even sacrilegious, as he noted, then mine, 'Why the History of Australian Law is Not English', is doubly so. This is at least passing off, and, of course, it is not completely accurate. Much of Australian law is English in tone, language and even content. It is not entirely so, however, particularly before 1850, and its history was not English even when its content was.

The subject of this Lecture is inspired by the work of Alex Castles. We have him to thank for being able to say that the history of Australian law has been written, even if it is incomplete. His *An Australian Legal History*[4] was published in 1982, and most practising Australian legal historians have a battered copy of it on their desks. His life's work, it seems to me, was to show the distinctive quality of Australian law, in its interaction between the formal reception of law and the ideas of those who used it or were subject to it in this country.

If we cannot apply Maitland's title to Australia then, we can certainly adopt Baker's. The history of Australian law has certainly not been finished. We have begun to uncover original source material, but there is very much left to do. In the last few years, a team at Macquarie University has been working on the records of the Supreme Court of New South Wales from the time of its inception in 1824 onwards. For each historical year, we are publishing only about a 10th of the cases for which records survive. We have now completed the project for the period between 1824 and 1840, by placing about 1500 edited cases on the internet.[5] This contains over two million words of cases and commentary. We rely mainly on newspaper accounts of court proceedings, supplemented by judges' notebooks. Chief Justice Dowling alone left behind 250 notebooks, which are stored in the State Records of New South Wales, and there are thousands of newspaper reports. This is a vast project which has so far cost the Australian Research Council and Macquarie University over $150,000, yet we

4 Alex Castles, *An Australian Legal History* (1982).

5 At www.law.mq.edu.au/scnsw.

need two more grants of that size to reach 1863, when continuous contemporaneous law reporting began in New South Wales. The law reports before then, particularly *Legge's Reports*, were compiled retrospectively and inadequately. We have already shown, like Baker, that some important cases have remained buried until now, and that other cases that reached the law reports are so poorly reported that the accumulated gloss added since the delivery of the judgments has been painted on a suspect base.[6] Even after 1863 there is much to do, since our project is not simply to publish judgments, important as that is.

We undertook this project because law reporting was in such a poor state in New South Wales. There were several separate plans for contemporaneous law reports in the 1830s, but nothing came of any of them. The authors of one of these plans explained that general education should include some knowledge of law, and that the law in New South Wales was modified in 100 ways from that of England.[7]

This lack of law reporting is even worse in Tasmania and Western Australia. In those colonies there is almost a complete absence of 19th century continuous reports.[8] To find out what the courts did there before 1900, we have to rely on newspapers and judges' notebooks, assisted in Tasmania by a digest of newspaper reports. Stefan Petrow and I have now begun work on the earliest Van Diemen's Land Supreme Court cases,[9] but we too need 10 men (and women) over 10 years to take us to the position where even the most important judgments of all of the Australian colonial superior courts are readily accessible. We do not have tons of sheepskins to examine. Instead we have thousands of newspapers and small notebooks to try to decipher. The latter were not official reports, but were compiled by the judges with varying degrees of care. Some survive and some do not, but they and the newspaper reports tell us much about what the courts said and did. The newspapers are usually our best surviving sources. Many of their reports were taken from shorthand, and some of them received judicial compliments for their accuracy.

Rather than concentrating on what is missing from our legal history, I want to talk about what we have uncovered. In particular, I want to follow on from Alex Castle's 1991 speech called 'The Vandemonian Spirit and the Law',[10] in which he argued that Van Diemen's Land had a distinctive legal culture. By the time he delivered that

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6 See *R v Ballard* (1829); and *R v Murrell* (1836), both at www.law.mq.edu.au/scnsw.

7 *Australian*, 18 October 1833; and see *Sydney Gazette*, 31 March 1832; *Sydney Herald*, 16 April 1832; *Australian*, 18 April 1834. There is a striking contrast with the United States, where Pennsylvania's reports, for example, are in 650 volumes covering 250 years: see Joel Fishman, 'The Reports of the Supreme Court of Pennsylvania' (1995) 87 *Law Library Journal* 643.

8 See Alex Castles, *Annotated Bibliography of Printed Materials on Australian Law 1788–1890* (1994), xix–xxii.

9 See www.law.mq.edu.au/sctas.

10 Alex Castles, 'The Vandemonian Spirit and the Law' (1991) 38 (nos 3, 4) *Papers and Proceedings of the Tasmanian Historical Research Association* 105.

lecture, Alex had discarded the positivism of a previous generation of Australian legal historians, and with it the belief that England was the almost exclusive source of both authority and formal law in Australia. This new insight into the process of law making expanded the range of materials to be examined. Judgments and counsels' arguments alone will no longer do. We need to know what was said and done in court, who gave evidence and what they said, how people were treated after they were found guilty, and what attitudes to law the ordinary people of the colonies had.

In particular, we need to look for the ways in which local legal practices were elevated into the formal law of the colonies. Only about 20 per cent of the early New South Wales Supreme Court material we have placed online contains formal judgments. The colonial newspapers were at least as keen to entertain their readers as they were to provide formal reports of judgments. They also had sharp political points to make. These sources allow us to take a much broader view of the law than is possible within the limits of formal law reporting. This lecture is based largely on what we have so far uncovered in New South Wales.

I RECEPTION OF ENGLISH LAW

So what do these official and unofficial sources tell us about the Englishness of Australian colonial law? The most basic formal law of the colonies emphasised the inheritance of English law. Blackstone famously wrote that English law was the birthright of British subjects in settled colonies (as the Australian colonies were assumed from the start to be), but he qualified it: the colonies received 'only so much of the English law, as is applicable to their own situation and the condition of an infant colony.'[11]

The first person in Australia to cite this formula appears to have been George Crossley. A disgraced former attorney, Crossley was transported to New South Wales in 1799 for perjury. By 1803 he had managed to obtain a pardon and to set up a legal practice. In that year he acted for John Palmer, the administrator of the insolvent deceased estate of John Stogdell. Crossley drafted a document for Palmer's appeal to Governor King, who sat alone in the colony's Court of Appeal. Quoting Blackstone, Crossley argued that the colony had been established in an uninhabited land and that all the English laws were in force as the birthright of every subject. In this and other

11 William Blackstone, *Commentaries on the Laws of England* (9th ed, 1783, reprinted 1978) vol 1, 108. These qualifying words did not appear in the first edition: William Blackstone, *Commentaries on the Laws of England* (1st ed, 1765, reprinted 1979) vol 1, 104–05.

cases, he was apparently the first to develop the argument that Australia was *terra nullius*, and thus a settled colony.[12]

Crossley's opponent, the emancipist lay legal advocate Simeon Lord, accepted the basic structure of this argument, but that was not the end of their debate about the reception of law. Lord was proud to say that he was not referring the court to law cases, obsolete statutes and 'the Remoter pages of Antiquity'.[13] His opponent, he said, relied on 'Sophistry that can be extracted from the Remote Ambiguities of Law or may be advocated by its Subtle Professors'.[14] Instead of engaging in the 'Subtle perplexities and Quibbles of Law',[15] Lord said, he and his client Machin relied on justice and 'the Law of England, in its pure Construction and the law of equity and Reason in every sense'.[16] Lord did not deny that the law was fundamentally English, but to him English law meant a broad notion of justice, not strict precedent. Crossley, the disgraced former attorney, stood for the strict application of English law in the colony, with the layman Lord for a broader notion of English justice.

A more sophisticated example of this debate took place in 1833, in *Macdonald v Levy*.[17] This was the most important of the New South Wales Supreme Court's reception of law cases in the 19th century. Since 1788, interest rates in the colony had often been very high, much higher than English law would have allowed. The court had to decide whether the usury laws of England were in force in the colony to place a cap on these loan rates. By 1833, the reception of law test was in statutory form. Section 24 of the *Australian Courts Act* ((1828) 9 Geo 4 c 83) provided that the laws of England were in force 'so far as the same can be applied' within the colony. The court was faced with a simple legal problem, according to Burton J. The question was whether the law of England 'can' be applied, and it obviously could, he said. Burton was a thorough Anglophile, a person who believed that the common law and equity of England should not be changed: no colonial practices, such as the acceptance of high interest rates, could derogate from the received wisdom of England. One fully accepted source of English common law was the customs of the country,[18] but Burton said that no colonial practice could ever be elevated to such heights. Customs had to

12 *In re Stogdell*, in P G King, *Letter Book: Legal: Correspondence with Judge Advocates, Reports of Appeals, etc, 1800–1806*, vol 4, Mitchell Library, A2019, 152–54. See also *Crossley v Smyth, Edwards and Cleary*, 1803 and 1804, in King, 325, 339; *Crossley v Edwards, Faithfull, Baker and Baker*, 1804, in King, 414. See also the same argument in *Larra, Administrator of Smyth v Blaxcell*, 1806, in King (1800–1806: 470, 495), another piece obviously drafted by Crossley: the justification given for ignoring native occupation of the land in this version of the argument was that they had no law or religion.

13 King, above n 12, 136.

14 Ibid 139.

15 Ibid 177.

16 Ibid 179–80.

17 (1833) 1 Legge 39; www.law.mq.edu.au/scnsw.

18 See Blackstone, 1st ed, above n 11, vol 1, 74–79.

have been in existence since time immemorial, that is, time beyond memory. People remembered when the colony was founded, so none of its practices could be recognisable customs. Nothing colonial could ever have the status of law, except through legislation. However Burton's strict attachment to England, so similar to that of Crossley, was in a minority in this case.

Burton's two colleagues on the Supreme Court bench, Forbes CJ and Dowling J, found otherwise. Forbes was familiar with the statutory reception test, having used it in Newfoundland.[19] He said that s 24 was merely a restatement of the old common law rule on the reception of law, with a new date of reception. His concern in *Macdonald v Levy* and in other reception cases was to see that the law was applicable to the circumstances of the colony, that it was suitable to its conditions. Laws were necessary evils, he said here, and it was important to see whether they were necessary. He thought that there was nothing worse than to be ruled by unsuitable laws. He concluded that English usury laws were merely local to England, and inapplicable in the colony. Local practices accepting high interest rates were not customs, but evidence of a universal assumption that the English usury provisions had not been adopted.

Macdonald v Levy presented two possible tests then, a mechanical one which was likely to lead to the adoption of much of the technical law of England, and another which saw the colonies less as little Englands than as new outposts of Britain with their own, albeit closely related, legal cultures. The mechanical test was rooted in positivism, with its elements of strong adherence to precedent and its supposed value neutrality. It favoured a centralised, unitary view of the British legal empire, as opposed to the pluralist, local view implicit in Forbes' broader test. As Forbes said in *R v Maloney*, 1836[20]

> to hold that Parliament intended to force the whole mass of English laws — the laws of an old and settled society, which have grown out of occasions, during a long course of years, and which are become more refined and complicated than the laws of any other country in the world — to apply all these laws at once to an infant community, without limitation or restraint, "is a proposition much too inconvenient in its consequences, to be perfectly just in its principle."[21]

In *Macdonald v Levy*, the majority really did recognise local custom, although under another name. In dozens of other cases, the first Supreme Courts of the Australian

19 See (1792) 32 Geo 3 c 46, s 1; (1809) 49 Geo 3 c 27, s 1.

20 (1833) 1 Legge 74, 77; www.law.mq.edu.au/scnsw.

21 Oddly, this mechanical approach was taken by the High Court in its most recent serious examination of the question: *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617. The oddity is that the mechanical test was derived from a technical approach to the interpretation of legislation not in force in the state in question, South Australia. See Bruce Kercher, 'Reception of English Law' in Anthony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (2001) 586–88.

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colonies faced this question.[22] Forbes' approach showed that even within the formal reception of law rule there could be considerable variation between English and colonial law. As Simeon Lord showed in standing up to Crossley, and as we will see further, even when English law was formally adopted, it could be the adoption of such a broad set of principles that it was more a reception in spirit than a reception of rules. When that happened, the content of the law could be bent to local circumstances while satisfying broad notions of attachment to Englishness.

There were three possible outcomes of these reception cases, reception of strict rules, reception of broad principles, and rejection of English law on the point concerned. The strict approach was invented only in 1833. Before then and for some time afterwards, I will argue, pluralism was a more accurate description of the relationship between Australian colonial law and the empire than the unitary approach that became dominant later in the 19th century and far into the 20th.

II PRIVY COUNCIL

Of course the reception of law rule was not all that tied English law to that of the Australian colonies. Even the litigants in the earliest, most amateur civil courts had a right of appeal to the King in Council. That right was extended to the residents of all colonies (although there was some doubt about it between 1828 and 1845).[23]

The Australian colonies had a reputation for litigiousness, but that reputation is not justified by the records of imperial appeals. The first decided appeal from an Australian colony was the unreported New South Wales case of *Lord v Palmer*, 1809.[24] This was one of only 22 appeals from Australian courts or concerning Australian judges before 1850. Of them, only six reached the law reports. The first appeal from Van Diemen's Land was in 1844. The first appeals (reported or otherwise) in the other colonies were: Victoria, 1859; Queensland, 1860; South Australia 1864; Western Australia, 1871. Litigants from other parts of the empire were much more active in appealing to London. The records of the Judicial Committee of the Privy Council show many more appeals from Bengal, Jamaica, British Guiana and Bombay

22 See the Subject Indices to www.law.mq.edu.au/scnsw and www.law.mq.edu.au/sctas, under 'Reception of English law'.

23 See Bruce Kercher, 'Unreported Privy Council Appeals from the Australian Colonies before 1850' (2003) 77 *Australian Law Journal* 309; Anthony Blackshield, *The Abolition of Privy Council Appeals: Judicial Responsibility and the 'Law for Australia'* (1978) 14–23; Peter Howell, *The Judicial Committee of the Privy Council 1833–1876* (1979) 55–56.

24 See Public Record Office, PC2/179 *Council Register 1 Dec 1808 to 28 Feb 1809*, 400–04, 2 February 1809; and see *Sydney Gazette*, 23 February 1811. This was the appeal from *In re Stogdell*, above n 12.

than from the Australian colonies before 1850. Between 1830 and 1853, there were 254 appeals from these four colonies and only seven from the Australian colonies.[25]

Appeals from the Australian colonies developed quickly after 1850. Relying solely on the law reports, there were eight more appeals from Australian Supreme Courts in the 1850s, and 39 more in the 1860s.[26] By the 20th century, the Judicial Committee of the Privy Council was definitely in a position to check the development of common law in Australia. Tony Blackshield's research shows that it decided 178 Australian cases between 1906 and 1940, and a further 141 from then to 1982. In 140 of those 319 cases, the Judicial Committee allowed the appeal or varied the result.[27]

It is clear that appeals to London from the Australian courts were very regularly made by the 1860s, and this is very likely to have had an effect on the judges of the colonial Supreme Courts, even if some of them might otherwise have been inclined to move away from strict English law. Once the decisions of a court or tribunal are subject to regular revision of course, the tendency must be to fall into line with the superior authority. This would not have been restrictive if the Privy Council had taken the same pluralist line as Francis Forbes. However, before the end of the 19th century it took a much more unitary approach.

In 1879 the Judicial Committee declared that it was 'of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same'.[28] This suggests that there was just one law for the empire, a view that would have received the enthusiastic support of Burton J. This unitary view was the high water mark of the British legal empire. We should be careful not to assume that the same attitude was always expressed before then, and especially before 1850.

The appeals committees and Judicial Committee of the Privy Council had little opportunity to intervene in the activities of the Australian colonial courts before the 1850s. Even when they did, their formal decisions gave very little guidance to those courts. They recorded little more than the result of the appeal before 1854.[29] This meant that errors in individual cases were corrected, but with little general guidance to the colonial courts. It left those courts relatively free to adapt English law to local conditions, at risk only of occasional reversal. Strict judicial deference to imperial authority, and a strictly unitary approach, were more recent phenomena than many lawyers think.

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25 Kercher, above n 23.

26 From *R v Dallimore* (1865) 3 Moo PC (NS) 347; 16 ER 132; LR 1 PC 13 onwards, the Privy Council cases in the *English Reports* were also in the Law Reports series.

27 Anthony Blackshield, 'The Last of England: Farewell to their Lordships Forever' (1982) 56 *Law Institute Journal* 779.

28 *Trimble v Hill* (1879) 5 App Cas 342, 345, quoted by Paul Finn, *Law and Government in Colonial Australia* (1987) 166.

29 See Kercher, above n 23.

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Nonetheless, the early colonial judges were not left entirely to their own devices and the strength of their inherited legal culture. The Colonial Office in London undertook much of the guardianship of legal propriety in the colonies. This took three forms: consideration of mercy in criminal cases, advice to and by the judges on points of law, and consideration of repugnancy and royal assent for colonial legislation.[30]

III CROWN MERCY

Points of law in criminal cases in New South Wales were referred by the trial judge to the full Supreme Court sitting in banco in Sydney. Formally these were not appeals, though they had something of that effect.[31] From the banco court, there was no appeal in criminal cases to the Privy Council, at least before 1850: that was confined to civil cases. The Privy Council made clear in two decisions in the 1840s that appeals in felony cases would require a special provision in the relevant legislation or Order in Council.[32] In New South Wales and Van Diemen's Land in the first half of the 19th century, it seems that the relevant provisions were confined to civil cases.[33]

The law and prerogative concerning appeals to the Privy Council is immensely complex,[34] but the assumption of the period was that permission to appeal in criminal cases would be granted very rarely. The Judicial Committee itself gave two policy reasons against such appeals in felony cases: the necessary delay incurred would lead to the loss of the 'public example' of swift punishment, and would keep convicts in a state of 'miserable suspense' only to suffer execution in any event.[35] The first criminal case taken on appeal from Australia to the Privy Council was in 1867. The Committee made clear that its concern was with the orderly development of the law rather than justice in individual cases.[36]

Instead of formal appeals, when the New South Wales Supreme Court judges thought a verdict was harsh or when they had doubts about the prisoner's guilt, they

30 See also Daniel O'Connell (ed), *Opinions on Constitutional Law* (1971).

31 See *Flint v Walker* (1845, 1847) 5 Moo PC 180, 201; 13 ER 459, 467.

32 See *R v Byramjee* (1846) 5 Moo PC 276; 13 ER 496; and *R v Stephenson* (1847) 5 Moo PC 296; 13 ER 504. See Blackshield, above n 23, 20.

33 See (1823) 4 Geo 4 c 96, s 16; (1828) 9 Geo 4 c 83, s 15; NSW: Third Charter of Justice (Letters Patent, 13 October 1823), cl 19; VDL: First Charter of Justice, 1823; Second Charter of Justice, 1831 (all in John Bennett and Alex Castles, *A Source Book of Australian Legal History* (1979)).

34 See Blackshield, above n 23, 14–23.

35 *R v Byramjee* (1846) 5 Moo PC 276, 290–291; 13 ER 496, 502.

36 *R v Bertrand* (1867) LR 1 PC 520; 4 Moo NS 460, 474; 16 ER 391, 397, cited in Castles, above n 4, 337. See also *R v Murphy* (1868) 5 Moo PC (NS) 432; 16 ER 432 LR 2 PC 35.

sometimes recommended Crown mercy. This happened in *R v McGregor* in 1834,[37] for example. All three judges of the Supreme Court thought that the verdict of guilty of murder was in error, and they recommended a pardon.

In effect, Crown mercy often took the role later taken by a Court of Criminal Appeal, although this was not in the control of the judges. In *R v Tommy* in 1827, for instance, Forbes CJ recommended mercy for an Aboriginal man who did not understand the proceedings, but the governor hanged the man in any event.[38] This case should have been finally disposed of by the authorities in England. In murder cases, only the Crown in England could grant mercy. A colonial governor's refusal to send a case to London was a practical confirmation of the death sentence. In reverse, once a governor decided to send a murder case there with a recommendation for mercy, it was, in practice, a reprieve from the capital sentence.[39] As the passage from the Privy Council indicated, the general view in the first half of the 19th century was that it was unduly harsh to leave a person for months not knowing whether he or she was to be hanged. While the formal decision was to be made in England, in fact it was taken locally. The tyranny of distance became, in this instance, the mercy of distance but only if the governor could be convinced to exercise it.

There was room for legal questions in criminal cases to be referred to London, even if not by way of formal appeal. In *R v Morley* (1847) 1 Legge 389, the trial judge, Therry J, referred a point of law to the full court of the Supreme Court (including himself). There were two English decisions which held the opposite way to that taken in Therry's summing up to the jury, but they were decisions of individual judges. Despite that, in a statement that would have received the whole hearted approval of Burton J, Dickinson J of the New South Wales Supreme Court said that 'a colonial court should always follow in the footsteps of the English judges along those paths which they have indicated. Where English decisions are conflicting, the inferior tribunals must adhere to that adjudication which they consider most preferable in principle.'[40] He would have overturned the conviction, but the majority, Stephen CJ and Therry J held that they were not bound by such authority. They thought there was sufficient doubt about the law, however, to seek further advice. They recommended that the prisoner's sentence of death be pardoned, on condition of him being transported for life. They would then seek to obtain the opinion of the English judges, or at all events that of the Attorney-General and Solicitor-General in London. If their

37 In www.law.mq.edu.au/scnsw.

38 See www.law.mq.edu.au/scnsw.

39 See for instance, *R v Chip, Ridgway,Colthurst and Stanly*, 1826; *R v Stanley*, 1827, at www.law.mq.edu.au/scnsw.

40 *R v Morley* (1847) 1 Legge 389, 391. My attention was drawn to this by John Bennett and J R Forbes, 'Tradition and Experiment: Some Australian Legal Attitudes of the Nineteenth Century' (1971) 7 *University of Queensland Law Journal* 172, 181, although they did not point out that Dickinson J was in a minority in this opinion.

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opinion favoured the prisoner, he would be pardoned. In these circumstances, legal propriety was decided in England, if not through the courts or the Judicial Committee of the Privy Council.

IV ADVISORY OPINIONS

The governors of the Australian colonies did not always have confidence in the advice offered by their colonial Attorneys-General or Solicitors-General. Instead, they sometimes sought advisory opinions from the colonies' Supreme Court judges. In New South Wales this happened, for instance, over the competency of ex-convicts to sit on juries. This issue had come before the court in formal litigation through mandamus in 1825,[41] but in 1833 the governor simply sought the opinion of the three judges.[42]

One of the most of important of these opinions concerned the highly controversial Sudds and Thompson case. They were two soldiers who had been convicted of criminal offences in a civil court. Governor Darling earned his reputation for harshness largely through his actions in this case, when he ordered extra punishment beyond that imposed by the courts. One of them, Sudds, died apparently as a result of the additional punishment, and the governor sought the opinion of his Acting Attorney-General. That opinion did not satisfy him, so he sought the further opinion of Forbes CJ and Stephen J. The judges advised him that his powers did not go as far as he thought, and ultimately the matter was referred to London. Viscount Goderich, the Colonial Secretary, declared that the Supreme Court judges were right, and ordered Thompson's release.[43]

Some of Francis Forbes' most important legal writing took the form of advisory opinions for the governor. In 1828, for instance, he and the other judges gave their views of the date of reception of statute law, Forbes taking a line common in North America, that the relevant date was the time of establishment of a colonial legislature. Conflicting views on this point led directly to the passage of s 24 of (1828) 9 Geo 4 c 83, which provided a new date in 1828 as the date of reception of law for all of the present eastern states of Australia.[44]

Once a firm date of reception was chosen, from that time onwards there was a necessary divergence between English and colonial law, as the parliament at

41 *R v Sheriff of New South Wales* (1825), www.law.mq.edu.au/scnsw.

42 *Attainted Jurors Opinion* (1833), www.law.mq.edu.au/scnsw.

43 See *Transportation Opinion* (1826), www.law.mq.edu.au/scnsw.

44 *Applicability of Criminal Laws Opinion* (1828), www.law.mq.edu.au/scnsw.

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Westminster continued to add to the body of statutory law. Acts passed at Westminster after 1828 were not applicable in the colonies except when the imperial parliament imposed its will by paramount force or the imperial Act was adopted by the colonial legislature. Otherwise colonial law on this point was frozen at the date of reception.

Another important advisory opinion concerned the rights of convicts and their masters. (Most convicts worked for private masters to whom they were assigned by the governors, rather than for the government itself). Forbes thought that there were strict limits on the governors' powers over the assignment of convicts, partly due to the rights of their masters over their convict servants' labour. This led to another opinion for Governor Darling who, in sending it to Lord Bathurst the Colonial Secretary, in effect was appealing to London against an adverse decision. Darling claimed indirectly that Forbes was 'a person of American principles and American feelings,' a view apparently shared by his colleague, Dowling J.[45] He may have been right in this instance: property in the labour of convicts, servants and even slaves may well have been familiar to Forbes through his extensive experience in North America. This time Forbes' view was in practice overturned by the Crown's law advisers in London. He delivered one judgment on this issue, knowing that the Attorney-General and Solicitor-General held a contrary view, but when the British government insisted on its viewpoint, Forbes buckled.[46] When they had no judicial tenure, colonial judges had to do as they were told even on points of law.

Forbes was Chief Justice, a member of the Legislative and Executive Council and, due to the governors' lack of faith in their Attorneys-General, an occasional Crown law adviser. In that situation, we should not be surprised that he gave advisory opinions. Occasionally the judges refused to do so, stating that the appropriate course was to bring a formally argued case before the court.[47] When they did give formal advisory opinions, there was provision in practice for an appeal to London. This meant that there was an opportunity in these cases, whether taken or not, to keep colonial law on the straight and narrow path of Englishness. As we will see, however, that was not the usual attitude taken by the Colonial Office.

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45 Dowling thought that 'from early education, [Forbes'] mind [was] imbued with American sympathies' and that he had 'a round head republican look' as he had a bald head, and wore no wig: see Charles Currey, *Sir Francis Forbes: the First Chief Justice of the Supreme Court of New South Wales* (1968) 5; and see John Bennett, *Lives of the Australian Chief Justices: Sir Francis Forbes* (2001) 102.

46 *In re Jane New*, 1829; *Convict Assignment Opinion*, 1827. See Bruce Kercher, 'Perish or Prosper: the Law and Convict Transportation in the British Empire, 1700–1850' to be published in (2003) 21(3) *Law and History Review*. For other opinions, see *Dissolution of Trusts Opinion* (1831); *Opinion on Juries* (1836); *Transportation Opinion* (1829); *Jurisdiction of Supreme Court Opinion* (1826); all in www.law.mq.edu.au/scnsw.

47 Forbes and Stephen to Darling, 19 January 1828, *Historical Records of Australia*, Series 1, vol 13, 737–39; Chief Justice's Letter Book, State Records of New South Wales, 4/6651, 132–33.

V REPUGNANCY AND JUDICIAL REVIEW

When the permanent Supreme Courts of New South Wales and Van Diemen's Land were first established, their respective Chief Justices had veto power over the colonies' legislation. Under s 29 of the *New South Wales Act* 1823, any bill of the Legislative Council had to be placed before the Chief Justice for his certificate that it was not repugnant to the laws of England, but was consistent with such laws so far as the circumstances of the colony would admit.[48] This veto power was abolished when the Act was replaced in 1828. The *Australian Courts Act* (9 Geo 4 c 83) provided in s 22 that new legislation had to be enrolled in the Supreme Court, after which any individual Supreme Court judge had 14 days in which to protest to the governor that the new law was repugnant to English law. If a judge did object, the law was suspended until the governor and Legislative Council reviewed it. This time, however, the legislators could stick to their legislation and send it on to London for final decision. The repugnance provision had become merely a warning.

Like judge–made law, then, there were formal mechanisms for checking colonial legislation against the standards of English law. Once again the question is how far this was taken. Like 'applicability,' 'circumstances,' and 'consistency', the expression 'repugnant,' was a loose term, giving the decision makers plenty of scope for discretion. Different officials, like different judges, could have contrasting views on these questions. Behind those views were often striking differences of opinion about the nature of the colonial enterprise and its laws. Was there to be one law for the empire, or was the empire more like a loose federation with encouragement for plural approaches to plural problems? Was the standard of colonial law a broad notion of justice, or was it to be a strict body of law?

Chief Justice Forbes' *Newspaper Acts Opinion*[49] of 1827 showed once again that he took the broad view. The background to this opinion concerned Governor Darling's fierce conflict with the editors of some of the Sydney newspapers, particularly the *Monitor* and the *Australian*. Darling introduced two bills to regulate the press, a licensing bill and a stamp duty one. (At this time, only the governor could initiate legislation in the Legislative Council). Darling relied for his newspaper bills' consistency with English law on the opinion of the deferential Pedder CJ of Van Diemen's Land. Forbes disagreed with Pedder. He treated the question of repugnancy as a broad constitutional question, rather than one of the technical application of the

48 This repugnancy notion was an ancient one. It was used, for instance, in the Charter granted by Charles II in 1663 concerning Rhode Island: see Ernest Mayo, 'Rhode Island's Reception of the Common Law' (1998) 31 *Suffolk University Law Review* 609, 613. I thank one of the reviewers for a reference to the first repugnancy test, in the Charter of Massachusetts, 4 March 1629, in Merrill Jensen (ed), *English Historical Documents: American Colonial Documents to 1776* (1964) 78.

49 *Newspaper Acts Opinion*, 1827, at www.law.mq.edu.au/scnsw.

law of England. Relying on Blackstone, Forbes based his opinion on the British notion of freedom of the press. He told his friend Horton that

> an unrestrained press is not politic or perhaps safe in a land where one half of the people are convicts, who have been free men; yet I must not leave out of the account that the other half of the people are free, and that, as an abstract right, they are consequently entitled, as of birth-right, to the laws and institutes of the parent state ... I have always thought that the colonies were only a more remote portion of the British realm; that the laws of England were the common bond that united Englishmen in their allegiance to the King, and in fraternity with each other.[50]

Behind all of this was Forbes' private view that the governor's aim was to use the licensing measure to destroy opposing newspapers, and to use the rest of the press as a propaganda arm of government. He thought that the governor's stamp Act would be a silencing tax in support of this.[51]

As usually happened, the British government ultimately upheld Forbes' view over that of the governor. In London, the Crown Law Officers (the Attorney-General and Solicitor-General) found that the licensing Act was repugnant to English law. While they found the stamp duties Act not to be repugnant, it was denied royal assent on the grounds that the sum involved was too high for mere revenue and that the Act was not passed with all formalities.[52] The British government found fault with both Forbes and Governor Darling over their conflict, however, and threatened to sack both of them if they continued to squabble as they had done.[53] Politics, fundamental rights and law were tightly bound together in one of the great crises of Australian legal history.

The same broad question of consistency with English law was in issue again in 1834, when the Supreme Court had to consider whether the New South Wales *Bushranging Act* 1834 was repugnant to English law. The Supreme Court records show how violent the colony's white community had become by this time. Even Robert Wardell, one of the founders of the New South Wales bar, was murdered by escaped convicts at his property just outside the town of Sydney.[54] The first of the *Bushranging Acts* was passed by the New South Wales Legislative Council in 1830.[55] It severely restricted the liberty of the colony's people, particularly in its provision that any person with firearms could be arrested, after which that person had an onus of disproving an intention to commit robbery.

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50 Ibid, n 1 and 2. The best analysis of these events is that of Brendan Edgeworth, 'Defamation Law and the Emergence of a Critical Press in Colonial New South Wales (1824–1831)' (1990) 6 *Australian Journal of Law and Society* 50. See also J J Spigelman, 'Foundations of Freedom of the Press in Australia' (2003) 23 *Australian Bar Review* 89–109.

51 Note in Francis Forbes' handwriting, dated by a librarian at 1827, Forbes' Papers, Mitchell Library, A743.

52 *Newspaper Acts Opinion*, 1827, www.law.mq.edu.au/scnsw, n 15.

53 Ibid, n 16.

54 *R v Jenkins and Tattersdale*, 1834, www.law.mq.edu.au/scnsw.

55 (1830) 11 Geo 4 No 10.

The Act was renewed every two years, but on its 1834 renewal Burton J objected that he thought it repugnant to English law.[56] Once again he was in a minority of one on the Supreme Court bench, but this time there was a reversal of roles between Burton and his colleagues. Burton put the same kinds of arguments that Forbes had made in the *Newspaper Acts Opinion*. Burton, not Forbes, referred to 'fundamental and constitutional principles' as well as the liberties of English people, and particularly to the presumption of innocence. Burton's concern was with the 'spirit of the Law of England' and with the rights of free immigrants. Burton was the liberal this time. Forbes and Dowling both thought the Act was consistent with English law, despite its obviously repressive features. The Colonial Secretary, Lord Glenelg, upheld the view of Forbes over Burton,[57] as British officials usually did. This extraordinary reversal of the two judges' usual positions shows the utter flexibility of the repugnancy test.

In another way, however, the judges did act consistently with their usual practices. Burton and Forbes showed their usual fundamental attitudes to the allowance to be made for local circumstances. In his *Bushranging Acts* opinion, Forbes noted that 'repugnant' did not simply mean different. It had a broader meaning, as shown by the fact that the slavery legislation of the American colonies was not repugnant to English law even though there was nothing like it in England. To Forbes, there was nothing wrong with colonial law being markedly different from that of England, so long as it was not repugnant to English law's broadest principles.

In this opinion, Forbes linked the meaning of repugnancy to the test of reception of English law, saying that it was necessary to look at the circumstances of the colony and to make laws to remedy local evils in a manner merely consistent with the general principles of English law. In the case of the *Bushranging Act*, he said, the colony of New South Wales had circumstances which were more extreme than those of England, and which English law could not cure. Forbes was much more concerned that local laws should meet local circumstances than Burton. Burton seemed to want one law for the empire, while that was never Forbes' concern in practice.

It is easy to overlook one immense difference between colonial and English law. Ironically, when Anglophiles such as Burton J declared local laws to be repugnant to English law, they acted in a way fundamentally at odds with the judiciary in England. Judicial review of legislation was created in the colonies and in the United States, not in England. It began as a necessary consequence of the attempt to reconcile colonial law with that of England. In the hands of judges like Forbes and even Burton in his *Bushranging Act* opinion, this led them to hold legislatures to broad constitutional standards of liberty.

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56 See *R v Elliot*, 1834.

57 Glenelg to Bourke, 5 September 1835, *Historical Records of Australia*, Series 1, vol 18, 94–95.

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VI THE COLONIAL OFFICE

The Colonial Office was in the key position to check the imperial propriety of colonial legislation. It examined the judges' review of legislation through the repugnancy doctrine. In addition, once a colonial governor gave assent to a local Act, he had six months to transmit it to the Colonial Office after which the Crown could disallow it.[58] Disallowance was done through the Colonial Secretary, which meant, in effect, that all colonial legislation passed the scrutiny of James Stephen junior. He was legal adviser to the Colonial Office from 1813 onwards and permanent Undersecretary from 1836.[59] Stephen had close connections in New South Wales: he was the nephew of John Stephen, the first puisne judge of the New South Wales Supreme Court, and first cousin of Alfred Stephen a later Chief Justice of that court. His decisions were occasionally overruled by the Attorney-General or Solicitor-General.[60] Forbes saw these officers as the final authorities on repugnancy, as he noted in his *Newspaper Acts Opinion*.

In most cases, however, Stephen gave the conclusive advice on approval or disallowance of colonial legislation. It is very significant then, that his vision of colonial law was so similar to that of Forbes. Stephen repeatedly emphasised that as colonial conditions differed from those of England, so should their laws. There was no need, he thought, for colonial laws to copy the statute law of England. In 1827, he commented that 'it certainly has never been required that the Law of England should be made the inflexible model for all Colonial Legislation'.[61] On another occasion he said:

> Whatever is tyrannical or very foolish you may safely call "repugnant" &c. But whatever is necessary for the comfort or good government of the colony you may very safely assume to be in perfect harmony with English law ... Take a new code, wherever the old one won't suit you. Keep up the family resemblance between your law and ours as well as you can, and never think it worthwhile to go mad over a difficulty which an act of his Excellency in Council can grind into powder with a blow.[62]

His attitude is also shown by his response in 1834 to the Van Diemen's Land judges' declaration that a colonial Act was repugnant to English law. The relevant Act required seamen to have a pass at night. Stephen said that he disagreed with the judges' view that repugnancy simply meant any variation from the fundamental principles of English legislation. He doubted that there were any such fundamental principles of either legislation or judge–made law, and was sure that parliament did not

58 See (1828) 9 Geo 4 c 83, s 28. By s 29, the colonial Act was also to be laid before Parliament.

59 See Paul Knaplund, *James Stephen and the British Colonial System 1813–1847* (1953).

60 Knaplund, above n 59, 206. On the Stephen family, see Bennett, above n 45, 53.

61 Knaplund, above n 59, 231, and see ch 9 esp.

62 Roger Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (first published 1863, reprinted 1974) 318.

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mean that such different societies as a convict colony and England should have the same laws. As much as practicable of English law should be adopted in the colony, he said, but only so far as it suited colonial needs. He noted that there were other safeguards than repugnancy: the duties of the governor, the composition of the legislature, the royal veto, and the obligation of laying every law before the parliament at Westminster. What this ignores, of course, is that the latter two were subject to his own advice.

As his biographer noted in reproducing this passage, this appeared to anticipate the *Colonial Laws Validity Act* 1865 by more than 30 years.[63] Here, at least, Stephen went far beyond even the pluralism of Francis Forbes. James Stephen certainly believed that colonial law had no need to be English. In many cases, the imperial restrictions on colonial legislation were more matters of form than substance in the Colonial Office.

VII RECOGNITION OF COLONIAL LEGAL PRACTICES

The European residents of the Australian colonies had their own views of law. Take, for example, their attitude to keeping pigs on the streets of early Sydney. Pigs wandered the streets, eating crops, fouling streams and frightening children. The early governors repeatedly issued Orders to prevent this, but Sydney's people ignored them.[64]

This was not simple disobedience, according to the American legal historian Hendrik Hartog.[65] In analysing the similar conduct of 19th century New York pig fanciers, he argued that they were making their own assertions about the legitimacy of their actions. Edward P Thompson's influential articles and books made a similar argument: he inquired carefully into what appeared at first to be simple lawlessness. Behind it, he argued, there was sometimes an assertion of ancient practices, rooted in deeply held ideas of legality.[66] In the colonies, these ideas about law may sometimes have been brought with settlers or convicts from their homes, just as the invisible baggage of English law was said to be carried on the First Fleet. But some ideas were truly local, particularly when they concerned issues that had no parallel in Europe.

63 Knaplund, above n 59, 233, passage at 232–233.

64 See Bruce Kercher, *Debt, Seduction and Other Disasters: the Birth of Civil Law in Convict New South Wales* (1996) ch 5.

65 Hendrik Hartog, 'Pigs and Positivism' [1985] *Wisconsin Law Review* 899.

66 See for example, Edward Thompson, *Customs in Common* (1993).

36

This different way of looking at legal history has been very influential over the past 20 years. It requires us to look at different sources as well as the old sources in a new way. We need to read unofficial literature as well as law reports, and to examine trial transcripts carefully not just for official law but for unofficial assertions of legitimacy as well. In early New South Wales, for instance, the convict and free populations refused to obey governors' orders concerning the making of promissory notes and, particularly, those which attempted to regulate conveyancing.

The conveyancing cases provide rich examples of this. Prior to the commencement of the Legislative Council in 1824, the New South Wales governors had lawful power to make some orders, so long as they were not repugnant to English law. When the early governors decided that land titles were becoming chaotic, they ordered that all sales of land were to be held invalid unless they were registered at the judge's office. Unregistered sales were not to be recognised by the local Court of Civil Jurisdiction. The people of New South Wales took very little notice of these orders: they had always bought and sold land as easily as any other form of property. They passed on their title deeds from hand to hand, in return for pigs or goats or cows, and they gambled them away on boozy afternoons and evenings. When these informal sales reached the court, the judges should have decided that they were invalid. In effect, cases of this kind showed a contrast between local legal practices through informal sales of land, and strict, colonial law. The judges were obliged to follow the orders of the governors as well as the laws of England.

In 1814, Judge Advocate Ellis Bent decided *Sanders v Jones*, in which there was a direct conflict between a governor's order and the local practice of selling land informally. Between the buyer and the seller stood an illiterate sharp dealer known as Dick the Needle. Bent found in favour of the local practice of conveyancing, in the face of both the governor's order and English law. Even Ellis Bent then, the first barrister to hold judicial office in Australia, and a person who was determined to introduce English legal propriety in place of what he thought was the shambles of the law before his arrival in Sydney, held in favour of informal conveyancing practices, thus elevating them into formal law.[67]

Land law in Australia was never the same as that in England, and never could be, even when the courts took a strict approach. What was a fiction in England, that all titles derived from the King, was supposed to be the reality in the Australian colonies. The Supreme Court of New South Wales held this in *Attorney-General v Brown* (1847) 2 Legge 312, but of course this meant that colonial law was sharply different rather than the same as English law. There was no Crown grants in England, no need to enquire very closely into their legitimacy. Only in the colonies was it necessary to create a new branch of the law to deal with this question, and with the consequences of the failure to follow the formalities.

67 Kercher, above n 64, ch 6.

Crown grants were issued by the governors, and should have been made under the public seal of the colony in the name of the King, and registered.[68] In fact the early governors often authorised the occupation of land in a much less formal way. When a colonist applied for a grant, the governors often simply noted their approval on the letter of application, and the person took possession. That was universally taken in the colony to be good title, at least until the courts held otherwise. Money was spent on improvements, and land was bought, sold and mortgaged on what was merely the informal promise of a grant. In 1823, Governor Brisbane reported that nearly every town allotment 'had been purchased from some obscure individual, who had exercised the right to sell, under an old verbal permission to occupy'.[69]

When the Crown sued Robert Cooper in intrusion in 1825, informal and formal law met head on.[70] Cooper had entered into possession of the land on the promise of a grant, and had spent a large sum of money there, after which the Crown sought to assert its title. Francis Forbes had to decide between two ways of viewing title. He decided in favour of the Crown, despite the special jury finding that 'Mr Cooper has obtained possession of the land in question, in the manner hitherto practiced in the colony'. In this case, and a number of other important intrusion cases,[71] Forbes sounded like Burton in *Macdonald v Levy*. He held in *R v Cooper* that any contrary local practices were merely 'loose usages'.

Forbes saw the injustice in this, stating in *Cooper* that there was 'a good deal of hardship in this case', but finding that this 'could not do away with the principles of law'. He reconciled himself to the injustice by recommending to the governor that the individuals affected should receive favourable consideration. There were so many of these cases that the Legislative Council created a Court of Claims. It was required to investigate such cases according to 'the real justice and good conscience of the case,

68 See for example, Governor Phillip's Instructions, 25 April 1787, *Historical Records of Australia* (*HRA*), Series 1, vol 1, 13–14; *Registry Act* 1825 (6 Geo. IV. No 22). I am indebted to Jodie Young for the analysis of this issue. See Bruce Kercher and Jodie Young, 'Formal and informal law in two new lands: land law in Newfoundland and New South Wales under Francis Forbes' (presently unpublished; copy available from authors).

69 Brisbane to Bathurst, 3 September 1823, *HRA*, Series 1, vol 11, 121.

70 *R v Cooper*, 1825, at www.law.mq.edu.au/scnsw.

71 See for example, *R v Payne* (1830); *R v West* (1831 and 1832), at www.law.mq.edu.au/scnsw.

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without regard to legal forms and solemnities'.[72] On the receipt of the advice of this body, the governor could, at his discretion, issue a new grant.

Why did Forbes take such an uncharacteristically strict approach to the application of English law in these intrusion cases? He had been much more willing to recognise informal land titles in Newfoundland,[73] as well as in New South Wales when both parties to the case were private individuals. In the latter cases, Forbes and Dowling were quite willing to hold that a promise of a grant was sufficient to bring an action in ejectment.[74] The difference was, apparently, that Forbes showed particular deference to the interests of the Crown in New South Wales. While he usually favoured a pluralist approach to the law, allowing sharp differences to arise between New South Wales and English law, he sometimes did the opposite when the Crown's interests were directly in issue. He was similarly careful to follow English law in cases concerning criminal law, when a prisoner's life might have been in question.

Forbes' strictness in the intrusion cases did not mean that there was no room for the recognition of informal legal practices. They were put into effect through the Court of Claims.[75] The same happened to squatters, the trespassers on what the High Court told us in *Mabo* may well have been Aboriginal land, but what was then thought to be Crown land. Squatting was popularly thought to be legitimate, like pig keeping in New York. When faced by the law breaking on a massive scale that squatting represented and by the political and economic influence of its practitioners, the British and colonial governments backed down. They legitimised it, first through licences and then through leases. Sometimes, then, law was made by breaking it. As James Stephen said, on these great issues concerning land, it was impossible for the Crown to resist the general will.[76]

72 *Crown Land (Claims) Act* 1833 (4 Will IV No 9), later incorporated in *Crown Land (Claims) Act* 1835 (5 Will 4 No 21), when the court was established on a more permanent basis. Cited in Enid Campbell, 'Promises of Land from the Crown: Some Questions of Equity in Colonial Australia' (1994) 13 *University of Tasmania Law Review* 1. See Castles, above n 4, 215–16. New South Wales: see www.law.mq.edu.au/scnsw in the Dowling Subject Index, under 'Court of Claims'. For Tasmania which called it a Caveat Board, see *In re Griffiths, Tasmanian*, 9 May 1834; *Sharp v Gregson, True Colonist*, 10 April 1835; *Terry v Spode, Tasmanian*, 23 October 1835, *Tasmanian*, 4 December 1835.

73 See Kercher and Young, above n 68.

74 *Doe dem Unwin v Salter* (1832); and see *Brown v Alexander* (1828), in www.law.mq.edu.au/scnsw.

75 I thank Alex Castles for this insight.

76 Knaplund, above n 59, 74–75. Nor did Stephen want to impose English land law on the colonies, as Knaplund shows by examples from Sierra Leone and Newfoundland: 71, 93.

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VIII RECOGNITION OF ABORIGINAL LAW

The greatest potential challenge to imperial law was the recognition of the laws of the conquered peoples. European empires had been dealing with this problem for hundreds of years before 1788,[77] sometimes recognising indigenous laws expressly and at other times implicitly. While Australian law is notorious for its failure to recognise Aboriginal land titles until *Mabo* in 1992,[78] it was not unique. It shares the dishonour with the colony of British Columbia, but still the contrast with the recognition of the laws of most other colonised peoples is often drawn. Was there always a complete failure to recognise the laws and autonomy of Aborigines, as is usually assumed? Did the assertions of *terra nullius* in *Cooper v Stuart* (1889) 14 App Cas 286 and *R v Murrell* (1836) 1 Legge 72 represent the universal view of Australian law prior to *Mabo*?

The answer to these questions is no. Seven years before *Murrell*, the Supreme Court of New South Wales declared in *R v Ballard* (1829)[79] that it had no jurisdiction when one Aborigine allegedly killed another even though the act was done close to Sydney. Chief Justice Forbes stated that

> I am not aware that British laws have been applied to the aboriginal natives in transactions solely between themselves, whether of contract, tort, or crime. Indeed it appears to me that it is a wise principle to abstain in this Colony, as has been done in the North American British Colonies, with the institutions of the natives which, upon experience will be found to rest upon principles of natural justice. ... the savage is governed by the laws of his tribe — & with these he is content ... [they] make laws for themselves, which are preserved inviolate, & are rigidly acted upon.

Justice Dowling agreed:

> all analogy fails when it is attempted to enforce the laws of a foreign country amongst a race of people, who owe no fealty to us, and over whom we have no natural claim of acknowledgment or supremacy. We have a right to subject them to our laws if they injure us, but I know of no right possessed by us, of interfering where their disputes or acts, are confined to themselves, and affect them only.

Dowling noted that English law protected each race against the other, however:

> The same principle of protection applied to the preservation of property, although the notions of property may be very imperfect in the native. The Englishman has no right wantonly to deprive the savage of any property he possesses or assumes a dominion

77 See Lauren Benton, 'Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State' (1999) 41 *Comparative Studies in Society and History* 563; Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (2002).

78 *Mabo v Queensland (No 2)* 175 CLR 1.

79 See www.law.mq.edu.au/scnsw.

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> over. On the other hand the native would be responsible for aggressions on the property of the Englishman.[80]

The strong implication of these passages is that Aborigines were not British subjects. They were entitled to live their own lives according to their own laws. Only Dowling hinted at recognition of Aboriginal property laws, however. Forbes seemed to hold consistently that the Crown had full beneficial title to the whole of New South Wales from the moment the colony commenced.[81]

Ballard was overruled in *R v Murrell* in 1836. The judgment in *Murrell* was written by Burton J, with the concurrence of Forbes CJ and Dowling J. In it, Burton famously held that Aborigines were too primitive to have laws or sovereignty of their own. There was only one law in the colony, he held, the law of England. Aborigines were as liable to, and as protected by, English law as were any other people, even for acts done between them. Under *Murrell*, Aborigines were held subject to English law, whether for clashes among themselves or with the British colonists. They were supposedly protected by the same laws, although there is no known 19th century case where their land rights were recognised explicitly. James Stephen was one of many critics of this position:

> We take possession of their Country, introduce amongst them the most profligate habits and the Severest Law of Europe — and having tainted them with our vices, and oppressed them with our injustice, we execute against them all the severity of our own Law merely for having too well learnt the lessons we have taught them.[82]

The best account of Burton's judgment in *Murrell* is not in the law reports, but in a manuscript in the archives.[83] The case is badly reported. The archival version shows that even he gave some recognition of Aboriginal autonomy. He said that 'the aboriginal natives of New Holland are entitled to be regarded by civilized nations as a free and independent people, and are entitled to the possession of those rights which as such are valuable to them'. The latter words concerning the possession of rights were left out of the law report of the judgment, its most important omission. However Burton failed to say what those rights were, nor how they might be protected by what he thought was the only law in the colony, that of England.

Equally importantly, Burton's further lengthy handwritten notes for this judgment, although not delivered in court, make clear that he did not think that Aborigines were British subjects. He said there that they were aliens until they chose to become subjects of the British King. In his view, then, they were in the odd legal category of aliens

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80 A similar argument was put by Edward Lander, *The Bushman; or, Life in a New Country* (1847) 186-95. I thank Alex Castles for this reference.

81 See *R v Steele*, 1834 in www.law.mq.edu.au/scnsw; Forbes' memorandum, July 1834, in John Bennett, ed, *Some Papers of Sir Francis Forbes: First Chief Justice in Australia* (1998) 227–28.

82 Knaplund, above n 59, 21.

83 See *R v Murrell* (1836), in www.law.mq.edu.au/scnsw.

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without laws of their own, and without sovereignty, but with unenforceable and undefined rights.

Murrell is not authority for the proposition that Aborigines were British subjects. That view was imposed not by the courts but by Lord Glenelg, the Colonial Secretary, in 1837.[84] Burton immediately came to accept this,[85] as did Dowling.[86]

Although the High Court came to recognise native title in *Mabo*, Brennan and Toohey JJ held that Aborigines became British subjects from the moment of 'settlement'.[87] On that point, the High Court was less willing to recognise Aboriginal autonomy even than Burton J in *Murrell*.

Murrell is the only one of many pre-1850 cases concerning Aborigines to be reported formally (if inaccurately), and the only one to be cited in modern courts. *Ballard* provides contrary authority by two of the *Murrell* judges, even if they later changed their minds under the influence of Burton's reasoning. So does *R v Bonjon* (1841).[88]

A close examination of the New South Wales decisions between 1824 and 1838 reveals a much richer jurisprudence on the question than is commonly assumed, but we have little knowledge of how the Supreme Courts of the other colonies dealt with this issue. When our 10 men and women get to work in the other state archives and in the newspapers of the other colonies, we may find that the story is more complex still. Preliminary work in Van Diemen's Land[89] and Western Australia[90] shows the same concern for protecting Europeans and Aborigines from one another, and the same uncertainties about the recognition of Aboriginal law.

84 Glenelg to Bourke, 26 July 1837, *Historical Records of Australia*, Series 1, vol 19, 48.

85 See his draft bill, in Miscellaneous Correspondence Relating to Aborigines, State Records of New South Wales, 5/1161, 385f, dated June 1838.

86 *R v Billy*, *Sydney Herald*, 9 November 1840.

87 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 38, n 93 (Brennan J), and 182 (Toohey J).

88 Reported in (1998) 3 *Australian Indigenous Law Reporter* 417.

89 See *R v Mosquito*, *Hobart Town Gazette*, 3 December 1824.

90 Alex Castles collected some Western Australian cases in his Comparative Legal History Materials for the College of William and Mary School of Law, 1998. See among them, the Proceedings of the Grand Jury, in *Perth Gazette and Western Australian Journal*, 7 October 1837 (holding Aborigines subject to liability for theft); and see the issue of 21 October 1837 (on crimes committed between Aborigines); *R v Winmar*, *Western Australian Journal*, 8 January 1842 (holding Aborigine subject to law for alleged murder of another Aborigine). See also *R v Monkey* (1861) VLR (L) 40; *R v Cobby* (1883) 4 NSWLR 355.

IX CONCLUSION

I wish to conclude by returning to the lessons we might learn from Alex Castles' 'Vandemonian Spirit' speech. In it he argued that there was a close link between the law and what he saw as the independent, cynical character of the island's colonists. Before the New South Wales Court of Criminal Jurisdiction first visited Hobart in 1821, he said, a separate, quite informal criminal law was developed there. There was also an independent, frontier quality to the island's civil law. More than that, the Vandemonians offered particularly strong resistance to the attempts by Governor Arthur and Pedder CJ to impose a stricter, more English version of law. This speech was a pointer to the possibility of a different kind of Australian legal history.

Van Diemen's Land was not the only frontier community to have an experience like this. While every new colony had its own experiences and its own approach to law, they had in common a practical rejection of many English civil law rules in particular. Alex Castle's description of civil law in Hobart is reminiscent of the operations of the Court of Civil Jurisdiction in Sydney between 1788 and 1814.[91] There were similar experiences in newly acquired California, in colonial Connecticut, in early 19th century Newfoundland and other Canadian colonies, and in Antigua.[92] A shortage of sterling led many of these societies to develop their own currencies, and an absence of bankruptcy laws to their own methods of delaying debt payments. Frontier law was often sharply different from the law of the parent state. On these points, usually without reference to one another, these jurisdictions often had more in common with one another than with the common law of England.

Nearly every European colony saw conflict with native peoples, and English law gave little guidance either to judges or the colonists. Through the judges' notebooks and newspaper accounts of trials, we can uncover a frontier view of these clashes. The hysterical campaign surrounding the Myall Creek trials in 1838 shows that it was widely believed in the white community of New South Wales that Aboriginal lives deserved less legal protection than those of Europeans.[93] This unpleasant finding should warn us not to be nostalgic about the idea of informal law: just as we are now horrified by some of the formal laws of the early 19th century, so do many of us find some of our ancestors' legal ideas to be abhorrent.

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91 See Kercher, above n 64.

92 Bruce Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (1987); Cornelia Dayton, *Women Before the Bar: Gender, Law and Society in Connecticut, 1639–1789* (1995); David Langum, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821–1846* (1987); Francis Forbes, 'Decisions of the Supreme Court of Judicature in Cases Connected with the Trade and Fisheries of Newfoundland 1817–1821' in Forbes Papers, Mitchell Library, A740; Kercher and Young, above n 68; Knaplund, above n 59, 204.

93 See *R v Kilmeister (Nos 1 and 2)* (1838) and accompanying notes, in www.law.mq.edu.au/scnsw.

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These ideas were sometimes put into effect in the courtroom, when juries acquitted whites of killing Aborigines despite strong evidence of guilt. The formal law may have attempted to protect Aborigines against white attacks, but once a jury acquitted a defendant, there was nothing the judges could do about it. Similarly, local people sometimes agreed to cover up evidence of killings, and even official energy to prosecute could wane.[94] The conflict between formal and informal law was not always mediated by judges.

Court records can also help us to gain some idea of Aboriginal notions of right. For instance, when about 100 Aborigines attacked an isolated New South Wales farm house in 1834, one of them explained their reasons for doing so: 'black fellow was best fellow,' he said. 'Black fellow master now rob every body — white fellow eat bandicoots & black snakes now'. This was a rare instance of a massed attack by Aborigines, and it is clear that their aim was not murderous. The two white occupants were allowed to escape.[95] The reconstruction of these interactions from an Aboriginal perspective is among the most important services legal history can offer.

An awareness of the possibility of informal law should make us sensitive to cases in which it was elevated into formal law. On its face, *Macdonald v Levy* was simply a case about differing opinions on the applicability of English usury laws. It was more than that, however, since the majority effectively recognised the law making powers of the population of New South Wales.

The frontier period of informal law ended in Sydney with the arrival of Francis Forbes as the first Chief Justice of the new Supreme Court in 1824. This was not the immediate beginning of strict adherence to English law, however. From the available evidence at present, it seems that Australian judge-made law became progressively more English in content, 25 years after then, from the middle of the 19th century onwards. This was less because of a change in colonial circumstances than because of intellectual and imperial changes. Like British people around the world of his generation, Forbes saw England as home even though he was not born there and spent little of his life there.[96] He thought that he was adopting the spirit of English common law, even in his legal pluralism. In Virginia, St George Tucker debated with his more conservative legal colleagues in post-revolutionary America about whether there was one common law or many.[97] This may not have mattered in practice: in the early 19th century, the common law across the British and formerly British world was

94 See *R v Finney*, 1835; and *R v Lowe*, 1827, in www.law.mq.edu.au/scnsw. See also Roger Milliss, *Waterloo Creek: the Australia Day Massacre of 1838, George Gipps and the British Conquest of New South Wales* (1992) on the unpunished Waterloo Creek massacre.

95 The clearest accounts are in William Burton, *Notes of Criminal Cases*, State Records of New South Wales, 2/2418, vol 17, 25–35; and 2/2420, vol 19, 1 (quotations from latter).

96 For his biography, see Currey, above n 45.

97 See Frederick Miller, *Juries and Judges Versus the Law: Virginia's Provincial Legal Perspective, 1783–1828* (1994) 69–70.

marked by pluralism, not unanimity. Law in the British diaspora often differed from that of England.[98]

How, then, did this pluralism end? Tony Blackshield argues that from about the middle of the 19th century, there was a change in the nature of judicial reasoning. He states that one of the factors in this change was the passage of the *Reform Bill* in 1834.[99] After then, the judiciary needed a new form of legitimacy. The old reliance on traditional ruling class services to those beneath them had to give way once parliament began to represent a broader electorate. From that time, parliament was seen to make law, and judges merely to apply it. The 19th century passion for scientific reason also entered the courts. Somewhere in the vast body of reported law, there was assumed to be one correct, neutral answer. Following a strict notion of precedent, appeals courts corrected 'errors.'[100]

We saw something of this in Burton's decision in *Macdonald v Levy*, which was a precursor of a form of reasoning which would dominate Australian courts for well over a century. Forbes usually stood for an older form of reasoning, one which was less concerned about close textual analysis and strict authority than with broad principles. His judgments did refer to English precedents, but to their principles not their words. This did not mean that he acted without any restrictions: he followed broad guidelines from English cases, and often referred to his own previous decisions, whether in Newfoundland or New South Wales.

When the new form of scientific judicial reasoning and strict adherence to precedent, particularly that of the Privy Council, were applied in colonial courts, the evidence indicates that they had the effect of diluting the distinctive quality of colonial law. John Bennett, one of Australia's leading legal historians, argued in a jointly written paper in 1971 that colonial judges after 1850 became more independent of English authority because they did not always feel bound by their equivalents in England.[101] I argue the opposite, that they became more deferential over time, not less. Their refusal to be bound was consistent with the scientific method and a strict attitude to precedent. Errors could be made by other judges and pointed out by their equals, while those directly above them in the judicial hierarchy were binding through authority. Colonial judges knew that they were bound by the Privy Council, especially after it showed its determination for a uniform law of the empire in 1879.[102] The possibility of appeals to the Privy Council increasingly became a reality after 1860, not long before it became more unitary in its assertion of principle. Just as there

98 This has recently been shown with startling clarity: see Peter Karsten, *Between Law and Custom: 'High' and 'Low' Legal Cultures in the Lands of the British Diaspora* (2002).

99 Anthony Blackshield, 'The Legitimacy and Authority of Judges' (1987) 10 *UNSW Law Review* 155.

100 See also Brian Simpson, 'Legal Iconoclasts and Legal Ideals' (1990) 58 *University of Cincinnati Law Review* 819, though pointing to much earlier expressions of similar ideas.

101 See Bennett and Forbes, above n 40, 181–82.

102 *Trimble v Hill* (1879) 5 App Cas 342, 345.

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was one right answer for any legal problem, so was there one law for the empire. This was the high legal empire, a time when Australian judge-made law was as English as it ever became.

Until it was removed recently, our positivist blindfold stopped us from seeing that there was a different view before 1850. It made us think of the reception of law rules as descriptions of reality rather than prescriptions of conduct, which were originally intended not to be taken too tightly. Seen backwards from the high water mark of strict legalism, there was no need to study Australian cases, as they could only ever have been imitations of the real thing, the case law of England. This was the legal version of cultural cringe. Legal historians saw the Australian colonies merely as an outpost of England rather than part of a loose confederation of British colonies with their own distinctive laws. Now that the United Kingdom is a foreign power, the High Court will no longer refer to the 'common sovereignty in all parts of the British Empire'.[103] With the passing of that view our blinkers have been removed, and we can also see that early Australian law was part of a grand plurality of laws of the empire.

The loss of empire, the death of strict precedent, the abolition of appeals to the Privy Council, and the loss of faith in the fairy tale of scientific legal neutrality,[104] together have given us a chance to rediscover our past. This requires us to uncover more sources, and to search for further examples of the elevation of popular legal practices into formal law. We can now see that there was an older method of legal reasoning, one less stuck on the words of written judgments than based on memory.

We are almost flooded with unread sources of Australian law, just as Professor Baker said of England. The more work we do, the more we are likely to change our views. These conclusions about the Englishness of our law can only be tentative. Perhaps other colonies than New South Wales were swamped by Burtons. If we are lucky though, we might find other judges as fascinating as Forbes. We should not assume that all colonies responded in the same way.

The writing of the history of Australian law is not finished, but we know enough of it to conclude that our law and its history were not simply English either. When the 10 men and women do their 10 years of work, we may well find that our law's 'Englishness' came in the common law method, its language, its structures and its broad spirit as even Burton once called it, rather than the strict reception of rules, at least prior to 1850. Even when the rules were precisely the same, their context and history often differed: the killing of an Aborigine was never the same as the killing of

103 Justice Kirby, introduction to the 1999 Alex Castles Lecture in Legal History, 'Living with Legal History in the Courts,' 15, referring to *Sue v Hill* (1999) 199 CLR 462 and the *Engineers' Case* (1920) 28 CLR 129, 146.

104 For a recent example of the decline of the influence of the strictly 'scientific' view of law, see Kirby J, 13. In describing constitutional interpretation, he said that the judiciary should not look for previous 'errors' but recognise that new generations of Australians will see the constitution in a different light.

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a fellow Briton in an English town, for example. Despite the obligation to avoid repugnancy, early colonial legislatures were much more free than we might have thought to adapt legal principles to local conditions. The existence of judges like Boothby and Burton should not blind us to the distinctive qualities of Australian law, although we must constantly be aware that in all periods that have been closely studied, there is evidence of conflict between pluralist and unitary approaches. If we see colonial law as culture as well as doctrine, it would be absurd to assume that it was all indigenously made, but equally erroneous to conclude that it was simply English. Yes the history of Australian law was English in part, even in great part, but no it was not in many important other ways.

The title to this lecture would more accurately be 'Why the History of Australian Law is not Simply English,' but that would dilute the pun on the titles of two more distinguished lectures than this.

'A BIRTHRIGHT AND INHERITANCE'*

THE ESTABLISHMENT OF THE RULE OF LAW IN AUSTRALIA

By THE HONOURABLE SIR VICTOR WINDEYER†

This lecture commemorates the name of a man who was respected in this city as a magistrate and as a lawyer. I have, therefore, thought it fitting to take as my topic the way by which Australia inherited the law of England and how the rule of law became established here. What I shall say must, of course, be in part expressed in the language of law; but I shall, in speaking, omit some, especially the more technical parts, of what I have written, leaving that to be read later by anyone who may be interested to do so. Some of the occurrences to which I shall refer may seem to have been trivial, but I hope you may see in them the quickening in Australia of customs and doctrine that are both the source and the safeguard of liberties.

'An Uninhabited Country Planted by English Subjects'

The history of the administration of justice in New South Wales and Tasmania falls into three periods: the first that of the First Charter of Justice, 1788 to 1814; the second that of the Second Charter of Justice, 1814 to 1823; the third from 1823 onwards when the existing Supreme Courts of New South Wales and Van Diemen's Land were set up—their present Charters being dated 13th October 1823 and 4th March 1831 respectively. It is of the first few years of the first period that I shall speak. Yet any reference to the introduction of law into Australia makes most Australian lawyers think at once of section 24 of the Australian Courts Act, 9 Geo. IV, c. 83, an Act of the British Parliament passed in the year 1828. It provided that all laws and statutes in force within the realm of England on 25th July 1828 should be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land 'so far as the same can be applied within the said colonies'. English law —both the common law and statute law—as it stood in 1828 was thus declared to be the law of the two eastern colonies, New South Wales (then including what is now Victoria and Queensland) and Tasmania. And, except so far as it has been altered since then by our own Parliaments in Australia, and by such Acts of the British Parliament as have

* The fifth E. W. Turner Memorial Lecture delivered in Hobart Town Hall on October 6, 1961.

† A Justice of the High Court of Australia.

been made to apply here, it is still the law. So that today lawyers look to the Statute of 1828 as the good root of title of our inheritance of the law of England. But we must not think of it as the source of that inheritance. The source is the common law itself. The law of England had come to Australia with the First Fleet, forty years before 1828. Section 24 was inserted into the Act 9 Geo. IV, c. 83 to get over a particular difficulty. It fixes a date. It does not originate a doctrine. I shall deal with it later. I want to consider first the old and well-known principle of the common law that Englishmen going out to found a colony carried the law with them to their new home, and then to see how that law took root and what fruit it bore in the early days of British settlement in Australia.

The origin of that principle lies far back in the Middle Ages, in the doctrine, widespread in feudal Europe, of allegiance of subjects to their sovereign. A subject could not divest himself of his allegiance, except by becoming the subject of another sovereign. So that, wherever they went, men were bound by their allegiance and carried the law of their allegiance with them as a personal law. It was their birthright. It was also the measure of their duty. From these old ideas a further principle was developed. It has been happily described as follows:—'As soon as the original settlers had reached the colony, their invisible and inescapable cargo of English law fell from their shoulders and attached itself to the soil on which they stood. Their personal law became the territorial law of the Colony'.[1] Blackstone explained all this in the well-known passage in the *Commentaries* that begins:

> 'It hath been held that if an uninhabited country be discovered and planted by English subjects all the English laws then in being, which are the birthright of every English subject, are immediately 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 new situation and the condition of an infant colony . . .' [2]

As Story put it, speaking of the American Colonies:

> 'The common law is our birthright and inheritance and . . . our ancestors brought hither with them upon their emigration all of it, which was applicable to their situation. . . . "It was not introduced as of original and universal obligation in its utmost latitude", but with the 'limitations contained in the bosom of the common law itself'.[3]

Thus it was that Lord Watson, in delivering the judgment of the Privy Council in *Cooper* v. *Stuart* in 1889, referring to New South Wales, spoke of the law of England having become, subject to well-established exceptions, 'from the outset the law of the Colony'.[4] The first question then is, at what date is it to be said that in law Australia was first planted

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1 R. T. E. Latham, *The Law and the Commonwealth* in *Survey of British Commonwealth Affairs*, 1 (1937) 517.

2 *Commentaries*, Vol. I, 107. Countries inhabited only by 'savage' or 'uncivilised' peoples were within the doctrine.

3 *Commentaries on the Constitution* (abridged edn. 1833), 65.

4 14 App. Cas. 286 at 291.

by British subjects, to use the old phrase. For more than a hundred years New South Wales lawyers have been able to find a ready answer in the Supreme Court Calendar, which listed the 26th January as a court holiday, describing it as the 'foundation of the Colony'.[5]

The Foundation of a Colony

Accounts differ as to details of the small ceremony that occurred on the 26th January 1788 near the head of Sydney Cove, the place that Phillip had chosen instead of Botany Bay as the place for the permanent settlement. But in essentials they agree. A flag staff had been erected. From it the Union Jack was displayed. Standing under the flag the Governor and a group of officers drank toasts to the health of the King and the Royal Family and the success of the new Colony. A party of Marines fired a *feu de joie*. All gave three cheers, and the cheering was echoed by the ship's company of the 'Supply' lying at anchor in the Cove. Governor Phillip had entered upon his government. Indeed, both in strict law and in fact, he had done so as soon as the fleet reached the offing of Botany Bay; for his instructions directed him 'being arrived' to take upon himself 'the execution of the trust we have reposed in you'.

The display of the flag and the demonstration under it were intended as a reassertion and a making good of the title of the British Crown to the territory of which Cook had already formally taken possession in the name of the King. The presence in Botany Bay of the two French ships under La Perouse gave point and urgency to the proceedings. Phillip knew that he was taking possession of a country for the British Crown. It might become, he said later, the most valuable acquisition Great Britain ever made. And he, a post-captain in the Royal Navy, who had seen much active service, knew well enough that the title of the Crown to the new land would depend not so much on doctrines of international law as on effective possession, not only on the raising of the British flag, but on the existence of the British fleet. He knew too that he was founding a new British settlement of which he was the Governor. He had never thought of the expedition as having no greater object than the establishment of a gaol in the Antipodes.

No formality was needed to make the law of England the law of the new colony. Yet how better could that have been marked than by that ceremony and those cheers that disturbed the ancient silence of the little cove with its tall gums and stream of fresh water fourteen thousand miles from Home? This demonstration spelt thankfulness, determination and hope—the long voyage of more than eight months ended, safe arrival, the site of the settlement decided, a continent claimed, a new enterprise begun. A great Englishman and some companions had stepped ashore

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5 The *Rules and Orders of the Supreme Court*, published in 1840, listed as holidays in the Court and its offices: 'January 1st, New Year's Day; January 26th, Foundation of the Colony; The Annunciation of the Blessed Virgin; Good Friday and the following Saturday; Easter Monday; Ascension Day; Her Majesty's Birth Day; Whit Monday; December 25th, Christmas Day and the day following'. The Court sat *in banco* on Saturdays during term.

in Sydney Cove to found a colony under the British flag. The law of England had then come to Australia—not because of words written on parchment, but by skill in seamanship, by endurance, and by performance of duty by officers and men in the service of the Crown. There were, however, words written on parchment. They were important words, and Phillip's instructions required him to make them known, for he was 'as soon as conveniently may be with all due solemnity to cause our commission . . . to be read and published'. Therefore, on 7th February, 'as soon as the hurry and tumult necessarily attending the disembarkation had a little subsided', to quote Collins's account, a formal ceremony was held. For it the population, free and convict, some members of the crews of the ships, as many persons in all as could be spared from other duties, were assembled. The Marines paraded. Collins, the Judge-Advocate, read the Governor's commission and other instruments and then the Governor addressed the gathering. The 7th February was described at the time as 'the memorable day which established a regular form of government on the coast of New South Wales'. But, in law, this was no more than the proclamation of an already established fact. The ceremony only had a meaning because the law of England was already the law of the territory, because the Governor was already exercising his lawful authority there.[6] I mention this because a few years ago there was some correspondence in the Sydney press, arising out of a suggestion by Doctor Currey,[7] that 7th February might be celebrated as the anniversary of the foundation of Australia instead of the 26th January. The historical interest of the ceremony of 7th February is great. But its importance was formal rather than substantial. The main significance of the proceedings lies, I think, in their similarity to those that had long been customary in British colonies whenever a new Governor assumed office. The parade of troops and their salute, the formal reading of the commission, the public taking of the oaths, the discharge of firearms, were the ordinary ceremonies of such an occasion. They had all been regularly performed in the American Colonies before their independence.[8] These observances at Sydney Cove involved the tacit recognition of two underlying ideas of great consequence.

The first was that the new settlement was formed on the pattern of existing British colonial governments. It was not the same sort of colony as others. Lawyers might not fit it neatly into the accepted legal classification of colonies, as acquired by conquest, cession or settlement. It was established by the Crown, but with the recognition of an Act of Parliament. It was settled, not conquered; but its settlers were not persons who had gone out freely to form a colony.[9] But it was to be a colony. It was not to be either a merely military occupation, although it had a strong military complexion, or just a gaol.

[6] As Mr M. H. Ellis has pointed out, Phillip made some appointments by warrant before 7th February. One such, relevant here, was the appointment on 26th January of Henry Brewer as Provost-Marshal.

[7] See *Royal Australian Historical Society Journal*, 43 (1957) 153.

[8] See Labaree, *Royal Government in America* (1930).

[9] See *infra* including note 33.

The second was in the proclamation of the monarchical character of British rule and the authoritarian element in English law. It was the year before the French Revolution: but in the foundation of New South Wales there was no element of a social contract. The documents that were publicly read were royal letters patent. They assumed that the law of England was in force in the settlement, that from it the royal power was derived, that under it the Sovereign could issue commands.

If anything had been necessary to complete the Governor's lawful authority, it was the taking of the oaths that his commission required him to take, rather than the publication of the commission. Today anyone who is to be sworn in an office must ordinarily take the prescribed oath before he can lawfully perform the duties of his office. For example, every person appointed to fill the office of Governor of any Australian State is required by the letters patent constituting the office 'with all due solemnity before entering on any of the duties of his office to cause his commission to be read and published', which being done he must then and there take the oath of allegiance and the oath of office.[10] But that was not the position when Phillip came to the territory of which he had been appointed Governor. He came to found a new colony, not to be inducted as the new Governor of an old one. His commission directed that after publication of it he 'do in the first place take the oaths appointed'. He did not do so at once. But, as the law then was, it seems that no question could have arisen as to his authority or the validity of his acts as Governor done in the meantime.[11]

Constitutional Foundations—The First Commissions

It was at one time common for Australian historians and lawyers to say that New South Wales was established on shaky legal foundations. This was a lingering result of Bentham's railing in his pamphlet published in 1803, called:

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10 The Letters Patent in respect of the several States may be found in the Commonwealth Statutory Rules, Vol. V, 5326-5347. But there the office is permanently constituted by letters patent under the Great Seal, appointments to fill it being made from time to time under the sign manual and signet. That is the practice in most colonies today: see Halsbury, *Laws of England* (3rd edn.), Vol. 5, 558. But in Phillip's time the practice was different. He was, as will apear, both constituted and appointed Governor by letters patent. 'Constituted' is the technically correct word for the creation of an office: see *Bacon's Abridgment*, Vol. V, 188 under 'Offices and Officers'.

11 On 13th February, a week after the reading of the commission, Phillip took the first two of the oaths directed, namely, the oath of Abjuration of the Pretender and the oath, called the Assurance, acknowledging King George as the only lawful and undoubted Sovereign of the realm, as well *de jure* as *de facto*. These were required by the Acts 1 Geo. I, c. 13, and 6 Geo. III, c. 53. He also on the same date subscribed the declaration required by the Test Act. He might it seems have omitted these for six months with impunity: 9 Geo. II, c. 26. On 6th October he took the oath of office and the oath then generally required to be taken by governors of the plantations, which should have been taken within six months of his 'entrance upon his government': 8 & 9 Wm. III, c. 20, s. 69. The reason for the delays is it seems not known. Before the Promissory Oaths Act 1868 some troublesome questions could arise when an office-holder neglected to take his oaths within the prescribed times. At one period colonial governors were sworn in the Privy Council before leaving England and again on arrival in their colonies: Labaree, *op. cit.* But Phillip, having been appointed by the Letters Patent creating his office, his appointment was apparently complete.

> 'A Plea for the Constitution: shewing the enormities committed to the oppression of British subjects, innocent as well as guilty, in breach of Magna Carta, the Petition of Right, the Habeas Corpus Act and the Bill of Rights as likewise of the several Transportation Acts, in and by the design, foundation and government of the Penal Colony of New South Wales'.

In England little notice was taken of these denunciations. Their language was intemperate. Some of the criticisms were far-fetched. That, I think, is now generally agreed. But at one time Bentham's views, and other opinion of a like kind, were much quoted in the colony for partisan purposes. Much later still, long after these controversies had passed into history, some writers still referred to them, more intent perhaps on polemics and disparagement than on analysis of documents and understanding of events. More than thirty years ago, in lectures I gave in the University of Sydney, I questioned some of their conclusions. Mr Justice Evatt afterwards developed the same theme in an important paper.[12]

The idea that the Home government bungled the preparations for the constitutional foundations of the new colony persists. Lawyers who dabble in history may, I realize, go astray, as have some historians who have dabbled in law. But, accepting the risk, let us look closely at some of the documents as they are printed in the *Historical Records of Australia*. When the decision to send convicts to Botany Bay was taken, and Phillip had been chosen to command, he was given a commission as Governor. Later he got a second commission and instructions. The explanation of there being the two commissions, and the great significance of their differing forms are not generally understood.

The first was dated 12th October 1786. It commences:

> 'To our trusty and well-beloved Captain Arthur Phillip greeting—
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> We reposing especial trust and confidence in your loyalty, courage and experience in military affairs'—you will note those words—'constitute and appoint you to be Governor of our territory called New South Wales . . . and of all towns, garrisons, castles, forts and all other fortifications or other military works which now are or may be hereafter erected upon this territory'.

The territory was defined as including all of what is now New South Wales, Victoria, Queensland, Tasmania and half of South Australia and the Northern Territory — a large area, quite devoid of 'towns, garrisons, castles and forts'. But some people already had vaguely in mind greater purposes than the primary one of clearing the gaols. The next words are important:

> 'You are therefore carefully and diligently to discharge the duty of Governor in and over our said territory by doing and performing all and all manner of things thereunto belonging, and we do strictly charge and command all our officers and soldiers who shall be employed within our said territory, and all others whom it may concern to obey you as our Governor thereof and you are to observe and follow such orders and directions from time to time as you shall receive from us, or any other your superior officer according to the rules and discipline of war, and likewise such orders and directions as we shall send you under our signet or sign manual'.

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12 *Australian Law Journal*, 11 (1938) 409.

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Now that was not an ordinary commission for a colonial governor. It was a special form of military commission necessary to make Captain Phillip, a naval officer, a military governor and to give him command ashore. Officers of the Navy hold their commissions from the Lords of the Admiralty. But at that time, and for long afterwards, all commissions giving any command in the Army had to be signed by the Sovereign.[13] So this commission to Phillip was under the royal sign manual and countersigned by Lord Sydney.

Shortly after he had signed this commission, namely on the 24th October, George III signed two further commissions in preparation for the proposed settlement. One appointed Major Robert Ross of the Marines as Lieutenant-Governor. It followed the same form as that of the Governor.

The other was 'to our Trusty and well-beloved Captain David Collins' appointing him 'to be Deputy Judge-Advocate in the Settlement within Our Territory called New South Wales'.

The Office of Judge-Advocate

I shall here say something about the office to which Collins was thus appointed. It will be noticed that he was described as Deputy Judge-Advocate, apparently on the theory that he would represent the Judge-Advocate General. The office of Judge-Advocate General is an old one. The holder of it was in the eighteenth and nineteenth centuries usually a member of Parliament, and from 1806 a member of the Ministry, going out of office on a change of government. His duty was to advise the Crown and the Commander-in-Chief on matters of military law, review the proceedings of courts martial and generally supervise the administration of the Mutiny Act. Only on rare occasions did the Judge-Advocate General himself officiate at a court martial. Today he never does, for he exercises a supervisory jurisdiction over court martial proceedings. But in the eighteenth century, as today, an officer was always appointed to officiate as judge-advocate at a general court martial. His duty was to advise the court on matters of law and procedure and to sum up the evidence.[14] In England he was formerly appointed in most cases by deputation under the hand and seal of the Judge-Advocate General, but elsewhere he might be appointed by the officer convening the court, as is the common practice today. In the eighteenth century, and until 1863, a judge-advocate officiating at a court martial not only framed the charge, he also acted as prosecutor, in the sense that he assembled and led the evidence in support of the charge.[15] This he was expected to do in a judicial manner, befitting a prosecutor for the Crown. It was said that he should assist the court and stand between the prisoner and

[13] The law was altered by 25 Vict., c. 4, because at that time, 1862, there were 15,000 commissions awaiting the Queen's signature: *Anson on the Constitution* (3rd edn.), Vol. II, 59; Clode, *Military Forces of the Crown* (1869), Vol. II, 439-442.

[14] See Clode, *op. cit.* Vol. I, 77; Vol. II, 359-365, 747.

[15] The change was made by No. 159 of the *Articles of War* in 1863.

the bench in the character of an assessor of the court.[16] These duties could become conflicting. Lawyers, bred in a different tradition, found them so. But they were administrative, as well as judicial, and had their origin in military custom of times when, for civil magistrates no less than for military officers, police administration and judicial duties were mingled and largely performed by the same persons. A judge-advocate must see that members of the courts martial knew and observed the law and the customs of the service.

In overseas territories where there were military garrisons, permanent appointments as Judge-Advocate for the territory were made by commission under the sign manual. The persons so appointed performed in their territories duties in relation to members of the army and other persons subject to military law similar to those of the Judge-Advocate General at Home. Collins was thus to be Judge-Advocate, as he was generally called, or Deputy Judge-Advocate, as his commission read, for New South Wales. That did not prevent other officers being appointed from time to time to officiate at particular courts martial. Persons appointed as regular judge-advocates in places abroad or with forces serving abroad were ordinarily officers experienced in military law. They were seldom qualified lawyers. Indeed, I do not know that a lawyer was ever regularly employed as a judge-advocate abroad or in the field before Larpent went to Wellington's headquarters during the Peninsular War. The duties of a judge-advocate, whether in permanent appointment or officiating at a particular trial, were however regarded as of a semi-judicial kind, demanding qualities of temperament as well as a thorough acquaintance with military law and 'in a great measure with the municipal laws of his country'.[17] Collins was to shew himself as not lacking in these requirements for his office.

The Judge-Advocate General and his deputies had no jurisdiction in the Navy. The Judge-Advocate of the Fleet had similar duties there. The settlement in New South Wales was to be composed of Marines. The Marines were at that time a force that had been established in 1755 under the Admiralty.[18] When on land they were subject to their own Act, commonly called the Marine Mutiny Act,[19] and their own Articles of War: on board ship they were subject to naval discipline. A separate commission had therefore to be issued to Collins by the Lords of the Admiralty giving him authority to officiate as judge-advocate at any

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16 By Brougham speaking in Parliament, quoted by Clode, *op. cit.* Vol. II, 363: and see Simmons, *Courts Martial* (7th edn. 1875), 194-200.

17 *Adye on Courts Martial*, 104. Copies of this book were in New South Wales at an early date.

18 Marine Regiments had been from time to time raised and then disbanded, from the end of the seventeenth century.

19 28 Geo. II, c. 11 (1755) and 29 Geo. II, c. 6 (1758).

court martial of any member of the Marine Detachment in New South Wales.[20]

'According to the Rules and Discipline of War'

Collins's commission from the Crown as Deputy Judge-Advocate of New South Wales required him to perform the duties of that office and continued: 'And you are to observe and follow such Orders and Directions from time to time as you shall receive from Our Governor of our said Territory for the time being, or other your Superior Officer, according to the Rules and Discipline of War'. His commission from the Admiralty contained no such direction. This has been remarked on as an inconsistency. But that surely is wrong? Collins was an officer of Marines. The Lords of the Admiralty had no need to enjoin him to obey orders. They were merely giving him a warrant to officiate at courts martial of Marines. His duty in that capacity would be quite distinct from the duties of his office as Judge-Advocate of the Colony.

The command to obey the orders of the Governor and other superior officers, 'according to the rules and discipline of war', appeared in the commissions, not only of the Judge-Advocate, but of all the officers of the civil establishment, the Chaplain, the Surveyor-General, the Commissary, the Surgeon and their assistants. And the practice of inserting these words in commissions issued to civil officials in New South Wales continued for many years. It was not until Macquarie's time that there was any serious controversy as to their effect. Actually the first occasion when they were omitted seems to have been in Ellis Bent's commission as Judge-Advocate in 1809. It, nevertheless, commanded him to observe and follow the orders of the Governor or any other his superior officer: and Lord Bathurst then justified 'the continuance of a judicial officer who bore a commission exclusively military' as having 'many advantages with a view to the maintenance of that due subordination in the settlement upon which its welfare depends'.[21] Anyone who knows much about the early days of New South Wales will appreciate how greatly its welfare did depend upon due subordination and discipline, and how far trials and difficulties were the result of insubordination and indiscipline. The colony was under a form of military administration certainly; but it was a military administration of civil affairs, to use modern terms.

The duty to obey 'according to the rules and discipline of war' did not mean an abrogation of civil law, still less the establishment of a military despotism uncontrolled by law. Actually an injunction in those words was then a common form appearing in every military commission. It goes back to the seventeenth century. It has been said that it means that 'under his retainer from the Crown the officer, like the soldier, knows of no other authority to command his obedience — save the

20 In this appointment he had a salary of ten shillings a day. This ceased when the Marines left in 1791. As Secretary to the Governor, or as it was sometimes described, Secretary of the Colony, he got five shillings a day. As to his remuneration generally see *Hist. Records Aust.*, Series I, Vol. I, 531.

21 *Hist. Records Aust.*, Series IV, Vol. I, 171.

Sovereign and his superior officer — acting according to the rules and discipline of war'. . . . 'Every lawful order — or rather every order not obviously improper or contrary to law — must be obeyed'.[22] It certainly did not mean that every order of the Governor was lawful and must be obeyed. From the first the officers of the Marine detachment in the colony were insistent that there were limitations upon the duties that could be required of them. Ross, the Lieutenant-Governor, who was their commanding officer, was unco-operative to the extent of being insubordinate in his relations with the Governor. Instigated by him, they were unready to give the Governor the support that he might well have expected. But they claimed—wrongly at times—that the law regulating their Corps was on their side and that beyond that the Governor's authority did not go.[23] Obstructive and mean-spirited as their conduct was, it was yet important as probably the first assertion in Australia of the rule that government is subject to law, that the Governor must exercise his authority in accordance with law.

The Commission of Arthur Phillip Esquire, as Captain-General and Governor-in-Chief of New South Wales

The formal documents that were executed up till the end of 1786, and which I have so far described, all indicated an intention to establish a military command, and perhaps little more. New South Wales was to be a place to which convicts would be sent. Military law and penal discipline would suffice for all the inhabitants. Phillip himself had a larger vision when he wrote 'the laws of this country will, of course, be introduced in New South Wales, and there is one that I would wish to take place from the moment His Majesty's forces take possession of the country: that there can be no slavery in a free land, and consequently no slaves'.[24] He had served in the West Indies, and these remarks may well have been the result of his seeing the slave laws in operation in the colonies there. Probably he knew too of Lord Mansfield's famous decision in *Sommersett's Case*,[25] given sixteen years earlier, that no one could be a slave in England.

Phillip's view of his task was in accordance with the policy expressed in a new commission, the 'second commission', issued to him. Let us turn now to it. For it was the principal document of those that were publicly read on 7th February 1788 at Sydney Cove.

It is a patent under the Great Seal, not as the other was an instrument under the sign manual. The document printed in the *Historical Records of Australia* is not really the commission, although it is there described as such. What has been copied is a writ under the Privy Seal directed to Lord Thurlow, the Lord Chancellor; requiring him to issue letters patent under the Great Seal in the form set out, to bear date

22 Clode, *op. cit.* Vol. II, 65-66.
23 *Hist. Records Aust.*, Series I, Vol. I, 107-119, 122, 224, and Series IV, Vol. I, 22.
24 *N.S.W. Hist. Records*, Vol. I, Pt. ii, 53.
25 *State Trials*, Vol. XX, 1.

the 2nd of April 1787. This warrant was part of the elaborate procedure, going back to the time of Henry VIII, which until 1851 had to be followed for passing an instrument under the Great Seal.[26] But, as the warrant sets out the wording to be used in the commission, we know what form that took; and we can contrast it with the earlier commission. It begins:

> 'George the Third by the Grace of God of Great Britain, France, and Ireland, King, Defender of the Faith etc.'

The Sovereigns were then still formally claiming to be Kings of France. It is then addressed:

> 'To our trusty and well-beloved Arthur Phillip Esquire.
> We reposing especial trust and confidence in the prudence, courage and loyalty of you the said Arthur Phillip'.

You will notice that Phillip is no longer addressed as Captain Arthur Phillip, a naval commander, and that 'prudence' now takes the place of 'experience in military affairs', the quality referred to in the earlier commission. The document goes on:

> 'of our especial grace, certain knowledge and meer motion have thought fit to constitute and appoint you the said Phillip to be our Captain-General and Governor-in-Chief in and over our territory called New South Wales . . . and of all islands adjacent in the Pacific Ocean and of all towns garrisons castles forts and all other fortifications or other military works which may be hereafter erected upon the said territory or any of the said islands'—the pretence that there were already any there has been abandoned—'And we hereby require and command you to do and execute all things in due manner that shall belong to your said command and trust we have reposed in you, according to the several powers and directions granted or appointed you by this present commission or such further powers instructions and authorities as shall at any time hereafter be granted or appointed you under our signet and sign manual or by our order in our Privy Council'.

There is nothing this time, you will notice, about the Governor himself obeying the orders of his superior officers according to the rules and discipline of war; the only orders that he must obey would come to him from the Crown by sign manual and signet or by Order-in-Council. It is not necessary to go through the rest of the document. It conferred extensive powers on the Governor, including a power to 'appoint justices of the peace, coroners, constables and other necessary officers and ministers in our said territory and its dependencies for the better administration of justice and putting the law in execution. Its wording is, for the most part, that of the ordinary form of commission of a colonial governor as then in use—a form that in all its essentials had long been in use in the American Colonies.[27] The main difference between Phillip's commission and the then usual form of a colonial governor's commission is the absence of any provision for summoning a Council or Assembly such as existed in most colonies. But after the loss of the American Colonies the British Government did not look with much

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26 27 Hen. VIII, c. 11; Bowyer, *Constitutional Law* (2nd edn. 1846), 125; Anson, *Law and Custom of the Constitution*, Vol. II, Part 1, 54.

27 In Stokes's *View of the Constitution of the British Colonies* (1783), an interesting book by an interesting man, there is a specimen of the then ordinary form of a colonial Governor's commission.

favour upon such bodies. The conditions of old Canada that had recently led to the enactment of the Quebec Act of 1774 were very different from those that would exist in the new settlement at Botany Bay. The intention was that Phillip should be an autocrat unaided and unhampered by a Council. But he was to be an autocrat only in the sense that a commander on a foreign station is. He must obey the orders given him from Home: his own orders must not be repugnant to law. He was subject to the law, and he would be liable to be sued at Home for acts done by him in excess of his lawful authority. That had then recently been made clear by the decision of the Court of King's Bench in *Mostyn* v. *Fabrigas*.[28]

According to normal constitutional practice, Phillip received instructions with his commission. These instructions were under the sign manual; but, and this is again according to practice, they were not countersigned. They are dated 25th April 1787. They state that 'with these our instructions you will receive our commission under our Great Seal' . . . —so that it seems incorrect to say, as has sometimes been said, that Phillip actually got his commission on 2nd April.[29] Indeed, it may not have then passed under the Seal. His appointment as Governor was, it appears, notified in the London Gazette as being of 17th April.[30] Whatever the exact date, it was some time in April 1787.

What had occurred between October 1786 and April 1787 to cause the issue of this second commission, so very different from and superseding the first? A most notable decision had been taken. It was that the proposed settlement at Botany Bay should not be just a penal establishment under military government.

'A Colony and Civil Government'—The Act 27 Georgs III, c. 2

Sometime in January or February 1787 the Statute 27 Geo. III, c. 2 was enacted. I am not sure of the exact date, because until 1793 the date when an Act received the royal assent was not endorsed on it — the strange rule being that every Act was deemed to come into force on the first day of the session in which it was passed, unless some other date was fixed by it. The first day of the session in question was 23rd January 1787.[31] The full title of the Act is 'An Act to enable his Majesty to establish a Court of Criminal Judicature on the Eastern Coast of New South Wales and the Parts Adjacent'. After reciting that authority had been given for the transportation of convicts to New South Wales, the Act contained the pregnant sentence:

> 'And whereas it may be found necessary that a colony and a civil Government should be established in the place to which such convicts shall be transported . . . and that a Court of Criminal Jurisdiction should also be established within such place as aforesaid, with authority to proceed in a more summary way than is used within this realm, according to the known and established laws thereof'.

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28 (1773) Cowper 161.

29 Dr O'Brien says so in his scholarly book, *Foundations of Australia*, 292; but this may be a slip.

30 See the *Annual Register* for 1787.

31 Some writers have mistakenly said that this was the actual date when the Act was assented to.

The Act therefore provided that the Crown might by commission under the Great Seal authorise 'the person to be appointed Governor . . . at such place'—not, you will notice, the person who had been appointed Governor—'to convene from time to time as occasion may require a Court of Judicature for the trial and punishment of all such outrages and misbehaviours as if committed within this realm would be deemed and taken, according to the laws of this realm, to be treason or misprison thereof, felony or misdemeanour'.

The court was to consist of 'the Judge-Advocate to be appointed[32] for such place together with six officers of his Majesty's forces by sea or land'. It was to proceed by calling the offender before the court, causing the charge (which was to be in writing and exhibited by the Judge-Advocate) to be read; then, after hearing witnesses, to decide by majority whether the accused was guilty. If guilty, the sentences were to be, in capital cases, death 'or such corporal punishment not extending to capital punishment as to the Court shall seem meet'; in other cases, 'such corporal punishment not extending to life or limb as to the Court shall seem meet'. There was a proviso that unless five members of the court had concurred in adjudging a prisoner guilty of a capital offence he was not to be executed until the proceedings had been transmitted to the King and approved by him.

The importance of the Act is twofold. First, is the recital that it might be found necessary that a colony and a civil government should be established—that is to say, established by the Crown. Second, is the authority for the establishment by the Crown of a criminal court on the lines indicated. The Act did not itself set up anything. But very soon after it had received the royal assent the Government acted to give effect to both purposes it foreshadowed.

The First Charter of Justice

On 2nd April 1787, George III put his initials to two instruments under the Privy Seal, which together were to establish the Colony and Civil Government. One was the warrant for Governor Phillip's second Commission which I have described, a civil commission, as the Governor of a Colony, not merely as commander of a fort or a garrison. The other was a warrant for the issue of the Letters Patent commonly called the First Charter of Justice.

The provisions of this instrument as they appear from the warrant, I shall now describe. It recites that:

> 'We find it Necessary that a Colony and Civil Government should be established in the place, to which such convicts shall be transported, and that sufficient Provision should be made for the Recovery of Debts, and for determining of private causes between party and party in the place aforesaid . . . and being desirous that Justice may be Administered to all our Subjects'.

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32 The words 'to be appointed' suggest that Collins, like the Governor, was to get a new commission; but, so far as I know, none was issued.

It goes on to establish a Court, to be called the Court of Civil Jurisdiction, to consist of the Judge-Advocate for the time being together with two fit and proper persons inhabiting the said place to be appointed from time to time by the Governor or in case of his death or absence by the Lieutenant-Governor (or of any two of them of which the Judge-Advocate must be one). The Court was authorised:

> 'to hold plea of, and to hear and determine in a summary way all pleas concerning Lands, Houses, Tenements and Hereditaments and all manner of interests therein, and all pleas of Debt, Account or other contracts, Trespasses, and all manner of other personal pleas whatsoever'.

A chapter could be written on each of those words. Lawyers will recognize that the court was to have jurisdiction in all forms of civil action then known to the law of England. It was also by a later provision empowered to grant probates and letters of administration. The procedure it was to follow in civil actions was prescribed: Upon complaint in writing it might issue a warrant under the hand and seal of the Judge-Advocate directed to the Provost Marshal. The warrant was to state the substance of the complaint and command the Provost Marshal to summon the defendant to appear or (if the amount demanded was ten pounds or more) to arrest the defendant and bring him before the court or take bail for his appearance. When the case came on for trial the court was to take evidence on oath and 'to give Judgment and Sentence according to Justice and Right'. If the plaintiff were successful a warrant of execution would issue for the amount of the judgment and costs. If the defendant were successful he might be awarded costs. If a judgment were not satisfied by execution upon the judgment debtor's goods, the defendant might be imprisoned for the debt. There was an appeal to the the Governor; provided that it was 'interposed' within eight days. And in cases where the debt or thing in demand exceeded the value of three hundred pounds, an appeal lay to the Privy Council, but it had to be 'interposed' within fourteen days.

The Charter went on to recite the provisions of the Act authorising the establishment of a Criminal Court and to set up such a court to be called the Court of Criminal Jurisdiction. There were detailed provisions concerning its composition, jurisdiction and procedure, which reproduce and amplify the provisions of the Act to which I have already referred. The requirement that if less than five members had found an accused guilty of a capital offence the sentence should not be executed but reserved for the royal pleasure was supplemented by a direction that no capital sentence should be executed without the Governor's consent. By other provisions of the Charter the oaths to be taken by the members of the two courts were prescribed: in the Civil Court, 'well and truly to try the issues brought before them and to give true judgment according to the evidence': in the Criminal Court, 'to make true deliverance' between the King and the prisoner 'and to give a true judgment according to the evidence'. The Judge-Advocate was authorised to administer the oaths. The Criminal Court was made a Court of Record, as the statute

had said it was to be. The Civil Court was not. The distinction is technically interesting, but not I think important here.

These two instruments, the Governor's Commission and the Charter of Justice, were thus in readiness to bring into existence in Australia 'a colony and civil government'. It is an elementary error to suppose, as some people have, that because there was no local legislative body there was no civil government. The Governor's Commission was a civil commission, which had superseded the earlier military commission. He had power, within somewhat uncertain limits, to make regulations having the force of by-laws for his territory.[33] There were courts to administer the law, and the law they were to administer was the law of England.

Later on it was often said that the Civil Court was not lawfully established because, unlike the Criminal Court, there was no statutory authority for its creation. This was much urged in New South Wales in Macquarie's time: Barron Field adopted it and Bigge referred to it in his report. But it is erroneous.[34] The Crown can create courts for Crown Colonies by Charter or by Order-in-Council, provided they are to administer the law of England.[35] In Gibraltar there was a court similar in composition and jurisdiction to that of the New South Wales Civil Court. It had been set up by a charter similarly worded to the charter for New South Wales.[36] Gibraltar was primarily a military station, but with a civil population: it had a Judge-Advocate, and its court may well have been the model for that of New South Wales. The New South Wales court was to proceed 'in a summary way': but that meant only that justice in New South Wales would not be entangled in the elaborate forms of plenary procedure which then prevailed in England, and from which justice there was not freed until the reforms of the nineteenth century. A defendant was liable to arrest by the Provost-Marshal, and might be required to give bail for his appearance: but that was only a modification of the procedure by *capias* then used in England.

As to the Criminal Court: the position of the Judge-Advocate as prosecutor and judge and the substitution of seven naval or military officers for the ordinary jury of twelve neighbours, were departures from the established procedures of criminal trials. But, as the Court had a statutory basis, there could be no question that it was lawfully created. That death or other corporal punishment were the only sentences it could award has been spoken of as peculiarly harsh. But, when read

33 This was a controversial question. I have said something about it elsewhere: *Royal Australian Historical Society Journal*, Vol. 42, 264-5. See the introduction to *Hist. Records Aust.*, Series IV, Vol. I and *ibid.* p. 486. and note 22, p. 908. The question really arose because New South Wales was a colony and also a command. Considered as a colony, it was not ceded or conquered; and therefore, according to the ordinarily accepted doctrine, the Crown could not legislate for it. Yet it was not at the outset 'settled' in the ordinary sense, that is by voluntary migrants; it was set up by the Crown. Its inhabitants were at first nearly all either servants of the Crown or prisoners of the Crown.

34 *Hist. Records Aust.*, Series IV, Vol. I, 231, 285.

35 Chitty, *The Prerogatives of the Crown* (1820), 75-76; Halsbury, *Laws of England* (3rd edn.), Vol. 5, 653, Vol IX, 344.

36 See Chalmers, *Opinions* (1858), 184.

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against the background of the awful severity of English criminal law of those days and the character of the population of the proposed settlement, the penal provisions of the Charter seem less remarkable. It is noteworthy that corporal punishment might be awarded instead of death for capital felonies. Corporal punishment was usually by flogging, and some dreadful sentences were given. But the expression 'corporal punishment' did not necessarily mean flogging. Imprisonment on bread and water on Pinchgut Island in Port Jackson, for example, was a corporal punishment.[37]

The Vice-Admiralty Court

In addition to the two Courts created by the Charter, and to the jurisdiction of those persons whom the Governor should appoint as Justices of the Peace, there was to be a Vice-Admiralty Court. The first instrument by which this was to be created is dated 4th April, that is two days later than the Privy Seal warrants we have already noticed. It was an Order-in-Council directing that a commission issue under the Great Seal to authorise the Lords of the Admiralty to constitute a Court of Vice-Admiralty in New South Wales. And, on 18th April, they gave a direction for this commission for Ross, the Lieutenant-Governor designate, as Judge of 'the Vice-Admiralty Court of the Territory called New South Wales'. Then, on 5th May, by letters patent under the seal of the High Court of Admiralty, Governor Phillip and other naval officers were appointed as Commissioners, empowered to exercise Admiralty jurisdiction in respect of piracy and other criminal offences committed on the high seas.[38]

'A Stable Foundation Whereon to Erect their Little Colony'

When, on 7th February 1788, the documents had been read it seemed to Collins that 'from the different modes of administering and obtaining justice which the legislature had provided for this settlement, it is evident that great care had been taken on their setting out to furnish them with a stable foundation whereon to erect their little colony'.[39]

Mr Justice Evatt, in the paper to which I have referred, has said that 'from the very first the courts worked, ill-equipped as they often were'. This he rightly attributed to 'the common sense, courage and care of so many of the Governors and their officials'. But one remark can give rise to misunderstandings: 'In the spacious days of Eldon', he

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37 This has sometimes been assumed not to be so: *e.g.* Dr O'Brien, *op. cit.* 157. But 'corporal punishment not extending to life or limb' seems properly to mean any punishment (other than death or mutilation) which was not one of a pecuniary kind, or one having consequences affecting property. Standing in the stocks is an example. In the contemporary parlance of military law the phrase had the same meaning: Grose, *Military Antiquities* (1801), Vol. II, 106-8. It should be noted that the Act treated capital punishment as a form of corporal punishment.

38 The instruments are printed in *Hist. Records Aust.*; and see Jordan, *Admiralty Jurisdiction in New South Wales.*

39 Collins, *Account of the English Colony in New South Wales.*

said, 'the legal job of preparing for the settlement was regarded as a rush one, for they had only four years in which to perform it'.[40] Were the legal instruments really rushed or ill-prepared? Their language is precise, their purpose plain. Crown lawyers of that time could hardly fail to have in mind the legal position of colonial governors. The case in the King's Bench against Governor Mostyn had occurred in 1773.[41] And in 1774 the great case of *Campbell* v. *Hall*[42] had been heard. It was concerned with the power of the Crown to make laws for the colonies, and with the distinction between settled and conquered colonies. Both those cases had aroused much interest. The latter was argued four times; and so great was the crowd at the proceedings before Lord Mansfield that Lofft, the reporter, was hindered in taking his notes.[43] Moreover, although for some people Eldon's name is a convenient synonym for dilatoriness, the period when preparations were being made for the settlement of New South Wales can hardly be called Eldon's time. And I have not seen any statement that he was concerned with them. Then John Scott, he was still only a private member of the Commons of some four years standing. He first attained office when he became Solicitor-General in June 1788; that is more than a year after the First Fleet had sailed. He did not become Lord Chancellor until 1801. Thurlow was Chancellor in 1787. Pitt, who personally took an interest in the proposed expedition, was by then already distrustful of Thurlow. As Chancellor, Thurlow was formally concerned in the affixing of the Great Seal to the Letters Patent, but he does not appear to have been otherwise concerned or consulted. We do know, however, that Pitt consulted Camden about the draft of the Bill for the Act 27 Geo. III, c. 27, and that he replied by a letter dated 29th January 1787:

> 'Dear Pitt,
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> . . . I have looked over the draft of the Bill for establishing a summary Jurisdiction in Botany Bay. I believe such a jurisdiction in the present state of that embryo (for I can't call it either a settlement or a colony) is necessary, as the component parts of it are not of the proper stuff to make jurys in capital cases especially. However, as this is a novelty in our constitution, would it not be right to require the Court to send over to England every year a report of all the capital convictions, that we may be able to see in what manner this jurisdiction has been exercised? For I presume it is not meant to be a lasting jurisdiction; for if the colony thrives and the number of inhabitants increase one should wish to grant them trial by jury as soon as it can be done with propriety'.[44]

This letter is interesting, for in later years trial by jury, especially for criminal cases, would be most insistently demanded by many of the free settlers in New South Wales as well as by most of the emancipists. It was to become the first object of the reformers and opponents of the

40 *Australian Law Journal*, 11 (1938) 422.

41 *Mostyn* v. *Fabrigas* (1773) Cowper 161.

42 Lofft, 655; 1 Cowp. 204; *State Trials*, Vol. XX, 239.

43 Lofft, 655 at 748.

44 Quoted by J. H. Rose, *William Pitt and National Revival*, 439 and referred to by Dr O'Brien, *op. cit.* 138, where however Camden is mistakenly called the Lord Chief Justice. He never was. He was Chief Justice of the Common Pleas, 1761-1766; Lord Chancellor, 1766-1770; Lord President of the Council, 1784-1794.

Government in the Colony. The views that Lord Camden expressed in his letter are those which might have been expected of him. In the same year he, being then seventy-one, speaking in the Lords on the Excise Bill, said:

> 'I have been early tutored in the school of our constitution, as handed down by our ancestors, and I shall not easily get rid of early predilections. They still hang hovering about my heart. They are the new sprouts of an old stalk. Trial by jury *is* indeed the foundation of our free constitution; take that away and the whole fabric will soon moulder into dust. These are the sentiments of my youth — inculcated by precept, improved by experience, and warranted by example. Yet strange as it may appear to your Lordships the necessity of the case obliges me to give my assent to the present bill'.[45]

A Growing Colony — Demands for the Rights of Englishmen

No elaborate machinery was needed for the administration of the law for the 1,036 persons, men, women and children (736 being convicts) who made up the total population at the beginning.[46] But Camden had correctly foreseen that courts formed on the original model would not suffice as permanent institutions if the Colony should thrive. The population grew rapidly. Before the end of the century some 8,350 convicts in all had arrived, and free settlers also were coming in increasing numbers. With a steadily strengthening voice the colonists began to demand that their institutions be more closely assimilated to those of their Homeland. Lieutenant Tench of the Marines was another who had early foreseen that what then worked fairly well might not continue to do so. In a letter written in 1788 he said:

> 'To liken this Court to any others that we know of were impossible: Its institution is new, though its verdict is directed to be given according to the laws of England, "or as nearly as may be, allowing for the circumstances and situation of the Settlement". Were it not for this necessary and saving clause, the wisest among us would be now and then puzzled how to act; but this solver of difficulty unties every gordian knot, and levels every impediment which might otherwise obstruct the career of justice, in her most exemplary form. For how long a period it may, however, be found requisite to continue this present system, I do not take on me to determine; and how far adventurers, who may intend to settle here, will approve of it, I do know not'..

Governor Hunter saw the matter in the same light when in 1796 he wrote to the Duke of Portland:

> 'I must further add, my Lord, that I look forward with hope that the time may not be far distant when our Courts will be settled more immediately upon the plan of those in our mother country'.[47]

And in 1802 Balmain, who had come out with Phillip as Assistant-Surgeon, wrote that:

> 'When the colony was first planted the Civil and Criminal Courts of Judicature were capable of performing all that was required of them. The officers who were occasionally summoned as members (that is summoned as occasion required) were in general steady men . . . In this early stage, therefore, where difficulties seldom occurred in any of the trials, neither the Judge-Advocate or members were required to possess any intricate knowledge of the British laws; nothing

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45 Quoted in Campbell, *Lives of the Chancellors* (2nd series 1846), Vol. V, 334 footnote.

46 The figures are those given by Collins. See Dr O'Brien's analysis, *op. cit.* 279-284.

47 *Hist. Records Aust.*, Series I, Vol. I, 603.

was yet agitated in the colony that could tend to perplex their minds or warp their judgments. The people were satisfied and the ends of justice were fully answered'.[48]

But Balmain contrasted with this the conditions prevailing at the date when he was writing. Affairs were then more complex; the Colony was growing; the Courts were no longer generally respected; the officers who sat were often ignorant or inexperienced. 'The Judge-Advocate,' he urged, 'should be a man of the strictest honour and integrity, possessing a thorough knowledge of the laws of his country, and capable of conducting the duties of his office in an independent spirit'.[49] Atkins, who was Judge-Advocate when Balmain wrote, did not answer to any part of that description.

As time went on dissatisfaction grew. The officers who sat in the Courts were said to be not impartial, to be hostile to emancipists and biassed in favour of the military; and the Criminal Court seemed too like to a court martial. But this is going beyond my period. It is enough to say that up till the grant of the Charters of Justice for New South Wales and Van Diemen's Land in 1823, and indeed afterwards and until the establishment of trial by jury in the ordinary form, there were complaints that in the judicial arrangements of the Colony Englishmen abroad were being deprived of rights that Englishmen enjoyed at Home. In all this, as so often in British history, agitation for constitutional reform was not expressed as revolutionary doctrine. It was a claim to enjoy ancient rights and lawful liberties. It embodied a concept—implicit and not analysed, but basic—of the common law as the ultimate foundation of British colonial institutions, a belief that not even Parliament could properly deprive British subjects anywhere of their birthright. There was here an echo of the conflict in constitutional theory that had been important before the break up of the old Empire. Bentham's pamphlet, erroneous though it was according to the strict law of Parliamentary sovereignty and of prerogative power, yet had in parts a deeper truth. Those who said that the government and institutions of the Colony were illegal were wrong—yet, again in a deeper sense, they were right. It was not that the legal foundations of the first settlement had been insecurely laid.[50] It was that a time had come when those foundations would not support the growing weight of a British colony breathing the spirit of the common law. But, perhaps because of the Home Government's preoccupation with Napoleon and the urgent affairs of Europe, the administration of justice in the colonies got little attention in Britain in the first decade of the nineteenth century.[51] Australia was not the

48 Letter to Banks, *Hist. Records Aust.*, Series IV, Vol. I, 35.

49 *Ibid.*

50 There was one serious omission. The Admiralty neglected to issue a warrant to the Governor to convene general courts martial for the trial of officers of the Marines. But that was an impediment to military discipline rather than a limitation upon civil government. It ceased to be important after the Marine detachment left in December 1791.

51 One example is the failure to provide separate courts and effective local arrangements for the administration of law in Van Diemen's Land, despite frequent representations of the need for this. See *Hist. Records Aust.*, Series I, Vol. VIII, 584; Series I, Vol. IV, 350; Series I, Vol. VI, 516, 715.

only place neglected. The constitutional history of Newfoundland provides some marked similarities; and it has a special interest because of the part played there by Francis Forbes,[52] later to become Chief Justice of New South Wales and to be the main architect of the reconstruction of the legal institutions of the Australian colonies.

But it is time to return to the eighteenth century and to New South Wales.

The Rule of Law

The rule of law is an expression that Dicey made familiar. I do not propose to discuss his doctrine in the light of modern criticisms. I simply adopt his phrase in the sense in which he used it. In that sense it enshrines some greatnesses of our legal system. They are not principles that are inherent in the nature of law. They are a produce that English courts distilled from the ferments of past political struggles and controversies or read out of, or in to, the resulting great pronouncements from Magna Carta to the Bill of Rights. They are concepts that we owe more to history than to logic—more to Coke than to Austin. Now they lie 'in the bosom of the common law', to use Story's phrase. Thus understood, the rule of law means, among other things, that no man can lawfully be punished except for an offence against the law; that all persons, whatever their station or status, are subject to law; that all should be able freely to assert, and by the processes of law to vindicate, rights under the law. Let us see now how far these principles were recognized when the law was first administered by courts in Australia.

The records of the early proceedings of the courts have been preserved. Remembering that those who conducted them were not lawyers nor assisted by lawyers, the formality and formal correctness of the proceedings are impressive—but perhaps not surprisingly, for it was a formal age, and naval and military officers were accustomed to ceremonial observances and ordered and orderly procedures and to the niceties of eighteenth-century military law. What is surprising is the precision and care with which, in the very early days, the proceedings were recorded by men writing them down as they occurred in the camp beside Sydney Cove. Some of the early documents are reproduced in lithograph in Dr Watson's book, *The Beginnings of Government in Australia*, a book with a stirring introduction that deserves to be better known than it is. But no reproductions can fully shew the clear handwriting of many of the originals. And their formality may remind us that adherence to forms and the following of prescribed procedures are an important factor in the steady maintenance of the law and the correct administration of justice. These early court records are, as Watson well said, among the 'birth certificates of a nation'. They were long in the custody, although scarcely in the care, of the Supreme Court of New South Wales. They are now in the New South Wales archives and are housed in the Mitchell

[52] McLintock, *Establishment of Constitutional Government in Newfoundland* (1941), 33-77, 133, 134-5.

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Library. By the courtesy of Mr Richardson, Principal Librarian and Government Archivist, I have examined them so far as I have found time to do so.

The First Sittings of the Criminal Court

It is not surprising that the first court convened was the Criminal Court. It assembled on the 11th February, pursuant to a formal precept of the Governor of the previous day. The place of assembly is described as 'Head Quarters in Port Jackson'. Collins presided. The six officers who made up the Court were Hunter, Captain of the *Sirius*, two other naval officers and three officers of the Marines. They were in full uniform. The Act of Parliament constituting the Court, Collins's commission as Judge-Advocate and the Governor's precept convening the Court were read. The Court then proceeded to try a convict on a charge of 'personally abusing Benjamin Cook, Drum Major to the Detachment of Marines, and striking John West, a Drummer in the said Detachment with a Cooper's Adze, thereby putting him in Fear of his Life, and for repeatedly abusing the Centinel and other Soldiers of the Guard while in their Custody'. This charge really alleged several matters, some of them military offences rather than civil crimes. But it seems to have been treated as severable. There was nothing perfunctory about the hearing. The witnesses were sworn and gave their evidence. It is carfully recorded — mostly in narrative form, although some of the questions asked by members of the Court and the answers of the witnesses appear verbatim. The manuscript record covers nine and a half folio-size pages. The prisoner was invited to question each witness, but generally he declined to do so. He made a statement in his defence. He had been drinking, he said; a dispute had arisen, and 'the liquor began to operate'. The Court found him 'Guilty of the whole of the charge exhibited against him' and sentenced him 'to receive one Hundred and fifty Lashes on his bare back with a Cat of nine tails'.

Two other prisoners, convicts, were arraigned on the same day. One was charged with 'Detaining a Convict and forcibly taking and carrying away a certain Quantity of Bread the said Convict was carrying in a Bag on his Shoulder; to the value of two Pence'. Probably it was worth more but put at this sum because forcibly stealing goods above the value of a shilling was then in some circumstances a capital offence. The record states that 'The Court having heard the Evidence and the Prisoner's Defence, are of Opinion that he is Guilty of taking the Bread, but not Guilty of forcibly taking and carrying it away — and adjudge him to be sent and confined in Irons for the Space of one Week, on Bread and Water, on the small, white, rocky Island adjacent to this Cove'. The third prisoner, also a convict, was charged with stealing two deal planks, value ten pence. He was convicted and sentenced to fifty lashes. But the Court 'in Consequence of the Prisoner's apparent Ignorance of committing a Crime do recommend his case to the Consideration of His Excellency the Governor.' And the Governor pardoned him.

So ended the first sittings of the Criminal Court. It was not long before it was assembled again to deal with serious matters. A conspiracy to rob the stores was discovered and thefts of the public supplies occurred, notwithstanding that at that time the rations issued were adequate and the same for all. This made even the lenient Phillip think that exemplary action was needed. On the 27th February the Court sat. Four convicts were tried on charges of theft. Three of them were sentenced to death. Two were reprieved. The sentence of the third was carried out. Then on 29th February the Court sat again, this time to try cases of theft from private persons. Three convicts were charged together with the theft of 'eighteen Bottles of the Wine of Teneriffe, Value forty shillings'. One was acquitted. The other two were each found guilty of the theft of five bottles to the value of ten shillings. One was sentenced to death, but recommended to the mercy and clemency of the Governor, who pardoned him. The other was also sentenced to death but pardoned on condition of becoming exiled.[53] That, before the settlement at Norfolk Island was established, seems to have been a sentence of somewhat uncertain meaning. Two others were charged with stealing flour. One was awarded three hundred lashes, but pardoned. The other was sentenced to death, but was grimly pardoned on condition of his becoming the public executioner. Tench noted in his Journal that at the gathering on 7th February:

> '. . . the settlers were informed that four courts would occasionally be held, as the nature of the offence required:—namely, a Civil Court, a Criminal Court, a Military Court and an Admiralty Court. The settlers were then told, that nothing would draw these laws into exercise, but their own demerits; and as it was then in their power to atone to their country for all the wrongs done at home, no other admonitions than those which their own consciences would dictate, it was hoped, would be necessary to affect their happiness and prosperity in their new country.
>
> 'But such is the inveteracy of vice, that neither lenient measures, nor severe whipping operated to prevent theft: rigorous measures were therefore adopted, and after a formal trial in the Criminal Court, two men were hung in one day, and soon after two others suffered in a like way'.

There are some things which redeem the melancholy records of the criminal law. Before a man was punished for a criminal offence he was tried by a court, tried according to law and heard in his own defence. And, in the early days at least, the trials were patiently conducted. The offences charged were crimes known to the law. Sentences of death were passed only in cases of felonies that were then capital by the law of England, then in one of its most harsh periods. And very often the Governor mitigated the punishments awarded.

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53 These figures, which seem to accord with the Court's records, are given by Watson. But see Phillip's despatch to Lord Sydney, 15th May 1788: 'Your Lordship will not be surprised that I have been under the necessity of assembling a Criminal Court. Six men were condemned to death. One, who was head of the gang, was executed the same day; the others I reprieved. They are to be exiled from the settlement, and when the season permits I intend they shall be landed near the South Cape, where, by their forming connexions with the natives, some benefits may accrue to the public': *Hist. Records Aust.*, I, I, 22. This probably is intended to summarise the results of the sittings of 27th and 29th February. See too Collins, *op. cit.* (2nd edn.), 13.

THE FIRST MEETING OF THE MAGISTRATES

On 19th February the Bench of Magistrates met for the first time. Collins was there, this time in his capacity of a Justice of the Peace, and with him Augustus Alt, the Surveyor. Alt had been appointed a Justice by the Governor pursuant to the power given by his commission. Again the proceedings are carefully and fully recorded. In the first case a woman convict was charged with 'detaining a Shirt, a Pair of Trousers, and a new Frock and a Pair of Stockings' belonging to a seaman on one of the transports. The charge was dismissed after an investigation of the circumstances in which she had got the articles from him. The second case was a charge of abusing an overseer. The convict prisoner was sentenced to a hundred lashes; but, on the application of the prosecutor, the Governor forgave him. In the third and last case dealt with on the first day the prisoner was curiously charged by another convict 'with a Breach of Trust, he having entrusted to his Keeping an Animal, which Animal he (the Prisoner) made away with, contrary to his Intention without his Knowledge and contrary to Orders given to that Purpose'. The prosecutor said he had 'caught an Opossum, which he secured in a Bag for the Night—that the next Morning he delivered it to the Prisoner to take Care of for him charging him to keep it safely, as he meant to present it to the Governor — that he promised to take Care of it accordingly'. But the prisoner, it appeared, had given away the possum and the bag for a bottle of rum, which he had drunk. The Court found the prisoner 'guilty of disobedience of orders'! It seems that, breach of trust or not, he should not have exchanged the possum for rum. He was sentenced to receive a hundred lashes in the middle of the convicts' camp. The Governor, who reviewed all proceedings, minuted the record 'to receive Fifty'. So ended the first day's sittings of the Magistrates.

Thereafter Magistrates dealt regularly with minor offences, including disobedience of standing orders. They dealt also with squabbles and complaints by one convict against another. Much of their time was occupied with such matters, some of them really civil claims. No one questioned this jurisdiction. Indeed later, during the period in which the Home Government had neglected to set up courts in Van Diemen's Land, one of the duties of the Magistrates there, Governor Macquarie said, was to settle petty debts.[54] It is worth noting that what is sometimes called the first civil action tried in Victoria was really a complaint of detention of some tools, heard before Bate, the Deputy Judge-Advocate at Port Phillip, sitting as a Justice there before Collins transferred the settlement to Hobart.[55]

But let us now turn to the first true civil action brought in Australia.

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54 *Hist. Records Aust.*, Series III, Vol. I, 465, 579.

55 *Ibid.* 92, 122-3.

THE FIRST SITTINGS OF THE CIVIL COURT—THE CASE OF THE CABLES' PARCEL

The Court of Civil Judicature sat for the first time on 1st July 1788, to try an action brought by Henry Cable[56] and his wife Susannah, plaintiffs, against Duncan Sinclair, Master of the transport *Alexander*, defendant. The facts out of which the case arose are most remarkable. In 1783 Cable had been convicted at the assizes at Thetford in Norfolk of burglary or housebreaking. This, as the law then was, was a capital offence. But Henry Cable was only a youth eighteen or nineteen years old, and he was apparently not the principal in the crime. By virtue of Acts passed in 1717 and 1768,[57] transportation to America could be ordered as an alternative to the execution of the death sentence. Thus Cable was sentenced to transportation for fourteen years and imprisoned in Norwich Castle to await transportation. But the loss of the American Colonies had made transportation to America impossible. An Act of 1777[58] studiously ignored the Declaration of Independence, but it recognised its consequences by the under-statement in its preamble: 'Whereas the Punishment of Felons, and other Offenders, by transportation to his Majesty's Colonies and Plantations in America is attended with many difficulties'. The Act therefore provided that transportation might be to 'any Parts beyond the Seas whether the same be situated in America or elsewhere'. In 1784 the 'Act for the effectual Transportation of Felons and other Offenders'[59] was passed. It authorised the transportation of persons under sentence of transportation to any places overseas that the Privy Council should appoint as places to which such persons should be sent. Orders-in-Council were made on 6th December 1786 appointing 'the Eastern coast of New South Wales or some or other of the islands adjacent' as such a place. The convict passengers in the First Fleet were thus to be conveyed to a lawful destination, Botany Bay. Meanwhile Cable, and many others like him, had remained in prison in England as convicts awaiting transportation to America. He had been in Norwich Castle about a year when a young woman, Susannah Holmes,

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56 I have spelt the name 'Cable' here, as that is how it is spelt in the Court records. 'Kable' was usual later.

So far as I have been able, in the time available to me, to check this story from early sources, with the help of Mr Richardson, Principal Librarian and N.S.W. Archivist and of officers of the Mitchell Library, I have relied mainly on: the Court records; *Ralph Clark's Journal*, date, 11th March 1787; *N.S.W. Hist. Records*, Vol. I, Pt. II, 181; two of the *Bonwick Transcripts*, one an extract from the *St James's Chronicle* of 15th February 1813, the other in similar terms from the *Bury and Norwich Post* (not dated), and especially on a contemporary narrative, reprinted on pp. 246-257 of Vol. III of Shiells, *Daniel Defoe's Voyage Round the World* (1787) and there described as 'lately published in a provincial paper'. For many dates and details, I am especially indebted to Mr A. J. Gray of Sydney, who furnished me with information, the fruits of his researches and exact knowledge concerning people who came in the First Fleet.

57 4 Geo. I, c. 11, and 8 Geo. III, c. 15.

58 19 Geo. III, c. 74.

59 24 Geo. III, c. 56. The law relating to transportation for felony, in relation to clergyable and non-clergyable felonies, is often misunderstood. I summarised it in my *Lectures on Legal History* (2nd edn. rev. 1957), 73-4, 297-9. For the operation of the law in the eighteenth century see Radzinowicz, *History of English Criminal Law*, Vol. I (1948), especially 110-122.

was sentenced to transportation for some offence of larceny or of housebreaking and also imprisoned in the Castle. Henry Cable and Susannah Holmes became associated in gaol and, in February 1786, she gave birth to a son, he being the father. He was then aged twenty, she about a year older.

The story so far is pitiful, but not much out of the ordinary. It becomes so in October 1786, when the expedition to Botany Bay was being got ready. Susannah Holmes and two other female convicts were ordered to be transferred from Norwich to the hulk *Dunkirk* at Plymouth to await transportation. The three women were taken to Plymouth by one Simpson, a turnkey of the Norwich prison. Susannah had her baby with her, but the master of the *Dunkirk* refused to take the child aboard, saying that he had no authority to accept children. The mother, in great grief, was led below decks on the hulk. Simpson, the gaoler, was left with an eight months old baby in an open boat in Plymouth harbour. Moved by the mother's distress, and resentful of the heartless adherence to the letter of his orders of the master of the prison hulk, Simpson as soon as he got ashore took coach to London, nursing the child on his knee and feeding it as best he could at the inns on the journey. On arrival in London he placed the child in the care of a woman, and went off to the Home Office to urge that the convict mother should be allowed to have her baby with her. Rebuffed by clerks, he refused to leave and waited in the hall. There he accosted Lord Sydney, Secretary of State for Home Affairs, himself, as he came down the stairs; and insisted on telling him his story. Lord Sydney was sympathetic and gave instructions that the child should accompany its mother. Then, being told by the kind-hearted and emboldened Simpson that Cable, the father was still at Norwich and that he wished to marry the mother and accompany her and their child, Lord Sydney directed that he too be transferred to the *Dunkirk*. Simpson at once journeyed back to Norwich with the baby. Thence he took father and child to Plymouth. In a letter dated 16th November 1786 he wrote: 'It is with the utmost pleasure that I inform you of my safe arrival with my little charge at Plymouth; but it would require an abler pen than mine to describe the joy that the mother received her infant and her intended husband with it'. Simpson said he had travelled 'with it in my lap upwards of seven hundred miles'.[60]

The preparations for the expedition to Botany Bay went on slowly, because of Phillip's care and insistence that all arrangements should be satisfactory before sailing. But at last, in March 1787 Cable and Susannah Holmes and their child were taken from the hulk *Dunkirk* to board the transport *Friendship*, and in that vessel they sailed with the First Fleet in May 1787. The ships reached the Cape of Good Hope in October. Susannah, her child and the other women from the *Friendship* were there transferred to the *Charlotte*, to make room for livestock taken

[60] This letter is printed in Shiells, *op. cit.*

aboard. Three and a half months later Cable and his family were reunited in Australia. There, at Sydney Cove, perhaps as a result of a general exhortation to matrimony that Phillip had made in his address to the gathering on 7th February, Henry Cable and Susannah Holmes were married by the Chaplain, Richard Johnson on the 10th February 1788. Theirs was one of the five marriages that Johnson celebrated that day. The record of it appears third in his register, the third Christian marriage in Australia.

The story of Simpson, 'the humane gaoler', had got into the press in England soon after it occurred. Cable, a newspaper said, 'seems very grateful to Lord Sydney and to Mr Simpson . . . and it is hoped he may, notwithstanding his past situation, turn out a useful individual of the new community'.[61] The plight of the little family being thus known before their departure from England, some charitable persons collected the sum of twenty pounds, and with it bought clothes and other things for their use. These were made into a parcel and put in charge of Duncan Sinclair, master of the transport *Alexander*. Johnson, the Chaplain, undertook to see that they were delivered. But when the parcel was sought for after the Fleet had arrived in Australia, it was found to have been pillaged. After some months had gone and their goods had not been recovered, Henry Cable and Susannah his wife, as she now was, decided, possibly at Johnson's suggestion, to invoke the aid of the law of England. They became plaintiffs in the first civil action in Australia. They duly addressed a complaint in writing to the Judge-Advocate. Who composed and wrote the document for them I do not know. They could not write. Each signed it with a mark. It is beautifully written in a legible hand and is worth quoting in full:

'Sydney Cove
County of Cumberland
, to wit,

To David Collins Esq
Judge-Advocate in and
for the Territory of New
South Wales etc. etc. etc.

Whereas Henry Cable and his wife, ~~New Settlers of this place,~~ had before they left England a Certain parcel shipped on Board the Alexander Transport, Duncan Sinclair Master, Consisting of Cloaths and several other Articles suitable for their present Situation, which were collected and bought at the Expense of many charitably disposed Persons for the use of the said Henry Cable, his wife and Child—Several applications has been made for the express purpose of obtaining the said parcel from the Master of the Alexander now lying at this port, and that without effect (save and except) a small part of the said parcel containing a few Books—The residue and remainder which is of some Considerable Value still remains on Board the said Ship Alexander the Master of which seems to be very Neglectful in not Causing the same to be Delivered to its respective owners as aforesaid—Henry Cable and Susannah Cable his wife most humbly prays you will be plea'd forthwith to Cause the said Duncan Sinclair, Master of the Alexander aforesaid, to appear before you to show Cause why the Remaining Parcel is not duly and Truly delivered in that ample and beneficial

61 Shiells, *op. cit.*

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a manner as is Customary in the delivering of Goods—And also humb'y prays you will in Default of the Parcel not being forthcoming take and use such Lawful and Legal means for the recovery or value thereof as your Honour shall think most expedient.

Signed by the Hands of the said Henry Cable and Susannah Cable his wife this the First Day of July in the year of our Lord. 1788.

his
Henry x Cable
mark

her
Susannah x Cable
mark

The plaintiffs, being convicts under sentence for a felony, were really not competent to bring a civil action. That was at that time an established rule of English law. No doubt, that is why they are not described as convicts, but as 'new settlers of this place'. The words have been struck out. Someone must have thought they ought not to stand. But no other description was substituted, and in the record of the proceedings Cable is described as 'Henry Cable, Labourer'. So that, his disqualification not being apparent on the face of the record, the Court need not take notice of it. The words 'new settlers of this place' are pleasing and interesting: for did not the common law say that such persons carry the law with them?

And what was 'this place'? Look at the top left hand corner of the document: 'Sydney Cove, County of Cumberland, to wit,'. That phrase is most striking. It is there because of technical rules about laying the venue in civil actions, rules that had their origin in the Middle Ages.[62] To omit a statement of the venue made a pleading defective; and in England all legal transactions were ordinarily said to have occurred in some County of the Kingdom. A centuries old, but by then largely formal and technical, rule of English legal procedure had come to New South Wales. The Governor had given the name 'County of Cumberland' to the district round Sydney on the 4th June 1788, the King's birthday, less than a month that is, before the Cables signed their complaint. And the Governor reported that he had done so 'as it is necessary in public acts to name the County'.[63]

The Court, consisting of Collins, the Judge-Advocate, Johnson, the Chaplain, and White, the Surgeon, assembled on the 1st July, the same day as the date on the complaint. The Letters Patent constituting the Court were read, then the Governor's order for its assembling and his appointment of its members. The Court was duly sworn. Cable appeared with his complaint and made an affidavit as to the value of the missing parcel, which he fixed at fifteen pounds or thereabouts. The Court thereupon issued its warrant, signed and sealed by the Judge-Advocate,

62 The history of this matter is conveniently summarised in *Tomlin's Law Dictionary* under 'venue'.

63 Phillip to Nepean, 9th July 1788, *Hist. Records Aust.*, Series I, Vol. I, 58.

requiring the Provost-Marshal to bring the defendant before the Court next day. After a further adjournment, the Provost-Marshal brought the defendant before the Court at 4 o'clock on the afternoon of Saturday, 5th July. The complaint was read to him 'and he joined issue on the business'. The witnesses, whose depositions appear in the record, were the First Mate and the steward of the *Alexander* and John Hunter, Captain of the *Sirius*. It appeared that the parcel had been received on board the *Alexander* addressed to Susannah Holmes, that it weighed about twenty-five pounds and was placed in the gun-room, that between Teneriffe and Rio de Janeiro it was, with other parcels, put down the scuttle to the after-hold, to which various persons had access from time to time. It was asked for at the Cape of Good Hope by Hunter, who had been instructed by Phillip to inquire for it. He was told by the defendant that 'the after-hold was in such a lumbered state it was almost impossible to look in it, and he, Hunter, had told Captain Sinclair that as long as the parcel was safe it was very well and to deliver it at Botany Bay'. The defendant did not give evidence and 'the Court found a verdict for the Plaintiff to the value stated by him in the complaint'.

A lawyer may perhaps find some things to criticize. Perhaps the Cables should have had their action summarily dismissed as they were convicts. But the law of England was introduced only so far as it was suitable for the circumstances of the settlement; and to have applied in New South Wales the strict rule that a felon convict could not sue would have left the Court with few suitors.[64] Perhaps Johnson should not have sat as a member of the Court, for he had a personal knowledge of the matter and a desire that the sympathy and charity which he had helped to arouse should not entirely miscarry; and he may have advised the Cables to bring the action. We may, however, overlook these objections—they were not made at the time—and feel glad that the Court and the civil law had made a good beginning. The plaintiffs were young. They were uneducated. Their station in life was a humble one, and they were serving a sentence for a crime. They might have expected humiliation, rather than help. The defendant on the other hand was a person of importance, the master of a vessel about to leave Port Jackson. The proceedings of the Court were a vindication of the rule of law.

Johnson wrote: 'I am sorry this charitable intention and action has been brought to this disagreeable issue, the more so because the public seemed to be so much interested in their welfare. The child is still living, of a weakly constitution, but a fine boy'.[65] In fact, he grew up and lived

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64 The rule that convicts could not sue was a constant source of difficulty in New South Wales later, especially after the decision in *Bullock* v. *Dodds* (1819) 2 B. & Ald. 257. It was often ignored or evaded by various technicalities, *Hist. Records Aust.*, Series IV, Vol. I, 419-422, 423-4, 483-4; Series I, Vol. IX, 820.

65 *N.S.W. Hist. Records*, Vol. I, Pt. 2, 181. The child was baptised by Johnson and named Henry on 5th December 1788. Henry Cable, the father, died in 1846 aged 82. His wife Susannah had died earlier in 1825. They were buried at St Matthew's, Windsor. Henry the son died in 1852 aged 66, and was buried at The Oaks, near Camden: information supplied by Mr Gray.

to a good age. His parents had a number of other children. Had Johnson known the future he would have felt little concern for the material welfare of the family. Kable, as his name was later usually spelt, prospered greatly in New South Wales. First, he was made a constable. And later, when the period of his sentence had expired, as shipowner, as a merchant in partnership at one period with Underwood and Lord, and as a brewer, he played a notable part in the early economic history of the Colony. And he came into the events leading up to the insurrection against Bligh. Waterhouse, in a letter to Banks, said of Lord, Underwood and Kable:

> 'These persons fitted up a kind of Naval Yard where they built vessels as large as 80 tons burthen which they employed in the seal fishery, in bringing Grain from the River Hawkesbury, coals from a settlement called Newcastle. I am informed they have each handsome houses at Sydney, keep their Gig, with saddle horses for themselves and friends, have two sorts of Wine, and that of the best quality on their Tables at dinner'.[66]

In the days of his prosperity Kable was a litigant in cases arising out of large mercantile transactions, very different matters from his first brave claim for the loss of the parcel. In one case, John Harris and Charles McLaren sued Kable and James Underwood as guarantors of a bill drawn by Lord. On 30th July 1811 the plaintiffs had a verdict for £3,974 and costs £2/4/4. Kable and Underwood appealed to the Governor, who confirmed the verdict. They were given leave to appeal to the Privy Council; but ultimately they did not prosecute the appeal, and on the 10th February 1813 it was dismissed.[67]

The legal tradition to which the Civil Court had worthily adhered at the outset continued, on the whole, to guide it during its first decade. The cases heard were very various. They included actions to recover penalties under a statute, for assaults, for libel.[68] In some cases there was an adherence to technicalities of the kind that in those days governed actions at law in England and which too often impeded the course of justice there. For example, in 1792 one Davenny was sued for damages because it was alleged that he had assaulted the plaintiff, who was 'employed in the Watch established for the preservation of the peace at Toongabbie', and had broken his jaw. As soon as the declaration was read, the defendant pleaded in abatement a misnomer, his name being Thomas Davenny not Stephen Davenny, the name in which he was sued. The Court upheld the objection and discharged the defendant out of the custody of the Provost-Marshal.

On the 20th July 1790 the Court made a grant of letters of administration. This is said to have been the first exercise of its probate jurisdiction. The supporting documents are marked by care and regularity.

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66 In the *Banks Papers* (in the Mitchell Library, Sydney), Vol. IV, 273-4.

67 The records are among the papers removed from the Supreme Court to the New South Wales Archives, housed in the Mitchell Library, and commonly referred to as 'the Supreme Court papers' although they relate of course to the period before the foundation of the first Supreme Court.

68 The Court records seem to be complete for this period. But they are not yet indexed or calendared sufficiently to permit of complete analysis.

The Court on that occasion was constituted by two members: Collins, the Judge-Advocate and Johnson, the Chaplain, an appropriate member when the Court exercised ecclesiastical jurisdiction.

The First Appeal

The Letters Patent, it will be remembered, provided for an appeal to the Governor from judgments of the Civil Court. This has been spoken of as a remarkable provision. It was, however, based on the ordinary rule in British colonies at that time.[69] In New South Wales the first case in which there was an appeal to the Governor seems to have been *Boston v. Laycock and others*, an action for assault. The story of this is fairly well-known.

The assault complained of in the action arose out of a squabble about the shooting of a pig belonging to the plaintiff which, contrary to standing orders, was abroad without a ring on its nose. The record of the trial covers many pages of manuscript. Printed in the *Historical Records*, it occupies nearly forty pages of close small print.[70] The plaintiff was a free settler, the defendants were Laycock, who was the quartermaster, an ensign and two privates, Faithful and Eddy, of the New South Wales Corps, which had succeeded the detachment of Marines as the garrison of the Colony. The Court consisted of Collins, Balmain and George Johnstone, then a captain in the New South Wales Corps. After a six day hearing they found a verdict for the plaintiff against two of the defendants, Laycock and Faithful, and ordered that each pay the plaintiff twenty shillings as damages. Faithful was instigated to appeal to the Governor. His supporters felt aggrieved. He said he had merely acted as a soldier in obedience to the orders of his superior. He filed a memorial in support of his appeal. Governor Hunter took exception to some of the language of this document, and said so:

> 'The language of this part of the memorial is in my judgment extremely indecent and not consistent with that respect which is due to a Court of law and justice:—Its members are here directly accused of not having been governed in their proceedings by true discretion, sound prudence, or being guided by the established customs of law and equity; these accusations I concede to be of a serious nature and a direct contempt to that Court, which I think would scarcely have been allowed to pass unnoticed in any Court of law in Great Britain; the members of that Court are not however disposed to pay any attention to this

69 It would have been remarkable if at that time the very small settlement in New South Wales had been given legal institutions differing much from those of the other colonies Britain then had. The general rule was that a colonial Governor was Chancellor of his province with the same jurisdiction there as the Lord Chancellor in England; he was often also the Ordinary, with power to grant probates; and he presided in the Court of Errors to hear appeals from the colonial courts. The judges in a colonial Court of Errors were ordinarily the Governor of the Colony and the members of his Council, but there was no Council in New South Wales. The arrangement—by which 'the decision of a regular bred lawyer comes upon appeal before a military officer and a small number of gentlemen, who, though highly honourable and intelligent labour under the disadvantage of the want of a professional education'—caused dissatisfaction in most colonies: Clark, *Colonial Law* (1834), a most useful book, pp. 31-33; and see Stokes, *British Colonies*, 222-231; Chitty, *Prerogatives*, 36; Howard, *Laws of the British Colonies* (1827), introduction *et passim*.

70 *Hist. Records Aust.*, Series I, Vol. I, 604-643.

mark of contempt from the person whose memorial it is. I have therefore judged it necessary to remark it. It would in my opinion have answered every end the memorialist could have had in view to have declared that his mind was not satisfied with the verdict found by that Court, assigning in the language of moderation, his reasons for claiming his right of appealing from the sentence to a higher Court. . . .'

'In the meantime I have to observe upon the soldier feeling himself cast from under the protection of the law by a confirmation of the verdict already given, that this opinion of the appellant is founded in total ignorance of the British Constitution and Laws, because the soldier ought to know, that he is as much and as safely under the protection of the laws by which we are governed in this country as any man or description of men within its limits, and although, the soldiers as well as the seamen in His Majesty's Service are subject in their respective characters as soldiers and seamen to martial law, they are nevertheless amenable to the civil power in all matters cognizable by that power—no man within this Colony can be put out of the power or lose the protection of the laws under which we live, from the meanest of His Majesty's subjects up to the Commander-in-Chief or first Magistrate, we are all equally amenable to and protected by the laws.

'I hope and trust most confidently that the civil power will be found at all times in this as in our Mother Country to have the energy sufficient for the protection of the person and property of all who reside within this part of His Majesty's Dominions'.

Whether you think the Governor's language eloquent or merely sententious, this was sound sense, and is well worth recalling. There are today people who think that their conduct should not be judged by the standards applied to the ordinary citizen, or by the ordinary courts of law, and who are ready to disparage those courts. But today they are usually not soldiers. In dismissing the appeal the Governor explained, carefully and plainly, that the appellant and his friends had mistaken the issue. It was not whether shooting the pig was lawful, but whether the assault was justified: the sum given as damages was not for the loss of the pig, but as compensation for the assault. The Court's decision, he said, was not only justified but lenient.

On another occasion Governor Hunter again gave a lesson in constitutional propriety. He had been unnecessarily summoned as a witness in a civil action, one of the parties perhaps hoping to embarrass him in the event of an appeal. Dore presided as Judge-Advocate — the first lawyer to hold the office.[71] The Governor came to the Court and addressed it, reading from a paper, as follows:

'In consequence of a summons which I yesterday received from Mr Dore in person I have appeared here as a mark of that respect which is due from every inhabitant of the Colony to our Court of Law. But I cannot help expressing my great astonishment at being called here on the present occasion—a contention between two men whose private concerns I am equally ignorant of . . . I appeal to the professional knowledge of the Judge-Advocate, how far it may be thought right and proper that the chief executive authority in all matters of a Criminal Nature and the person to whom in all matters of a Civil Nature an appeal may be had by the party dissatisfied with the verdict of the Court—can with propriety be called forward as an evidence upon every trivial occasion . . .'

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71 Collins left for England in 1796. Dore arrived in 1798 but died in 1800.

Dore agreed that he could not properly summon the Governor and explained that he had not intended to do so, and the matter passed off.[72]

The End of the First Chapter

I have now said something of the first proceedings in each of the Courts established by the First Charter of Justice, enough I hope to shew that the Courts began well, not questioning that their task was to do justice according to law—according, that is, to the law of England that the settlers had brought with them. There were departures from the rule of law later. They were serious sometimes, especially in the time of Bligh and the interregnum. But the significant thing is that they provoked criticism and complaint; and that in itself shewed the strength and resilience of fundamental principles of law and justice.

One issue had later to be determined. That was the relation between the executive and the law, between the Governor and the Judges. It was at the back of the disputes in New South Wales between Macquarie and the two Bents, and between Darling and Forbes, John Stephen and Dowling; and in Tasmania between Denison and Pedder. In each of these episodes there were echoes of the strife of greater occasions in our history. In the noise of these small bickerings in the Australian Colonies we can catch the voice of Coke, quoting Bracton in insistence that the King is subject to the law. But we ought not, as lawyers, to espouse too readily one side in these disputes. There were personal antipathies and interests as well as principles, involved. Lawyers sometimes resort to pedantry and repeat shibboleths. In insisting that courts are constituted to uphold the law and in asserting the dominance of law, they have forgotten sometimes that courts themselves are instruments of government, although judges are not the servants of the Government. Without finding it necessary to use the lofty language of Roman Law or of moral philosophy, charters of British colonial policy commonly stated the purposes of law as the 'peace, order, welfare and good government' of the territory. When it was decided to set up a 'colony and civil government' in Australia the first institutions to be created were courts of justice.

You will have noticed how often in this lecture I have mentioned Collins. Some Australian historians have been a little grudging in their recognition of him. They have reproached him for indecision and suggested he displayed a mildness of character that did not accord with robust leadership. I assume, however, that no one in this audience thinks it shewed lack of judgment to abandon Port Phillip in favour of Hobart! In this State he is remembered as the Lieutenant-Governor in the early days of Van Diemen's Land. But it is not for that, nor for

72 This episode occurred on 27th May 1799. The full record is in the papers from the Supreme Court now in the Mitchell Library. Relations between Hunter and Dore were strained for most of the time he was Judge-Advocate.

his long and distinguished service as an officer of Marines, nor as one of the first historians of Australia, that I have called him to your minds tonight. It is as David Collins Esquire, the patient, careful Judge-Advocate of New South Wales, the first man to administer the law of England on this Continent.

Postscript — 9 Geo. IV, c. 83, s. 24

I may add a note on 9 Geo. IV, c. 83, s. 24. As I have already said, it did not introduce the law of England to Australia, for it was already here. The only question was how much of it was here.

The generally accepted rule of the common law is that statutes of the British Parliament passed after the foundation of a colony do not apply there unless expressly or by necessary implication made to do so. The doctrine was logical enough. But it seemed to assume that there was some authority in the colony competent to legislate there, to adopt reforms and in other ways to modify the law that the first colonists had brought. There was therefore another view; one that had had some acceptance in some of the American Colonies. It was that statutes passed by the British Parliament, after the foundation of a colony and before it got a legislature of its own, came into force, provided they were applicable to the circumstances of the colony. Forbes, who became Chief Justice of New South Wales in 1824, took this view. He stated it, learnedly and lucidly, in reports to the Colonial Office in 1826 and 1827.[73] Proposals for reforms, based on experience of the working of the Supreme Court, which had been constituted by the Charter of Justice of 1823, were then under consideration. They were to result in 1828 in the Act 9 Geo. IV, c. 83. Forbes was largely responsible for its form; and section 24 was his devising. On 12th November 1827 he wrote:

> 'It has been assumed both in framing the first act and the new bill, that the laws of England are the laws of New South Wales, so far as they could be (physically) applied. In affirmance of this doctrine, I inserted the clause in the new bill. I have annexed to the draft, I sent home, the particular reasons I had for wishing such a clause to be inserted. Since the clause has been adopted, I beg to offer a few popular reasons for it. Every man, who has read Blackstone's Commentaries, knows that it is laid down as a given proposition, that the English laws in force, at the time of a British Colony "being planted", are in force in the Colony as the birthright of the subject (vol. I, page 107). But what may be the true epoch, at which to fix this planting or settling of a Colony, is not quite so clear. In all the older Colonies of the British Crown in America, it was held to be from the time of a local legislature being established within the Colony; until such time, the Colony was held not to be fully settled; not having within itself the elements of a legislative function, it was still considered as within the care of Parliament, and entitled to receive the benefit of all the municipal laws of the mother country. I have several printed cases of decisions incidentally recognizing this general principle in the Colonies, but, as they are not usually to be met with, I must refer you to a work in which you will find it laid down as a fundamental maxim in the older Colonies (Pownall on the Administration of the Colonies, page 127). That many difficulties will present themselves upon this branch of the law, I am fully aware of'.[74]

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[73] *Hist. Records Aust.*, Series IV, Vol. I, 649, 746-7.

[74] *Ibid.* 746.

As it was drawn by Forbes, the clause would have brought into force in Australia English law as it existed in 1823, the date when, pursuant to 4 Geo. IV, c. 96, Legislative Councils were constituted for New South Wales and Van Diemen's Land. But, when enacted as section 24, the decisive date was made, not 1823, but the date of passing of 9 Geo. IV, c. 83, namely, 25th July 1828. This was done deliberately—and, as was explained to the Governor of New South Wales, 'at the expense perhaps of theoretical accuracy'—in order to bring into force in New South Wales and Van Diemen's Land the reforms mitigating the harshness of the criminal law made by Peel's Acts. 'In order that the inhabitants may have the benefit of the great improvements which have recently been made by Parliament in the criminal law of England', the despatch said.[75] The law of England as it existed in 1828 thus came into force—but only so far as it 'can be applied in the said Colonies'. These words were to cause difficulties. Forbes thought them the equivalent of Blackstone's statement that colonists carry with them 'so much of the English law as is applicable to their new situation and the condition of an infant colony'. But Alfred Stephen, who was in Tasmania at the time the Act came into operation, writing on the matter later said that 'the enactment substitutes another and novel test', and 'with very great respect to the proposers, the writer ventures to suggest his apprehension that the clause has introduced more evils, if not more difficulties, than any which it was meant to remedy'.[76] He seems to have thought of it as another example of the intrusion by that tyrant a statute upon the peaceful life of the nursing mother, the common law. After years of fluctuating judicial opinion, it is now established that the test of whether any particular rule of English law was introduced, is whether it was as a whole suitable to the condition of the Colony in 1828, and capable of being reasonably applied there.[77] This, in substance, seems to have been the way in which Forbes had always interpreted the enactment that he had drafted; for in 1836 he said of section 24:

> 'This clause in the New South Wales Act has been the fertile subject of comment and the Court is frequently called upon to treat it as one quite new in principle and peculiar in its provisions, but it is neither new nor peculiar; it is affirmative of the text law as it is laid down by Sir William Blackstone and other elementary writers—and as it has been received and acted upon in the Courts of England—at least ever since the resolutions of the Privy Council in 1722'.[78]

For residents of New South Wales, Tasmania, Victoria and Queensland, section 24 of Geo. IV, c. 83 is thus of critical importance today. South Australia was not founded till 1836,[79] and now dates its reception

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75 See Murray to Darling, *Hist. Records Aust.*, Series I, Vol. XIV, 268. For Peel's reforms see Radzinowicz, *op. cit.* 567-607.

76 Stephen, *Constitution, Rules and Practice of the Supreme Court of New South Wales* (1843), 79-82.

77 *Quan Yick* v. *Hinds* (1905) 2 C.L.R. 345; *cf. Delohery* v. *Permanent Trustee Co.* (1904) 1 C.L.R. 283; *Mitchell* v. *Scales* (1907) 5 C.L.R. 405.

78 R. v. *Maloney* (1836) 1 Legge 74. As to the question in that case see now *Quick* v. *Quick* (otherwise *O'Connell*) (1953) V.L.R. 224 at 241.

79 See 4 & 5 Wm. IV, c. 95.

of English law from 28th December 1836.[80] But, as Mr R. W. Baker has pointed out,[81] it could have been argued, if ever it had become necessary to do so, that anyone who was in South Australia before 1836 was in fact subject to the English law introduced into New South Wales in 1828, because until the establishment of South Australia the territory of New South Wales extended to the 135th degree of East longitude. Western Australia was founded in 1829.[82] Without any statutory enactment, the law of England was immediately in force there according to the common law principle that colonists carry the law with them. And, as I have said, it was really that principle, aided and recognized by the Act 27 Geo. III, c. 2 and the First Charter of Justice, that brought the law of England to eastern Australia with the First Fleet.

80 Acts Interpretation Act (S.A.) 1915, s. 48; and see 4 & 5 Wm. IV, c. 95, s. 1.

81 *Australian Law Journal*, 23 (1949) 192.

82 See 10 Geo. IV, c. 22 and Order-in-Council of 1st November 1830.

Evolutionary development of British law in Australia by BRUCE KERCHER (2015)

Australian Courts Act 1828 (imp.), s 24: says that all the laws and statutes in force in England in July 1828 were to be applied in NSW and VDL "so far as the same can be applied within the said Colonies". This was the official origin of all laws in eastern Australia (NSW, Tas, Vic, Qld and ACT). It was meant to be the same as the common law rule on reception of English law (which used the word applicable), but with a new date of reception, 1828 rather than the generally (not universally) accepted date of settlement of each colony. Common law reception applies in WA, SA, NT. *Macdonald v. Levy* 1833 shows that there was debate over the meaning of the words. The debate lasted until late in the 20th century.

This meant that in the early colonies the vast bulk of English law arrived in theory as well as practice: there is no doubt about such basics as murder, trespass, common law method etc.

But no matter how zealous people were about applying English law, there were social and political differences which made the reception of the entirety of English law impossible and the creation of new law unavoidable. Its Australian colonies were not England: there was no resident aristocracy owning the bulk of the land, no professional judges in the first generation, a strong Irish and Scottish presence, a society of convicts in NSW and VDL, and an absence of currency for a generation. Most importantly there was a presence of Aborigines. Grace Karskens' brilliant book, *The Colony*, shows that Aborigines were within the colony, in the towns, and not just on the edges. Given all of that, it was impossible to bring in the whole of English law in unadulterated form. Examples of new laws include the registration of land law contracts, and complex rules on who could make and enforce promissory notes. These were created by the interaction of formal and informal law, with some law going from below to above.

There was a major change to the structure of law in NSW and VDL in 1824: this included fully professional courts, the first legislatures, and professional barristers. Amateurism ended, but not differences in law. The reception formula allowed flexibility, so there were split judicial decisions in *Macdonald v. Levy* (on the applicability of usury laws) and *R. v. Maloney* 1836 (marriage Act). Behind these judgments were conflicting judicial attitudes to reception of law: some wanted colonies to be miniature Englands (Burton), while others saw English law as a fund to be used to develop suitable laws for the colonies when it suited their needs (Forbes).

Even after 1824, the English government continued to allow differences between colonial and metropolitan law: James Stephen jnr of the colonial office told Francis Forbes that it was only necessary to retain a family familiarity between colonial and English legislation. (Under the 1824 changes, the colony's legislation was not to be repugnant to English law, and Forbes as CJ, had to certify its non-repugnancy.)

As the 19th century progressed, Forbes' attitude to reception of law lost out to the view of Burton. Reception decisions tended to favour English law regardless of its suitability. Professional judges were increasingly likely to lead to replicas of English law. The Judicial Committee of the Privy Council, which heard final appeals in civil and later criminal matters, began to provide written reasons and to demand uniformity of law. In *Trimble v. Hill* (1879) 5 App. Cas. 342 at 345, it declared that it was "of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the courts should be as nearly as possible the same".

Colonial legislation went the opposite way: as the 19th century progressed, it diverged further from English law. This local innovation was reinforced by responsible government and the *Colonial Laws Validity Act* 1865 (imp). The latter abolished requirement that colonial law was not to be repugnant to English law. However even after then, imperial parliament could pass statutes to be in force in any colony, through paramount force. The parliament at Westminster could change colonial law whenever it chose, either directly by its own statute, or by giving power to a colonial parliament to do so.

This is what it meant to be a colony in late 19th century:
. imperial parliament could impose law on a colony, which colonial parliaments could not override even under CLVA.
. colonial legislation required the assent of the British crown, meaning the British government,

. and the colonial courts were subject to over-ruling by an English tribunal, the Judicial Committee of the Privy Council.

During the course of the nineteenth century and into the twentieth, imperial parliament slowly allowed more power to rest in the hands of colonial legislatures, courts and governments. There were two major steps: federation and the *Australia Acts* of 1986 which finally ended all British controls over Australian law. Only in 1986 did the colonial period finally end. As you know, the *Australia Acts* provided that the British government had no more control over Australia, that the UK parliament would not attempt to change Australian law in future, and that there would be no more appeals to the Privy Council, in London.

Historiography: Three approaches succeeded one another.
First, strict legal approach of Currey etc, which assumed that common law/statutory rules told all we needed, top down, a pyramid.
Secondly, from about 1980s onwards legal historians paying close attention to colonial archives showed that individual colonies diverged from the expected pattern, that they invented own laws etc. People noticed in one colony after another that the formal laws of reception were often prescriptions rather than descriptions of legal behaviour. Alex Castles found that VDL law differed more than it should have, as did I for NSW. The same occurred in many North American colonies. Social history influenced legal history. Some legal ideas went upwards.
Thirdly, in last 10 years, there has been a concentration on the empire wide circulation of legal ideas, which sometimes went from one colony to another. There was a common pattern across the empire. One example is Stuart Banner's *Possessing the Pacific*, which is a study of the interaction of common law and native notions of land holding. Together legal historians are now writing a collective history of the British legal empire. The best image, I think, is of a spider's web rather than a pyramid. Under the pyramid theory of reception all law trickled down from an English above. The spider's web has it that London was at the centre of the empire, but that legal ideas often travelled from one colony to another, and even from the colonial outside to the imperial centre. Judges moved around the empire, from one colony to another, and so did legal ideas.
As yet, there is no single volume which attempts to provide a contextual history of the common law across all jurisdictions. It should be possible. In 2011, Diarmaid MacCulloch published a book called *Christianity: The First Three Thousand Years*. It is a contextual history of the ideas of Christianity across the world. MacCulloch is Oxford's Professor of the History of the Church. An Anglican priest, he describes himself as a friend of Christianity rather than its advocate or apologist. I think that is just the attitude which Law School based legal historians might take. Not so much the friendship, but the understanding and willingness to step outside legal doctrine, to see its malign as well as benign influences. We don't yet have a legal history book like that by MacCulloch, but he or she might be at work somewhere in the common law world, getting ready to provide a general account of the spread of common law ideas around the world.

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TURNING POINTS IN AUSTRALIAN LEGAL HISTORY (NSW)

- Foundational influence of colonisation by government (Australia) as distinct from colonisation by Royal Charter (USA).
- 1788- 1856: Ambiguous foundations in a penal colony, where courts served as an expression of democracy and trial by jury was a democratic right to be won.

    (a) 1787: Letters Patent, known as "The First Charter of Justice", created both a "Court of Criminal Jurisdiction" and a "Court of Civil Jurisdiction" presided over by (Deputy) Judge Advocate.

    (b) 1808-1809: Rum Rebellion. Governor Lachlan Macquarie takes office in NSW, 1810.

    (c) 1814: Letters Patent, known as "The Second Charter of Justice", replaced the Court of Civil Jurisdiction with a "Governor's Court" (exercising summary jurisdiction) and a "Supreme Court" (constituted by a Judge and two Justices of the Peace).

    (d) 1818-1823: Bigge Commission, with three reports published in 1822-1823.

    (e) *New South Wales Act* 1823 (Imp): 4 George IV chapter 96: Foundation for new Supreme Court, and (appointed) Legislative Council.

    (f) 1824: Letters Patent, known as "The Third Charter of Justice", proclaimed in Sydney, establishing Supreme Court of NSW (as still constituted).

    (g) *Australian Courts Act* 1828 (Imp): 9 George IV chapter 83: Fixed 25 July 1828 as date of reception of English law in NSW.

    (h) 1840: Transportation stopped.

    (i) *Administration of Justice Act* 1840 (NSW): Circuit Courts; Equity Judge

    (j) *Australian Constitutions Act*, 1842 (Imp): Introduced limited representative government.

    (k) *Australian Constitutions Act* 1850 (Imp): Liberalised elective franchise and authorised preparation of a colonial constitution.

    (l) *New South Wales Constitution Act* 1855 (Imp): establishment of a bicameral legislature and introduction of responsible government.

    (m) 1856: Election of first Parliament and Premier of NSW.

- Sir James Stephen (1789-1859), the Colonial Office, Empire and Australia's debts to India and Canada in particular: Stephen was the civil servant primarily responsible for establishment of Colonial Office, 1813-1847.

- Reception of English Law: the Privy Council; *Blackstone's Commentaries on the Laws of England* (1st ed, 1765-1769); Bentham's *Plea for a Constitution in New South Wales* (1803); *New South Wales Act* 1823 (Imp); *Australian Courts Act* 1828 (Imp); *Imperial Acts Application Act* 1969 (NSW).

- 1838-1839: Massacres of Aborigines at Waterloo Creek and Myall Creek. Trials for murders at Myall Creek: *R v Kilmeister* (1838) and *R v Lamb, Toulouse and Palliser* (1839). Controversy associated with trials may have been a factor in failure of authorities to prosecute any person for Waterloo Creek Massacre.

- *Attorney-General v Brown* (1847) 1 Legge 312: NSW Supreme Court ruled that local property law was governed by English feudal principles.

- 1810-1856: A "Constitution" emerges: Establishment of a court independent of Executive Government. Progress from "representative government" to "responsible" self government: *New South Wales Act* 1823 (Imp); *Australian Constitutions Act* 1842 (Imp); *Australian Constitutions Act* 1850 (Imp); *New South Wales Constitution Act* 1855 (Imp).

- The *Colonial Laws Validity Act* 1865 (Imp).

- Federation, 1901.

- *Statute of Westminster*, 1931 (Imp). Adopted by Australia, 1942.

- World War II liberates Britain from "Empire" and transitions "Home" and "Colonial" legal systems alike.

- High Court of Australia frees itself of House of Lords precedents: *Parker v The Queen* (1963) 111 CLR 610 at 632-633; cf Privy Council at 665.

- 1965: Growing restrictions on trial by jury, as NSW moves to Judicature Act system of court administration, with *Supreme Court Act* 1970, proclaimed 1 July 1972.

- 1968-1986: Restriction of Privy Council appeals.

- 3 March 1986 5am (Greenwich Mean Time): The *Australia Acts* 1986 (Imp/Cth) proclaimed: Formal end of Imperial British sovereignty over Australia; High Court of Australia becomes nation's ultimate appellate court.

- *Mabo v Queensland [No 2]* (1992) 175 CLR 1 – a departure from legal fiction of "Feudalism" in Australia, and a new "nation" without empty spaces?

Court structure in colonial NSW: 1788 -1814

Privy Council
- Where amount exceeded £300

Court of Appeals
- First Charter of Justice
- Governor sitting alone

Governor
- Had to ratify sentences of death

High Court of Admiralty

Court of Civil Jurisdiction
- First Charter of Justice
- Deputy Judge-Advocate & two 'fit & proper persons' (assessors)

Court of Criminal Jurisdiction
- (1787) 27 Geo III, c 2 & First Charter of Justice
- Deputy Judge-Advocate & six officers
- Only sentences were death or flogging

Vice Admiralty Court
- Letters patent May and April 1787

Magistrates (JPs)
Petty civil and criminal (not well defined)
Committal for trial

Compiled by Larissa Reid, October 2014.

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Court structure in colonial NSW: <u>1814 - 1824</u>

Privy Council
Limited appeal where the claim exceeded £3000 and the appellant would give a security of twice the amount claimed

Court of Appeals
- Second Charter of Justice
- Governor & Judge Advocate
- Decision was final up to £3000

Governor
Had to ratify sentences of death

High Court of Admiralty

Supreme Court of Civil Judicature
- Second Charter of Justice
- Judge & two lay magistrates

Court of Criminal Jurisdiction
- (1787) 27 Geo III, c 2 & First Charter of Justice
- Deputy Judge-Advocate & six officers

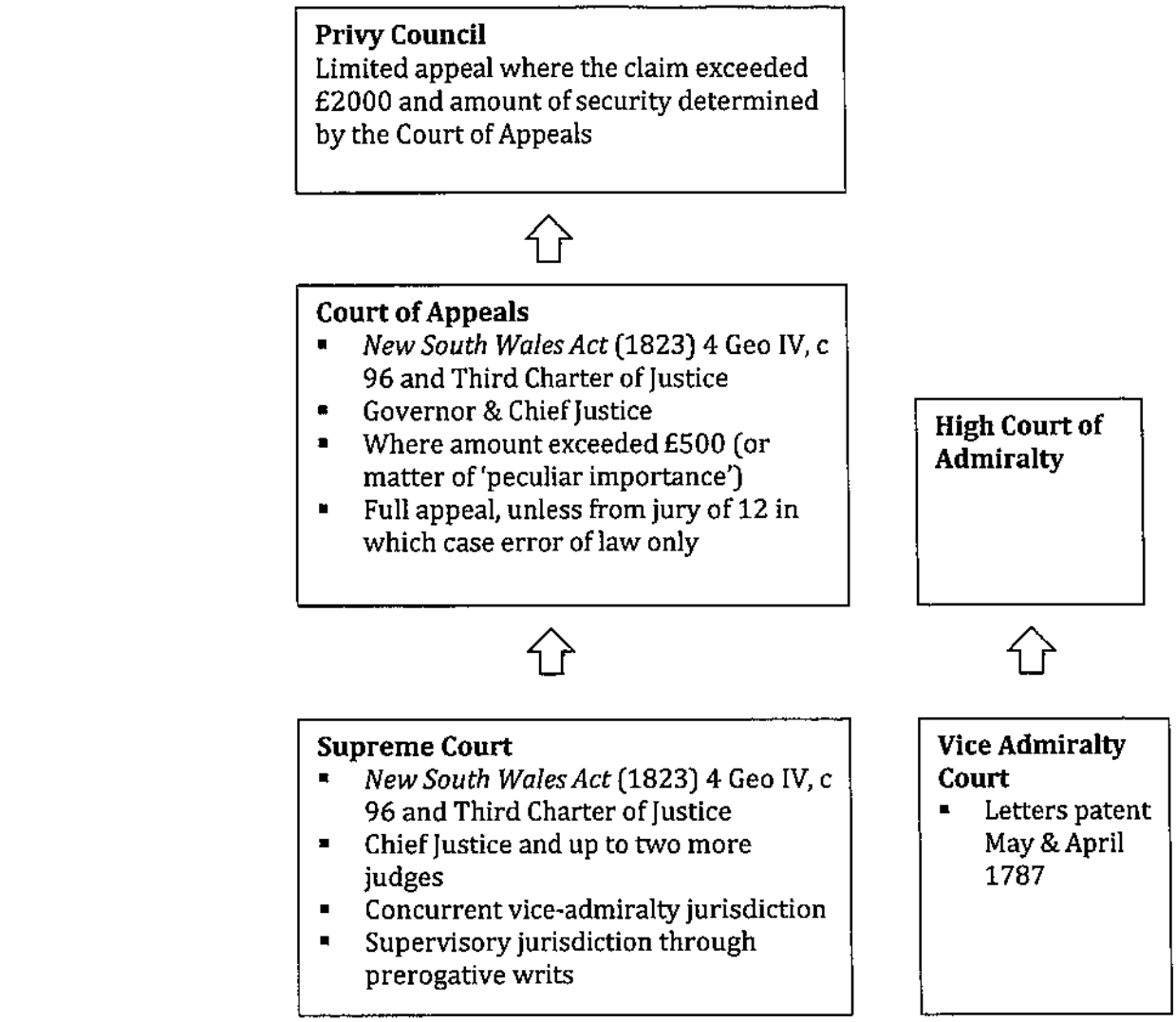
Vice Admiralty Court
- Letters patent May & April 1787

Governor's Court (NSW) (civil)
- Second Charter of Justice
- Deputy Judge-Advocate & two 'fit & proper persons'
- No right of Appeal
- Cases up to £50

Magistrates
Summary criminal offences, convict discipline, petty civil
Committal for trial

Compiled by Larissa Reid, October 2014.

Court structure in colonial NSW: 1824-1828



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Court structure in colonial NSW: <u>1828-1850</u>

Privy Council
Charter of Justice not amended after Court of Appeals abolished, thus no provision regulating appeals from Supreme Court until *Judicial Committee Act* (1844)

High Court of Admiralty

Supreme Court
- *New South Wales Act* (1823) 4 Geo IV, c 96 and Third Charter of Justice
- *Australian Courts Act* (1828) 9 Geo IV, c 83
- Chief Justice & up to two more judges
- Creation of Full Court and Equity Division: *Administration of Justice Act* (1840) 4 Vic, No 22
- Concurrent vice-admiralty jurisdiction
- Supervisory jurisdiction through prerogative writs

Vice Admiralty Court
- Letters patent May & April 1787

Courts of Requests (civil)
- *New South Wales Act* (1823) 4 Geo IV, c 96
- (1832) 3 Will IV, No 2
- (1842) 6 Vic, No 15
- Commissioner
- No right of appeal
- Cases up to £10 (except Cumberland, £30)
- All abolished (except Cumberland) & replaced with **Courts of Petty Session** (*Small Debts Recovery Act* (1847) 10 Vic, No 10)

Court of General or Quarter Sessions (criminal)
- *New South Wales Act* (1823) 4 Geo IV, c 96
- *Justices Act* (1829) 10 Geo IV, No 7
- Chairman & two or more magistrates

Court of Claims
- Established 1833 *Crown Land (Claims) Act* (1833) 4 Will IV, No 9
- *Crown Land (Claims) Act* (1835) 5 Will IV No 21
- Three Commissioners

Magistrates –
- Introduction of stipendiary magistrates mid 1820s
- Introduction of police magistrates 1832
- *Justices of the Peace Act* (1850) regulated their jurisdiction

Note: This diagram is a work in progress and does not yet include the **Executive Council**.

Compiled by Larissa Reid, October 2014.

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