THE STATUS AND AUTHORITY OF THE DEPUTY JUDGE-ADVOCATES OF NEW SOUTH WALES †

On the 18th May, 1824, a Supreme Court of New South Wales "having cognizance of all Pleas Civil Criminal or Mixed" was opened in Sydney under the authority of the statute 4 Geo. IV, c.96. At once military control of law and justice which had oppressed the Colony for nearly forty years was swept away. The consequent abolition of the office of Deputy Judge-Advocate (or Judge-Advocate as it was conveniently styled) brought to an end a judicial position which had been, in many ways, "unique in history".[1]

Nine Judge-Advocates were commissioned to the Colony from the time of the first settlement to 1824; of these, only five were in Sydney[2]: Captain David Collins, Richard Dore, Richard Atkins, Ellis Bent and John Wylde. Neither Collins nor Atkins had any legal training. Their common feature was appointment by commission from the Crown, under the terms of which they were treated as military officers. They had to "observe and follow such Orders and Directions" as they might receive from the Governor, the Lieutenant Governor "or any other, your Superior Officer".[3] Only Collins was at the same time commissioned to the military forces, though he considered his status to be "of a civil nature".[4]

The name "Deputy Judge-Advocate" suggests that the appointment was not intended to be entirely of a military character and this is borne out by the duties expected of the appointee[5]. His position as president of the Court was without precedent in British military law, because a judge-advocate served

†References marked with an asterisk in the following notes are drawn from manuscripts in the possession of the Trustees of the Mitchell Library, Sydney, N.S.W., who kindly permitted the writer to inspect such manuscripts and to make quotations from them.

The following abbreviations have been used:

Bartrum: 'Proceedings of a General Court Martial for the Trial of Lieut. Col. Geo. Johnston'. (1811).

Collins Account: David Collins — 'Account of the English Colony of New South Wales', (1798).

H.R.A.: Historical Records of Australia, (citing Series, Volume and page).

H.R.N.S.W.: Historical Records of New South Wales.

R.A.H.S. Journal: *Royal Australian Historical Society Journal.*

S.C.P.: Supreme Court Papers; manuscripts in the possession of the Trustees of the Mitchell Library, (citing the bundle and number of each manuscript).

Wentworth: W. C. Wentworth — *'A Statistical, Historical and Political Description* of the Colony of New South Wales', (1819).

[1] F. Watson. Introduction H.R.A. IV/I, p.xxx.

[2] Edward Abbott, an army officer ignorant of law, was commissioned in 1814 as Judge-Advocate to Van Diemen's Land where he presided over the Lt.-Governor's Court.

In 1803 Benjamin Barbauld was commissioned to the settlement at Port Phillip but, as he declined to leave England, Samuel Bate was drafted in his place to the staff of Lt.-Governor Collins. Collins had then been transferred to Hobart so Bate enjoyed a sinecure because no law Courts existed there at the time. The other Judge-Advocate was Thomas Hibbins who, in 1794, was commissioned to Norfolk Island.

After the suspension of Atkins in 1808, Edward Abbott acted as Judge-Advocate, being followed in turn by Charles Grimes and Captain Anthony Fenn Kemp before the arrival of Bent (H.R.N.S.W. Vol. VII, p. 65).

After the death of Bent, solicitor Frederick Garling acted as Judge-Advocate until the arrival of Wylde (H.R.A. I/IX, p. 31).

[3] H.R.A. IV/I, p. 1.

[4] Collins Account, p. 11.

[5] Apart from the implicit references in 27 Geo. III c.2. (which set up the Criminal Court) no statute governed the appointment, powers or duties of the Judge-Advocate. Collins (Account, *loc.cit*) relates that "the judge-advocate is the judge or president of the court; he frames and exhibits the charge against the prisoner, has a vote in the Court and is sworn, like the members of it, well and truly to try and to make true deliverance between the King and the prisoner, and give a verdict according to the evidence".

only in an advisory capacity before a court-martial[6]. Far from acting as president or giving the court's decision, he might only enlighten the bench on points of law, assist in cross examination, appear if necessary for prosecution or defence and sometimes sum up the case.

Rules and Discipline of War

Collins sailed with the First Fleet as judge-advocate to the marines. In addition he had been commissioned as Judge-Advocate for the Colony[7]. He also served as secretary to the Governor and, being one of the first three Justices of the Peace, was a member of the Bench of Magistrates. Apart from the Governor, who had supreme power, he was the sole legal authority in the settlement. Being ignorant of law, his resort was to conscience and expediency. For example, in 1788 the Governor sought his legal advice on the question whether marine officers were liable under warrant to serve on general courts-martial held in Sydney. Collins' opinion was that because the officers were on shore "the strict Letter of the Law" was that they were not liable; yet considering "the Time that must elapse before a Remedy can be applied" he concluded that the letter of the law must be disregarded[8].

The duties of the Judge-Advocate were to preside at the Criminal Court[9], consisting of himself and six fellow officers "of His Majesty's forces by sea or land" who were selected by roster; and to sit on the bench of the Civil Court[10] with "two fit and proper persons, Inhabiting" the Colony. The main legal concern in the convict settlement being "the punishment of vice, the security of property and the preservation of peace and good order",[11] Collins was preoccupied with the Criminal Court which began its sittings soon after the establishment of the Colony. In that Court the authority of the Judge-Advocate was tenuous; his was only one voice in a military coterie which ruled by majority[12]. The officers were openly biassed and unreasonable and they remained so throughout the whole history of the Court. They also objected to performing non-military duties and set about despatching the business as quickly as the tediousness of the process[13] would allow. The Judge-Advocate was accorded no judicial privilege, nor were the decisions of the Court.[14]

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[6] "He had no vote so far as the judgment of the Court was concerned, either on the main question or on interlocutory points; he could only advise" *per* G. B. Barton, H.R.N.S.W., Vol. I, p. 215. Lord Woodhouselee, 'An Essay on Military Law' (1814) p. 349 *et seq.; Manual of Military Law* (1884), p. 647; *cf.* Report of Army and Air-Force Courts-Martial Committee (1938) *Cmd.* 6200, published 1940.

[7] His commission as Judge-Advocate was given in 1786, he remained in office until 1797. As to his character — H.W.H. Huntington, (*R.A.H.S. Journal*, Vol. III, p. 122) and A. Halloran (*ibid.* Vol. X, p. 170).

[8] H.R.A. IV/I, p. 22; *cf.* the judgment of Lt.-Governor Foveaux in the case of *Lord* v. *Scott* (1808)* "In a Colony so peculiarly circumstanced as this is, at such an immense distance from the Mother Country, not enjoying the advantage of a Professional Lawyer to preside as Deputy Judge Advocate in the Civil Court, and not affording the assistance of advocates, or agents regularly bred, or at all qualified to give advice in Legal Questions, it is impossible to regulate the dealings between Man and Man by the strict letter of the Law, or to judge of them by any other criterion than that of sound equity and common sense". (S.C.P. 15/10).

[9] This had the statutory basis of 27 Geo. III c.2 — H.R.A. *op.cit.* p. 3 *et seq.*

[10] Established by Letters Patent, 2nd April, 1787 (H.R.A. *op.cit.* p. 6). Its constitutional basis reviewed by H. V. Evatt, 11 *A.L.J.* 409, at 415-416.

[11] Collins Account, p. 13.

[12] "However high the Integrity, Honour and ability of the J. A. might be, and however extensive his Legal knowledge . . . He has not the power of *controuling* or *qualifying* the opinion of the members of the Court", a draft letter of Atkins, (S. C. P. 18/47).*

[13] Tench, 'A Complete Account of the Settlement at Port Jackson', (1793) p. 110.

[14] The members of one of the Courts were themselves court-martialled for refusing to reconsider their decision (*R.A.H.S. Journal*, Vol. II, p. 89). In 1817 in the trial of Sanderson the military members of the court openly censured the Judge-Advocate (H.R.A. IV/I, p. 449). "This display of Military Justice . . . deeply impressed the public with a sense of what was to be expected from such a Tribunal, as well as the degradation a British Judge was obliged to undergo" (*ibid.*).

By contrast, however, in the Civil Court the Judge-Advocate's word was usually the law. In early times it was particularly hard to find two fit and proper persons to sit on the bench with him. Even when selected, they usually deferred to his opinion, because their own legal experience was so meagre. The justice meted out by these courts was summary and based on the laws of England "considering and allowing for the situation and circumstances of the settlement and its inhabitants".[15] The criterion for applying those laws was set out in the commissions of the early Judge-Advocates by the phrase "rules and discipline of war". The meaning of these words was not defined, they were not part of military law and did not appear in Collins' commission as judge-advocate of marines. No doubt they were deliberately flexible and adaptable to the necessarily unconstitutional tendencies of a military form of government.

Governor Phillip carried on a military administration; that of his immediate successors was martial. Major Francis Grose, Commander of the New South Wales Corps, assumed control of the Colony and forthwith dispensed with all civil rule. In particular he suspended the existing tribunals and vested the administration of justice in the officers of his Corps. He was replaced in 1794 by Captain William Patterson, but the same policy was continued until the arrival of the Colony's second Governor — John Hunter — in the following year. Hunter restored regular government and set out to replace and to improve the courts[16]. At first, he had the support of Dore[17] the new Judge-Advocate who, being the first person of legal qualifications to come to the Colony, was even more acutely aware of the need for reform. But Dore was a self-opinionated man and resolved to make changes of his own accord. Hunter resented this high-handedness, constantly rebuked the subordinate and countermanded his innovations[18]. The early death of Dore was a relief to Hunter who complained — ironically, considering the basic similarity of their aims — that instead of "the aid and confidence of one officer of weight, ability and activity" he had a Judge-Advocate who was "weak and irresolute"[19].

In criticising Dore, it was not apparent to Hunter that worse was to come. It did come in 1800 with the accession of Atkins[20] as Judge-Advocate.

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[15] Collins Account, p. 12; *cf.* Bathurst to Macquarie (H.R.A. *op. cit.* p. 108) "the internal Government of the Colony must . . . be guided by the English laws modified by the Usages which have always subsisted there". By contrast it is stated in Wentworth (p. 31) "these Courts regulate their decisions by the law of England, and take no notice whatever of the laws and regulations which have been made at various times by the local government".

[16] "It will be a happy circumstance for this colony when its Court can be form'd more upon the plan of the mother country, with an upright and independent Judge at its head", (H.R.A. I/II, p. 280)

[17] He took office in 1798, but died only two years later. As to his character — A. Halloran (*R.A.H.S. Journal*, Vol. X, p. 171).

[18] There were two major sources of dispute; the first being Dore's attempts to increase the fees of his office. To the opinion that "Mr. Dore must insist that he has discretional powers to act up to the full intent extent and meaning of the Tenor of such an authority which he feels vested in him by virtue of his present appointment the original documents of which will ever justify the exercise of his professional duty in the Colony according to his Ideas of Rectitude consistent with Honor and Integrity"),* (Enclosure to letter, Dore to Hunter, 24th June, 1799, S.C.P. 18/29) Hunter replied "I will admit that the Principal Law Officer in the Colony ought to be best acquainted with Legal forms, but I cannot allow that he is expected to be the only person qualified to understand or interpret plain English",* (Hunter to Dore, 27th June, 1799, S.C.P. 18/31).

The second source of dispute was Dore's claim to issue writs without the concurrence of the other members of the Civil Court. Hunter's answer was to convene a meeting of the officers of the Colony "Civil, Military and Naval" which resolved* "we are of opinion that the Judge Advocate is not authorised by the Patent to Issue Writs, but in Conjunction with the two members who with the Judge Advocate constitute the Court". "The members of the Civil Court have no Right to Delegate any authority to the Judge Advocate to Issue any Writs whatever, unless they are present". (Statement of 19th January, 1799, S.C.P. 18/15).

[19] H.R.A. I/II, p. 248, and generally p. 244 *et seq.*

[20] His term continued until his suspension in 1808. As to his character — M. H. Ellis, 'John MacArthur', (1955) Ch. VIII *et passim;* A. Halloran (*R.A.H.S. Journal*, Vol. X, p. 172).

All hopes for reform were instantly stifled. This gentleman, far from being commissioned here, came to the Colony by chance, finding it a safe retreat from his creditors. The influence of powerful friends in Britain secured him the office of Judge-Advocate which he treated as a sinecure for his personal benefit. His standards of honesty and his principles were appalling; his character quite out of keeping with his status[21]. Nevertheless, he lingered for years as "arbiter of life and death, of freedom and captivity"[22] in Sydney.

The most significant event of Atkins' judicial career was the trial of John MacArthur[23], which was a lurid illustration of the status and authority of this Judge-Advocate in practice. From the outset Atkins was an interested party to the case, being MacArthur's debtor as well as his admitted enemy. MacArthur had appealed to the Governor (Bligh) for some impartial person to preside at the trial. The Governor pointed out that by the terms of the Statute 27 Geo. III, c.2 the Criminal Court could not be constituted without the Judge-Advocate; he said that he could neither commission nor dismiss a Judge-Advocate and so was powerless to help[24]. Atkins therefore took his seat on the bench but, before he could be sworn in, MacArthur by an address without precedent in the Colony's courts, appealed for justice to the six military members[25]. Those officers were impressed and, ignoring the Judge-Advocate's protests, decided to hear the prisoner out[26]. Atkins departed in fury declaring, as was the fact, that they could not act as a court without him. Atkins repaired to the Governor and at his instigation a warrant was issued for MacArthur's arrest. The warrant was prompty executed and the prisoner thrown into the common gaol. The effect on the cimmunity was immediate. Revolu-

[21] "He has been accustomed to inebriety; he has been the ridicule of the community; sentences of death have been pronounced in moments of intoxication; his determination is weak, his opinion floating and infirm; his knowledge of the law is insignificant and subservient to private inclination; and confidential cases of the Crown he is not to be entrusted with". "I owe it to humanity to pray that the present Judge-Advocate may be immediately superseded by some honourable and judicious lawyer with a Salary which will make him independent". (*per* Governor Bligh) (H.R.A. I/IV, p. 150 and 151): *cf.* the opinion of Lt.-Governor Foveaux (H.R.N.S.W. Vol. VI, p. 754). Atkins himself admitted* "It is true (*as I have on a former occasion found it necessary to observe*) I may have prolonged the convivial hour too far, but it never interfered with my professional line of duty". (S.C.P. 18/47; italicized words were scored through in the manuscript).

[22] M. H. Ellis, *op. cit.* p. 103.

[23] On 25th January, 1808. (H.R.A. I/IV, p. 221 *et seq*: *ibid.*, p. 210; M. H. Ellis, *op. cit.*, p. 330 *et passim;* Dr. George Mackaness, 'The Life of Vice-Admiral William Bligh', (1951) Ch. XL).

[24] "The Judge-Advocate must necessarily always be upon that Court . . . the Governor has no more right to change the Judge Advocate who sits upon that Court, than he has to change a judge in England, or any where else", (Bartrum, p. 37 *per* Rt. Hon. Charles Manners Sutton, Judge-Advocate General). Contrast the view of Atkins — "I knew, sir, perfectly well, that I was subject to the Governor; and I knew that if I did not sanction those measures, I should run very great risk . . . of being suspended, which the Governor had the power of doing" (*ibid.*, p. 174).

[25] Dr. John Dunmore Lang was "altogether at a loss to discover the propriety of the measure to which Mr. Macarthur resorted in protesting against the Judge-Advocate". It was "impolitic in the highest degree, and absolutely suicidal". ('An Historical and Statistical Account of the Colony of New South Wales', 4th Edition, Vol. I, p. 120 and 121).

[26] The Officers expressed the opinion that the Judge-Advocate was simultaneously judge and juryman, and that in the latter capacity he could be challenged. That was quite erroneous:— A *Member.* "The word *Court* is made use of, but it could not be a Court".

Judge Adv. "Not a Court for the purpose of acting, certainly; but a Court for the purpose of designation".

A Member. "It appears that in that Court the Judge Advocate sits as a judge, and the officers as jury".

Judge Adv. "That is exactly the case . . . ; we hardly know in this country the nature of such a Court . . . I myself entertain no doubt whatever, that it was utterly impossible under any circumstances, and not speaking with a view to this particular charge, that it was perfectly incompetent to any person brought before that Court to offer a challenge against the Judge Advocate sitting upon it; he might as well offer a challenge against a judge in this country sitting at the assizes" (Bartrum, p. 36). It was not the case at all; the members took upon themselves the determination of law as well as fact and overruled the Judge-Advocate if they saw fit.

tionary forces under Lieutenant-Colonel George Johnston deposed Bligh, suspended the civil officers and proclaimed martial law.

These events were unconstitutional but, in their result, of undoubted benefit to the legal system. The Colony had too long suffered Atkins' lack of scruples, and he had allowed important matters of law to fall into the hands of an even greater villain — the emancipated convict attorney George Crossley[27]. Bligh himself openly relied on Crossley for assistance, because of Atkins' ignorance[28]. The dispensing of justice had become impossible in these circumstances and, rebellious though it was, the suspension of Atkins from office in fact left the way open for "the restoration of the Civil Law on a permanent Foundation"[29].

The Permanent Foundation

Administration was given a fresh start with the arrival of Governor Macquarie and of Ellis Bent[30]. The symbol of progress, as regards the Judge-Advocates, was the deletion from Bent's commission of the phrase "rules and discipline of war".

Bent and his successor Wylde[31] had much in common. They were trained lawyers who were dissatisfied with the state of law in the Colony and who vigorously advocated reform. Their devotion to the obligations of their office, which by this time had become very heavy shows their genuine concern for improvement;[32] though it should be remembered that they were also motivated by personal interests. Not being members of the judiciary they did not enjoy independence or security. Their appointments were only accepted after strong assurances of advancement had been given by the British Government.[33] They saw in the establishment of a local judiciary, of which they might be members, the safeguard of their futures and the justification of their labours.[34]

The first variation was made in the Civil Court. It had become inadequate to a Colony then influenced by a growing free population, the establishment of commercial interests and the change from penal settlement. Bent summarised his duties in that Court by saying, "the civil functions . . . have become extremely burdensome, important, and of great responsibility, em-

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[27] His activities are reviewed by Dr. Mackaness, *op. cit.*, p. 447.

[28] "When it was known that Mr. Crosley (*sic*) was consulted by Gov. Bligh, what was the general feeling of the inhabitants ? — It created the greatest alarm, and no person considered either his life or his property safe under the guidance of so notorious a character" (Bartrum, p. 219; *cf. ibid.*, p. 63).

[29] H.R.A. I/IV, p. 271.

[30] He was commissioned in 1810 and held office until his death in 1815. As to his character — J. A. Dowling (*R.A.H.S. Journal*, Vol. II, p. 91); D. J. Benjamin (*ibid.* Vol. XXXVIII, p. 57).

[31] He was commissioned in 1816 and held office until the Charter of Justice (9 Geo. IV c.96) rendered it unnecessary. As to his character — J. T. Bigge "Report of the Commissioner of Inquiry on the Judicial Establishments of New South Wales and Van Diemen's Land" (1823) *passim.*

[32] Wylde could only accomplish the work "by devoting much of the Night as well as Day to the object and by the sacrifice of every single private pursuit", (H.R.A. IV/I, p. 256); *cf.* Bent to Liverpool, (*ibid.*, p. 69). Dore wrote of the earlier Judge-Advocates: "Captain Collins Mr. Dore understands limited his hours of business from eleven to one every day and Governor Hunter well knows that Mr. Dore has unremittingly given his time to the public service from six o'Clock in the morning and sometimes earlier to a late hour at night . . . and is daily broken in upon and annoyed by troublesome Intruders without ceremony or distinction"* (Dore to Hunter, 6th December, 1798, S.C.P. 18/10).

[33] H.R.A. IV/I. p. 218; *cf.* D. J. Benjamin (*R.A.H.S. Journal loc. cit.*) at p. 64 — "Like many others who came from England to a colonial appointment, he (Bent) must have had in mind the making of his fortune and the consequent establishment of his family".

[34] H.R.A. IV/I, pp. 102, 107, 108, 257, 532.

bracing even more than the usual duties of a Judge, and requiring a greater knowledge both of the theory and practice of the law than it would become me even to think that I possess".[35]

Presiding with the two fit and proper persons was only a part of his varied obligations in that jurisdiction. In the absence of officers of the Court and of regular barristers or solicitors, it was for him to advise litigants. If the suit proceeded, he had to state the cause of action in writing, issue all process,[36] prepare the evidence and, when the hearing came, record the evidence and minutes of Court; he also made out all Court orders and decrees. Bent found that all these tasks could be performed "but imperfectly" as they were "beyond the power of any one man".[37] Much of the time was wasted by trivial or even frivolous law suits. The least satisfactory feature was that the preliminary investigations were inclined to prejudice the Judge-Advocate's mind when he came later to sit in judgment. Another flaw was the continued difficulty of finding two fit and proper persons for the bench; not to mention the impossibility of obtaining two such persons with any legal knowledge.

The British Government, being persuaded of these evils, thought to rectify them by establishing under the Letters Patent of 1814 a Supreme Court, having its own Judge, but jurisdiction in civil matters only. In fact the change neither benefited the Judge-Advocate nor effected any substantial improvement, though the Government, for another decade, would go no further. Bent thus had cause for dissatisfaction with the Patent. Not only did it preclude his attaining the judicial position he sought, but it also deprived him of considerable emolument by transferring into other hands the issue of process — the fees from which had been an important source of income to the Judge-Advocate.

Nor did the new system lighten the burden of his work, for a peculiar hierarchy of courts was created. The old Civil Court (the Judge-Advocate and two fit and proper persons) was now dignified by the title of Governor's Court and heard summarily, without scope for appeal, actions involving amounts less than £50. The Supreme Court had similar jurisdiction, but for actions involving over £50. Appeal lay from the Supreme Court to the High Court of Appeals which consisted of the Governor "assisted" by the Judge-Advocate. Its effect was to retain the Governor in person, despite his ignorance of law, as the highest legal tribunal in the land. The assistance to be rendered by the Judge-Advocate was not defined, with the result that the Governor recognised the Judge-Advocate as assessor only, whose advice might be accepted or rejected at pleasure. The effect was that either the Governor deferred to the Judge-Advocate's opinion or "acting upon the dictates of his Conscience only", made his own decisions.[38]

The continued importance of the Governor as lawgiver demonstrated the tenacity of military government. Justice depended on the Governor's personality and temperament, coupled with the relations existing between him and the Judge-Advocate. Witness the conflict between Macquarie and Bent[39] which, expanding from a petty argument, became so serious that only Bent's death

[35] *Ibid.* p. 102 and *cf. p.* 181.

[36] This was a source of personal income to the Judge-Advocate, fees having been charged from the time of Collins.

[37] H.R.A. *op. cit.* p. 60. Dore, for instance, did not wish to "retain his situation nor longer to surmount the encreasing anxiety and fatigues of office unless he is at liberty to attach those trifling advantages which in some measure compensate for the toils of it",* (Dore to Hunter, 6th December, 1798, S.C.P. 18/10).

[38] H.R.A. *op. cit.*, p. 369; *cf.* Note (8) *supra.*

[39] This arose from several sources the first of which seems to have been Bent's indignation at Macquarie's failure to proceed with the building of "a respectable court house and town hall" — M. H. Ellis, 'Lachlan Macquarie' (1952) p. 286. D. J. Benjamin (*R.A.H.S. Journal op. cit.* p. 62) considered the "most potent cause of the quarrels" to be "Bent's youth and ill-health, and his consequent reaction to the immense burden of his work".

prevented his recall. Macquarie also argued with Wylde[40] and a similar controversy existed between Brisbane and Wylde over the powers of the magistracy[41].

The autocracy of the Governor was detrimental to the legal system and it was entirely true to say that the proper performance of the Judge-Advocate's duties rested on "the personal character of the person in whose hands the Executive power of the Colony happens to be vested".[42] It has been observed that Bent and Wylde "manfully withstood invalid encroachments by Governors upon the legal rights of colonists when to do so was to imperil their judicial position".[43] It was a distinct defect that their judicial authority was open to such intrusion.

There was a final disadvantage under the new system. Wylde was not only harassed by the virtually undiminished civil jurisdiction, but considerably piqued because his status appeared subordinate to that of the Judge of the Supreme Court, Mr. Justice Barron Field.[44] A fire of conflict smouldered between them and sometimes burst into flames — "the Judge . . . has conducted himself generally with an *hauteur* and tone of dictatorial superiority (perhaps in unison only with the general Opinion here, that the Judge of the Supreme Court in name and character of Jurisdiction must have precedency)".[45]

The Criminal Court, unaffected by the civil reforms, remained as it had been in 1788 "imperfect in every point of view".[46] Bent condemned its military character as "both arbitrary and illegal" and constantly complained against the Court's resemblance to a court-martial.[47] In this Court the Judge-Advocate was "at once, the Committing Magistrate, Public Prosecutor, and Judge; and he is called upon to decide upon the legality of the Informations, drawn up and exhibited by himself".[48] Wylde took the analogy further — "in his hands rest all the powers vested by the English Constitution in the

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[40] The case of *The Tottenham;* H.R.A. IV/I, p. 825 *et. seq.*

[41] The case of *Burn* v. *Howe;* H.R.A. I/X, p. 639.

[42] H.R.A. IV/I, p. 62; *cf.* Brisbane to Bathurst (Despatch No. 19, 31st April, 1822) in Manuscript duplicates of Governors' Despatches* Vol. LV, p. 394 — "I cannot but remark the discrepancy that again exists between the actions of the Judge Advocate and the Commission under which he is acting: and I press on Your Lordship the imperious necessity that arises — founded not only on this, but on many previous instances wherein that Gentleman (*Wylde*) has assumed to himself the liberty of returning the most direct refusals to comply with my several requests — either that the nature of the Office of Judge Advocate in these Colonies should be speedily altered, or some Lawyer appointed who proposes to act frankly according to its tenour".

[43] Dr. C. H. Currey (Thesis (1929) unpublished) 'Chapters on the Legal History of N.S.W.; 1788-1863' p. 465.

[44] J. H. Bent was the first Judge of the Supreme Court, but he delayed opening the Court and became involved in a fierce argument with Macquarie over the admissibility of convict attorneys. On his recall Field was appointed. His was not a military position but it was inferior to that of the Judge-Advocate and subject of a smaller salary. Macquarie thought he might overcome the problem of inconsistent status by recommending Wylde for a knighthood, but without effect. (H.R.A. I/X, p. 378 at p. 380).

[45] H.R.A. IV/I, p. 254.

[46] *Ibid.* p. 48. "It has happened and will probably happen again, that the opinions of six members may coincide and give Judgment on a Case contrary to the decisive and avowed opinion of the J.A. which judgment is binding and may go into the world apparently with the sanction of the Judge Advocates voice, when in fact it may be directly the reverse of his opinion. It is further observable that the J. A. has no absolute power of checking any informality in respect to the proceedings of the Court, or any illegality in point of Law, except by a formal protest, and Your Excellency will readily observe what that would lead to was it often put in practice. — It would create a constant opposition to the J.A. opinion, or the supposition that he wished to contradict the members in the free operation of their Judgments",* (Atkins to King, S.C.P. 18/46).

[47] H.R.A. IV/I, p. 49. "It seems that the Governor considers me merely as a Subaltern Officer, a mere cypher, a person sent out simply for his convenience and merely to execute his commands as one of his staff". "I never did or could consider my appointment as a military one . . . such a supposition is incompatible with the due performance of its functions" (*ibid.* p. 127).

[48] *Ibid.* p. 59; *cf.* J. T. Bigge (*op. cit.* p. 28) who divided the functions into those of legal adviser, public prosecutor and member of the Court and illustrated the division by reference to the case of *Marsden* v. *Campbell.*

Grand Jury".[49]

Such a multiplicity of functions was clearly objectionable. As in the civil jurisdiction, the Judge-Advocate's impartiality was certain to be affected by his investigations before the trial. This prejudice was likely to sway the minds of the six officers, if they did not themselves have preconceived ideas.

The British Government refused to see these objections; "the Colony did not appear to H.M.'s Government sufficiently advanced to permit of withdrawing that appearance of Military Restraint, which had been found necessary on its first formation, and which the Composition of its Population had rendered it indispensible subsequently to maintain" so as to ensure "due Subordination in the Settlement".[50] Contemporary opinion was certainly not convinced of the benefits of military restraint.[51] The authority of Bent and Wylde extended beyond the civil and criminal jurisdictions to the whole legal administration of the Colony. As a Justice of the Peace and Magistrate, Bent sat weekly at a Bench of Magistrates and usually had referred to him in addition the cases listed before the sitting Magistrate for the week. Bent and Wylde were in turn Judges of the Vice-Admiralty Court, for which service they received no remuneration and had to contend with the incompetence of the appointed officers of the Court. Wylde, at the instigation of Commissioner J. T. Bigge began a series of Criminal Court circuits to Van Diemen's Land. The Judge-Advocates also had to supervise a limited ecclesiastical jurisdiction; and sometimes to attend general courts-martial. "But the Labours in the Public Courts were nothing in Comparison to the Duties that awaited the attention of the . . . Judge-Advocate at his Private Chambers".[52]

It is remarkable that such an inadequate system should have persevered for so long. The British Government persisted in its uncompromising refusal to abolish the office, in spite of repeated recommendations for reform by Governors from the time of Hunter and the voluminous proposals of Ellis Bent.

Behind this attitude lay the misconception that New South Wales as a mere convict settlement neither required nor deserved better than a military administration. The anomalies of that reasoning were reflected by the anomalies of the Judge-Advocate's office.

The inferior status of the Judge-Advocates was always at odds with their vast authority. The services expected of them were impossible — even to the best trained. Their anachronistic military appearance detracted from their judicial status which was further affected by the conflict of their duties as advocate with their obligations as judge. By 1814 when the office admittedly needed replacement, (Macquarie's recommendation for its abolition having crossed with the Patent), the British Government instead added to its scope.

Relations between the Governor and the Judge-Advocate were always inconsistent. The Governor's supremacy, though regarded in England as a power for good, was in fact causing many illegal acts "more glaring than would have been the case had the early Governors had the help of competent legal advisers".[53] Above these was the greatest anomaly — the personal influence of the Judge-Advocates, which by good fortune was regularly used with integrity, the regime of Atkins being the exception rather than the rule.

Notwithstanding these defects the office of Judge-Advocate was more than a historical curiosity. It endured in practice for nearly forty years as the foundation of the Colony's legal administration, to which the Judge-Advocates themselves, through their individual status and authority, made significant contributions.

J. M. BENNETT, B.A., Third Year Student.

[49] *Id.* 359.
[50] Bathurst to Bent, *ibid.* p. 171.
[51] "While the Court has the least appearance of or approach to, a Military character, instead of exciting the respect and confidence of the people, it will surely meet with their contempt and hatred". Eager to Bathurst (*ibid.* p. 475). "The appearance of this tribunal has long been odious and revolting to the majority of the colonists", Wentworth, p. 364.
[52] H.R.A. *op. cit.* p. 182.
[53] Dr. C. H. Currey, *op. cit.* p. 120.

THE COMMONWEALTH OF AUSTRALIA TRADE MARKS ACT OF 1955

The purpose of this comment is to discuss the Commonwealth Trade Marks Act of 1955.[1] The Act is to come into force on a date to be proclaimed, but at the time of writing no date has yet been fixed for its commencement.[2] The Act has introduced for the first time in Australia certain provisions which have existed in the United Kingdom legislation since 1938, and in some cases since 1919. Therefore the considerable body of English case-law that has developed is available to assist in the construction of the new Australian Act, although in some cases the Australian provisions differ from the corresponding ones in the United Kingdom legislation. The topic will be considered under the following heads:

I. *General.*
II. *Part B Marks.*
III. *Part C Marks: Certification Trade Marks.*
IV. *Part D Marks: Defensive Trade Marks.*
V. *Infringement of Trade Marks.*
  (i) General.
  (ii) Infringement by Breach of Restrictions.
  (iii) The Action for Threats.
  (iv) Names of Patented Goods.
VI. *Miscellaneous.*
VII. *Problems of Constitutional Validity.*

I. *General*

Under the Commonwealth Act of 1905-1948[3] provision had been made for registration of three types of trade marks:— ordinary trade marks, "standardisation" trade marks[4] and the "Commonwealth" Trade Mark.[5] Ordinary or "distinctive" trade marks identify goods emanating from a certain trade source, and this quality which may be inherent or acquired is the "distinctiveness" of the mark. A mark which consists merely of a description of the subject goods, a common surname, or a laudatory epithet, cannot serve to indicate to the public a single trade source of goods. However, such a mark while not inherently distinctive, may become distinctive as the result of extensive use and advertising. Standardisation marks indicated some quality or characteristic of goods apart from their trade origin, while the Commonwealth Trade Mark could only be applied to goods manufactured under fair labour conditions.

The 1955 Act provides for a Register of Trade Marks which is divided into Parts A, B, C and D.[6] Part A will contain the distinctive marks which were registrable under the 1905 Act. In Part B will be registered a new type of trade mark, which is not distinctive, but which is "capable of becoming distinctive". Certification trade marks, which replace the old standardisation marks, will be registered in Part C, and the new Defensive Trade Marks will

[1] Act No. 20 of 1955. [2] 20th December, 1957.
[3] Act No. 20 of 1905 — Act No. 76 of 1948. [4] S. 22.
[5] Ss. 78-85. These sections were probably invalid because of the decision in *Attorney-General of N.S.W.* v. *Brewery Emyloyees' Union* (1906) 8 C.L.R. 465. In any event the mark was never used. See the *Report of the Committee to Consider what Alterations are Desirable in the Trade Marks Law of the Commonwealth* (Cwlth. Govt. Printer, 3031, 1954) (here cited as the *Dean Report*) at 34. [6] S. 14(2).