'A BIRTHRIGHT AND INHERITANCE'*

THE ESTABLISHMENT OF THE RULE OF LAW IN AUSTRALIA

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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

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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.

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

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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 George 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'.

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.

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

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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.

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.
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> '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 pleas'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.*

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

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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.

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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.