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THE ROYAL PREROGATIVE TO CREATE COLONIAL COURTS

A Study of the Constitutional Foundations of the Judicial System in New South Wales, 1788-1823

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"The prerogative", A. V. Dicey once observed, "appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary and arbitrary authority, which at any given time is legally left in the hands of the Crown."[1] This residue of legal authority which the judiciary has permitted to remain with the Crown always has been a very variable quantity, its sphere of operation progressively diminishing with the maturation of parliamentary institutions and with the isolation of the judges from the policy-making organs of government. Every student of British constitutional history is familiar with the violent and bitter contests waged in 17th century England between monarchs proposing unusually wide applications of prerogative power and judges and parliamentarians urging abbreviation of royal power and influence at all points. The events of this troubled era and the accomplishments of the common lawyers have tended, however, to overshadow and sometimes obscure the fact that during the same period, the Crown was suffered to assume, with some encouragement from the judges, prerogative powers in regard to the governance of the newly acquired overseas dominions, of a kind and extent which emphatically had been denied to it within the realm.

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The following abbreviations have been used:
H.E.L.: Sir William Holdsworth, *History of English Law.*
H.R.A.: *Historical Records of Australia* (citing Series, Volume and page numbers).

[1] *Law of the Constitution* (10 ed. 1962) 424.

This essay deals with one facet of this curious disparity between what one might call domestic prerogatives and prerogative power in the colonies, the power to constitute courts of justice. The ambit of this power had been a contentious issue in the England of the Stuarts resulting in the abridgment of royal power to a point where without parliamentary sanction the Crown was permitted to create no new courts unless they be courts of common law adjudicating according to common law procedures. No such limitation appears to have been imposed upon the Crown in regard to the erection of colonial courts. True it was that from time to time the Law Officers of the Crown advised that the Crown's authority in this respect was not unlimited. However, no occasion appears to have arisen for judicial determination of the ambit of the prerogative until towards the end of the 19th century, by which time, of course, opinions about the propriety of allowing to the Crown wide governmental powers over colonies had undergone considerable revision. What the Judicial Committee of the Privy Council has had to say on the scope of the prerogative to create colonial courts, however, deals only with the extent of prerogative power after legislative institutions have been established in a colony. From this time the Board ruled *In re the Lord Bishop of Natal*,[2] "the Crown . . . stands in the same relation to that Colony or Settlement as it does to the United Kingdom". This, of course, does not resolve the question of how far the prerogative extends before a colony has received a legislature of its own or the question whether the ambit of the prerogative may vary according to whether the colony is a settled or conquered one. On these matters there is considerable difference of opinion.

In the first edition of *Halsbury's Laws of England*, for example, it is stated that:

> In colonies without representative legislatures the Crown enjoys the right of establishing such courts, appointing such officers, and making such rules for the administration of justice as it pleases, and the common law rule restraining the creation of courts of equity or ecclesiastical courts to administer any other than the common law does not apply.[3]

But, the authors continue, the Crown cannot "erect courts to make rules of justice contrary to the fundamental laws of the constitution, or contrary to the general laws of trade and the liberties of the subject".[4] On what authority this version of the law is based the authors do not indicate. Sir William Holdsworth, on the other hand, maintained in his *History of English Law*[5] that before *In re the Lord Bishop of Natal* the scope of the prerogative to create colonial courts was not clearly defined but that this case had established that "although the Crown may by its prerogative establish courts to proceed according to the Common Law, yet . . . it cannot create any new court to administer any other law".[6] The accuracy of this representation of the effect of the decision is open to question. What Sir William omitted to mention was that when the Judicial Committee spoke of the incompetence of the Crown to erect any other than common law courts, they appeared to be speaking only of the limits of prerogative power after a colonial legislature had been established. This apparent misunderstanding of the principle of decision of *In re the Lord Bishop of Natal*

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[2] (1864-5) 3 Moo. P.C. (N.S.) 115 at 148.
[3] Vol. 6, 426.
[4] *Id.* n. (e).
[5] 11 *H.E.L.* (1938) 266-7.
[6] (1864-5) 3 Moo. P.C. (N.S.) 115 at 152.

is all the more surprising when one remembers that Sir William was the chief contributor to the section in the first edition of *Halsbury's Laws of England* in which the view was expressed that until a colony received a representative legislature the domestic limitations on the prerogative did not apply in their entirety. In his most recent observations on the problem, Sir Victor Windeyer appears to have modified the opinion he ventured in passing in his *Lectures on Legal History*. There he suggested that, at the very least, the Crown could have constituted colonial courts of common law, an opinion for which he cited *In re the Lord Bishop of Natal* as authority.[7] In his E. W. Turner Memorial Address in Hobart in 1962, however, Sir Victor said this:

> The Crown can create courts for Crown Colonies (meaning, no doubt, colonies not yet possessed of a local legislature) by Charter or Order-in-Council, providing they are to administer the law of England.[8]

In the absence of judicial rulings dealing specifically with the question, it is impossible to appraise these various opinions except in terms of how far they conform with practice and usage and general principles regarding prerogative power in the overseas dominions. When one has regard to Crown practice and also the opinion of the Law Officers of the Crown, it becomes clear that down to the end of the 18th century, no one for one moment conceived that the Crown's power to create courts in the colonies was confined just to creation of courts of common law. Those responsible for framing the Letters Patent establishing courts in early New South Wales obviously did not think so. Until the passing of the Imperial Act, 4 Geo. IV, c. 96 (1823), only two of that colony's courts—the Court of Criminal Judicature and the Vice Admiralty Court[9]—had been established in virtue of statutory authority. All the rest, which included courts of equitable and testamentary causes jurisdiction, had been erected under the auspices of the royal prerogative.[10]

In considering the significance of Crown practice it is, however, material to bear in mind that during the 17th and for most of the 18th centuries, the Crown had governed most of the colonies on the basis that they had been acquired by conquest rather than by settlement. The importance of this consists in the fact that in conquered colonies the Crown was admitted to have considerably wider prerogative power than it enjoyed within the realm. In *Calvin's Case*[11] in 1608 the judges had resolved that where a colony had been acquired by conquest of a Christian kingdom, the laws of such colony should remain in full force until altered by the Crown. If, however, "a Christian King should conquer a kingdom of an infidel and bring them under his subjection, then

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[7] *Lectures on Legal History* (2 ed. rev. 1957) 303.

[8] "A Birthright and Inheritance—the Establishment of the Rules of Law in Australia" (1962) 1 *Tas. U.L.R.* 635 at 649; see also R. Else-Mitchell, "The Foundation of New South Wales and the Inheritance of the Common Law" (1963) 49 *R.A.H.S. Jo. & Proc.* 1 at 4.

[9] The Court of Criminal Judicature was established under 27 Geo. III, c. 2 (1787); the Court of Vice Admiralty (in his criminal jurisdiction) under 6 Geo. I, c. 19 (1719), an Act making permanent 11 and 12 Will., c. 7 as continued in force by 5 Anne, c. 34, and 1 Geo. I, c. 25. The Warrant for the Letters Patent of 1787 constituting the Court of Criminal Judicature is reprinted in *H.R.A.* IV i, 6. The Letters Patent under the Great Seal of the High Court of Admiralty establishing the Vice-Admiralty are reprinted in *H.R.A.* IV i, 13. The Letters Patent of 1826 appointing Forbes, C.J. a judge in Vice Admiralty (*H.R.A.* I xii, 143) assume that by Letters Patent of April 12th, 1787, Instance jurisdiction was conferred on the Court. No trace has been found of these (*cf.* Judge-Advocate Wylde to Earl Bathurst, 28/7/1821—*H.R.A.* IV i, 371).

[10] See the Letters Patent of 1787 and 1814 (commonly referred to as the First and Second Charters of Justice respectively) in *H.R.A.* IV i, 9-11, 77-94.

[11] (1608) 7 Co. Rep. 1 at 17b; 2 St. Tr. 559.

ipso facto the laws of the infidel are abrogated . . . and in that case, until certain laws be established among them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity. . . ." Hereby, the Crown was acknowledged to have virtually unlimited power over the legal systems of its colonies. In the exercise of this power, it was open to the Crown to extend part or the whole of the laws of England to a colony, but having done so it could not alter those laws without the concurrence of Parliament. The principles laid down in *Calvin's Case* dominated Imperial administration during the First Empire to such a degree that, though most of them were founded by English settlers, the North American colonies were considered to be no more than colonies acquired by conquest of infidels and therefore entitled to the laws of England only by grace and favour of the Crown.[12] "The laws of England", Holt, C.J. observed in 1707, "do not extend to Virginia, being a conquered colony their law is what the King pleases."[13] What the Crown invariably pleased was to grant to the plantations the laws of England excepting those trenching upon the prerogative.[14]

The conception of settled colonies to which the laws of England extended *ipso vigore* was of much later development than that of conquered colonies.[15] Initially it seems to have been confined only to British settlements in uninhabited territories, but with Lord Mansfield's repudiation in 1774 in *Campbell* v. *Hall*[16] of the distinction between colonies acquired by conquest of infidels and Christians respectively, it came to embrace also territories inhabited by "barbarians" whose laws were not considered appropriate to the government of settlers of European origin. "The reason why", Lord Lyndhurst observed in 1828,[17] "the rules are laid down in books of authority, with reference to the distinction between new-discovered countries, on the one hand, and ceded or conquered on the other, may be found, I conceive, in the fact that this distinction has always, or almost always, practically corresponded with that between the absence or existence of a *lex loci*, by which the British settlers might, without inconvenience, for a time be governed."

In the case of settled colonies, certain problems arose in determining the nature and scope of the royal prerogative to create courts that did not arise in the case of conquered colonies. A settled colony received so much of English law in force at the date of settlement as was capable of being applied in the colonial circumstances and it was not within the power of the Crown to select which parts of English law should apply and which not.[18] If, by the law of England, the Crown was prohibited from erecting courts other than courts of common law jurisdiction, was it not unreasonable to assume that the same restriction applied to settled colonies? Jeremy Bentham and Barron Field, the second judge of New South Wales' first Supreme Court, questioned whether, in a settled colony such as New South Wales, the Crown had any power at all to erect courts without the prior sanction of Parliament. According to Bentham,

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[12] See 1 Bl. Comm. 108.

[13] *Smith* v. *Brown* (1707) 2 Salk. 666. See also arguments of Holt and other counsel in *East India Co.* v. *Sandys* (1683-5) 10 St. Tr. 371, and *Dutton* v. *Poole* (1694) Show. P.C. 24.

[14] J. H. Smith, *Appeals to the Privy Council from the American Plantations* (1950) 475 *et seq.*

[15] *Blankard* v. *Galdy* (1693) Holt, K.B. 341; 2 Salk. 411; 4 Mod. 222; Comb. 228: *Anon.* (1740) 2 P. Wms. 75 (describing a Privy Council ruling of 1722).

[16] 20 St. Tr. 239 at 294, 323.

[17] *Freeman* v. *Fairlie* (1828) 1 Moo. Ind. App. 305 at 324-5.

[18] *Cf. Cooper* v. *Stuart* (1889) 14 App. Cas. 286 at 291.

if the Crown ever had any power to create colonial courts, its power had been abrogated by the Quebec Act, 1774. By this Act, he argued, the "practice of reorganising governments for British dependencies out of Great Britain, by the sole power of the Crown" had been "relinquished and virtually acknowledged to be indefensible".[19] In a letter to Commissioner J. T. Bigge, Baron Field argued that the creation of colonial courts necessarily entailed creation of new offices, which according to Coke, the law of England would not permit. His doubts as to the constitutionality of the civil courts were strengthened by the fact that Thomas Pownall, a former Governor of Massachussets, had said that if the Crown had any power at all to erect colonial courts it could establish only courts "whose practice, jurisdiction and powers" corresponded with that of known English courts.[20]

Although Bentham's views appear not to have attracted much notice, Field, J.'s opinion was noted in Bigge's report on the judicial systems of New South Wales[21] and Van Diemen's Land and presumably was not overlooked when the time came for reorganization of the colonial government. The Imperial Act, 4 Geo. IV, c. 96 (1823), left no loopholes in this regard and supplied statutory authority for all manner of courts the colony was thought to require then or in the near future. The enactment of Imperial legislation obviously was the simplest expedient for resolving any controversy over the limits of royal authority, but the result was to leave the ambit of the prerogative still in limbo.

Had the problem been inquired into properly there are several grounds for supposing that the authority of the Crown to constitute courts of justice in settled colonies would have been vindicated. Having regard to the genesis of the domestic limitations on the prerogative it is clear that in a number of particulars these limitations presupposed a state of affairs which was not always reproduced in newly found colonies. As a result it may be doubted whether the English rules were rules of a kind which could have been applied in those colonies. This is not to say that the Crown's power was an unlimited one. After the evolution of the domestic limitations has been considered and the reasons for suggesting that these were inapplicable in a newly settled colony explained, it is proposed to examine the limits within which the Crown's authority to create courts in the American plantations was assumed to be confined. As has been observed already, these colonies usually were characterised as conquered rather than as settled colonies. Nevertheless, in colonial Charters and gubernatorial Commissions the Crown normally directed that English law should be the norm of decision. Such directions appear to have been regarded as setting definite limits to what the Crown might lawfully do in exercise of its prerogative in regard to colonial judicial systems, a view probably inspired by the principle laid down in *Calvin's Case* that once the

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[19] "A Plea for the Constitution of New South Wales" (1863) in J. Bowring (ed.), 4 *The Works of Jeremy Bentham* (1843) 254 *et seq.*

[20] Field to Bigge, 23/10/1820—*H.R.A.* IV i, 858-9. "The only argument", Field, J. added, "for the legality of the present civil Charter, is that, since no subject of the King can emigrate without his licence had or supposed by his connivance (3 Coke's Institute 821-2; Pownall on British Colonies, 27 the settlers of New South Wales must be taken to have emigrated upon condition of accepting the constitution of its Charter of Justice." (*H.R.A.* IV i, 859.) The Imperial statute 54 Geo. III, c. 15 (1814) providing for execution of judgments recognized the exercise of civil jurisdiction in the colony and possibly, Field, J. thought, might be construed as confirming its legality. See also Judge-Advocate Wylde to Under-Sec. Goulburn, 31/3/1817—*H.R.A.* IV i, 231.

[21] *Report of the Commissioner of Inquiry on the Judicial Establishments of New South Wales and Van Diemen's Land* (1823) 4.

Crown has extended to a conquered colony the laws of England it is powerless to alter those laws without the concurrence of Parliament. If the Crown's authority to erect courts in colonies which by royal fiat were to be governed by English law or part thereof was circumscribed, its power to erect courts in settled colonies certainly could not have been any greater.

Domestic Limitations on the Prerogative

"The prerogative of creating courts and offices", Joseph Chitty wrote in 1820, "has been immemorially exercised by the Kings of England, and is founded on the capacities of executive magistrate, and distributor of justice, which the constitution of the country has assigned to the Sovereign."[22] "But the courts of England," he continued, "though they were originally instituted by royal power . . . have respectively, gained a known and stated jurisdiction. and their decisions must be regulated by the certain and established rules of law." No additional jurisdiction could be conferred on these courts, nor could the sovereign "grant a commission to determine any matter of equity" or "authorize any court to proceed contrary to the English laws, or by any other rule".[23] Subject to these qualifications, it was competent for the Crown to "constitute any number of legal and ordinary courts, for the administration of the general law of the land. . . ."[24]

The principles which Chitty described have their origin in the late 16th and 17th centuries. This represented a critical period in the history of English judicature, a period characterized by repeated conflict between the courts of common law and the rival jurisdictions recently established or reinforced by the Crown. The Crown had always claimed a residue of jurisdiction and authority to invest that residue in any of its servants, but never before had the monarchy attempted to utilise this part of its authority to the same extent as did the Tudors and Stuarts. The proliferation of new prerogative jurisdictions was seen as a real threat to the supremacy and exclusiveness of the common law: business was being diverted from the common law courts, alien forms of proceeding which seemed wholly repugnant to due process were being employed, but worse still, the King's first minister, the Lord Chancellor, was enjoining litigants at common law to desist from proceeding further in the courts of common law. When it appeared that conciliar tribunals were being used to enforce "illegal" royal proclamations and to liquidate those who opposed royal policies, the common lawyers and their friends in Parliament resolved upon drastic measures which, although not so far-reaching as to destroy prerogative courts and the power of the Crown to confer judicial power upon its nominees, hemmed in royal power to such a degree that never again was it possible for the Crown to do much about reorganization of judicature without the concurrence of Parliament.

Even before the Long Parliament was provoked into action, the common law courts had endeavoured to constrict the prerogative by the issue of writs of prohibition against conciliar tribunals and by refutation of the Crown's claim to establish courts of equity. In dealing with the campaign against equitable jurisdiction it is important to remember that it was not until after

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[22] *Prerogatives of the Crown* 75.
[23] *Id.* 76.
[24] *Id.* 77. Chitty drew heavily on Coke's opinions. See 4 Co. Inst. 163, 200, 478; also *Comyn's Digest*, Prerog. D. 28, 29; *Bacon's Abridgment*, Prerog. B. 3, f. 1.

the Restoration that equity could be identified with any particular body of legal doctrine. In the 16th and early 17th centuries it was conceived only as a general principle of decision according to which the judge should adjudicate so as to do justice between the parties albeit this should require departure from the strict letter of the law, "law" here meaning simply the common law. Although the chief dispenser of equity was the Lord Chancellor, equity was not his exclusive preserve; it was administered also by new tribunals such as the Court of Requests. But according to the common law judges it was to be administered nowhere else but in Chancery. The Crown, it was resolved in the *Earl of Derby's Case*,[25] "cannot grant a commission to determine any matter of equity, but it ought to be determined in the Court of Chancery, which hath had jurisdiction in such case time out of mind, and always such allowance by the law: but such commissions or new Courts of Equity shall never have such allowance, but have been resolved to be against law, as it was agreed in *Pott's Case*". *Pott's Case* may have been the one to which Serjeant Hitcham referred the Court of Common Pleas in *Martin* v. *Marshall and Key*[26] when he spoke of the resolutions of the judges in Elizabeth's reign. As represented by Hitcham, the judges had held that the Crown could not "grant anything in derogation of the common law, but tenere placita, according to the course of law may be granted and prescribed"; further,

> that part of equity being opposite to regular law, and in a manner an arbitrary disposition is still administered by the King himself and his Chancellor, in his name ab initio, as a special trust committed to the King, and not by him to be committed to any other. And it is true, that the one is bound to rules, the other absolute and unlimited, though out of discretion they entertain some forms, which they may justly leave in special cases.

It is possible that these observations may have been directed to the Court of Requests whose depredations on the Court of Common Pleas had caused it to come under heavy fire towards the end of Elizabeth's reign.[27] The reports contain one case, *Stepneth* v. *Lloyd*,[28] decided in 1598, in which the Court *in banc* held this equity court not to have "any power by commission, by the statute, or by the common law. . . ." Significantly this decision is mentioned in Coke's *Fourth Institute*[29] immediately after the statement "no court of equity can be raised by commission. . . ."

The authority of the Crown to establish new courts to administer the common law was not contested. On the other hand, the inference to be drawn from cases such as the *Case of Commissions of Enquiry*[30] in 1608 is that even if such courts are created, it is not open to the Crown to introduce novel forms of proceeding which derogate from the requirements of due process as defined by the common law. In the *Case of Commissions of Inquiry* the

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[25] (1613) 12 Co. Rep. 114 *per* Lord Ellesmere, L.C., Coke, C.J.K.B., Doderidge and Winch, JJ.

[26] Hob. 63. The action was for false imprisonment arising out of the committal of the plaintiff for contempt of the Chancery Court of the City of York.

[27] See I. S. Leadam (ed.) *Select Cases in the Court of Requests, 1497-1569* (Selden Society, 1898) xxiii *et seq.*

[28] Cro. Eliz. 647. The report gives the case as *Stepney* v. *Flood*; *Stepneth* v. *Lloyd*, however, is the title appearing on the Roll (see A. K. R. Kiralfy, *A Source Book of English Law* (1957) 308. See also *Turner* v. *Mosse* (1615) Kiralfy, *op. cit.* 311.)

[29] 4 Inst. 97-8. Despite the judicial rulings the Court continued in being until 1643.

[30] 12 Co. Rep. 31. See Harrison Moore, "Executive Commissions of Inquiry" (1913) 13 *Col. L.R.* 500.

judges held invalid two royal Commissions: one directing the commissioners to make inquiries in several counties into scheduled offences and abuses upon the sworn oath of jurors; the second, which had issued following return of the inquisitions into Chancery, authorising the commissioners to compound with offenders and to exonerate and pardon them. In holding the Commissions void and illegal, the judges appear to have been impressed most with the argument that those who, on inquiry, were presented as having offended were liable to penal sanctions without being afforded opportunity of traversing the allegations against them. The inquisitions returned into Chancery were not, the judge said, matters of record, and therefore could not have been removed into King's Bench by *certiorari*.

The Act, 16 Car. I, c. 10 (1640), whereby the Long Parliament abolished the Court of Star Chamber, the Councils of the North and Wales, the Court of the Duchy of Lancaster and the Court of Exchequer in the County Palatine of Chester, reinforced the requirement of due process. Besides taking away the jurisdiction of these tribunals and declaring that no court having the same or like jurisdiction as had been exercised by the Court of Star Chamber, should be erected within England or Wales, the Act provided:

> that neither His Majesty nor his Privy Council have or ought to have any jurisdiction, power or authority by English bill, petition, articles, libel, or any other arbitrary way whatsoever, to examine or draw into question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any of the subjects of this kingdom, but that the same ought to be tried and determined in the ordinary Courts of Justice and by the ordinary course of the law.

This statute sometimes has been regarded as prohibiting absolutely the creation of courts or the conferring of judicial power by exercise of the royal prerogative, but having regard to the mischief sought to be remedied and the language of the statute it is doubtful whether so general an effect can be attributed to it. The lengthy preamble recites a series of medieval statutes, each of them, in one way or another, enjoining that none be deprived of life, liberty or property without due process of law. It then proceeds to catalogue several grievances: excess of the jurisdiction conferred by the celebrated *Pro Camera Stellata* Act, 1487;[31] assumption by the "Council Table" of "power to intermeddle in civil causes and matters of private interest between party and party" and determination by it "of the estates and liberties of the subject contrary to the law of the land and the rights and privileges of the subject . . .". It is also alleged that "all matters examinable or determinable before the said Judges (that is, those mentioned in the *Pro Camera Stellata* Act) may have their proper remedy and redress, and their due punishment and correction by the common law of the land, and in the ordinary course of justice elsewhere. . . ." The complaint of the legislators, in short, is against the law administered by the Court of Star Chamber and the procedures it followed, and it is with respect to these that the prohibitory sections in the Act deal. There is nothing, it is submitted, in the Act which would have prevented the Crown from erecting additional courts to administer the common law according to rules of common law procedure.

Some of the modern decisions on the constitutionality of royal Commissions of inquiry appear to question the competence of the Crown without

[31] 3 Hen. VII, c. 1, as amended by 21 Hen. VIII, c. 20.

statutory authority to constitute any new courts whatsoever. In *McGuiness* v. *Attorney-General for Victoria*,[32] Latham, C.J., for example, said[33] at one point:

> (1) the executive government cannot by the exercise of the prerogative create new courts; and (2) the executive government cannot by any exercise of the prerogative interfere with the due course of the administration of justice.

In the same case, Starke, J. maintained that "the Crown cannot now set up by virtue of its prerogative, any new jurisdiction, whether it is a court, a tribunal, or a person, to inquire into, hear and determine any civil or criminal cause without the sanction of an Act of Parliament. Nor", his Honour continued, "can the Crown alter by virtue of its royal prerogative the established legal procedure whether for the purpose of trying causes or matters or bringing persons to trial".[34] No exception can be taken to what their Honours said about altering established procedures, but their assertions concerning new jurisdictions probably require qualification. The issue before them was not whether it is now open to the Crown to establish new courts of common law jurisdiction, but whether, in the absence of statutory authority, the Crown may appoint a Commission of inquiry with power to compel the attendance of witnesses. Commissions *ad inquirendum* merely are not of the same category as Commissions to hear and determine whether legal rights and duties have been infringed; thus, even though, as has been held, commissioners of inquiry have no power to compel attendance of witnesses without authority from Parliament,[35] it does not follow that the Crown cannot invest judicial power of a known variety by Commission. This seems implicit in the following passage from the opinion of Dixon, J. (as he then was) in *McGuiness' Case*:

> While the principle that the Crown cannot grant special commissions, outside the ancient and established instruments of judicial authority, for the taking of inquests, civil or criminal, extends to inquisitions into matters of right and into supposed offences, the principle does not affect commissions of mere inquiry and report involving no compulsion . . . no determination carrying legal consequences and no exercise of authority of a judicial nature *in invitos*.[36]

It needs to be added that even if by common law the Crown may still constitute new courts of common law, wheresoever legislation exists which constitute or provides for the constitution of a complete judicial system, the prerogative by implication must be taken to have been suspended.

The Act 16 Car. I, c. 10, was not the only statute of the Long Parliament which sought to clip the wings of the royal prerogative in regard to the erection of courts. The statute next following, 16 Car. I, c. 11, repealed that section (s.8) in Elizabeth's Act of Supremacy, 1559, which had authorized the Crown by Letters Patent to commission any natural born subjects to exercise "all manner of jurisdictions, privileges, and pre-eminence in any wise touching or concerning any spiritual or ecclesiastical jurisdiction within" England, Ireland or any other of the Crown's dominions; forbade the creation of tribunals having

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[32] (1940) 63 C.L.R. 73.
[33] *Id.* 85.
[34] *Id.* 90.
[35] *Clough* v. *Leahy* (1904) 2 C.L.R. 139; *McGuiness* v. *Attorney-General for Victoria* (1940) 63 C.L.R. 73.
[36] (1940) 63 C.L.R. at 102. *Cf. Cook* v. *Attorney-General* (1909) 28 N.Z.L.R. 405 at 423-5. In this case it was maintained that it is not given to the Crown to appoint a commission to inquire whether a specific person has committed an offence.

like jurisdiction and forbade the imposition of penal sanctions for ecclesiastical offences. To appreciate the full significance of this legislation it is necessary to consider briefly the antecedents of the ecclesiastical commissioners and the Court of High Commission.[37]

Ecclesiastical Commissions began to be issued soon after Henry VIII assumed supremacy of the Church in England and, according to the judges in *Caudrey's Case*,[38] this the Crown was competent to do without statutory authority. To begin with, the Commissions were issued principally to enforce ecclesiastical policy and to suppress offences inimical to the religious settlement, the main one being the Canterbury Commission or High Commission. From about 1580 onwards the High Commission began to stand in much the same relationship to the ordinary ecclesiastical tribunals as did the King's Council to the courts of common law, that is to say, it "exercised a jurisdiction which was to a large extent concurrent with that of the ordinary courts—supplementing their deficiencies, supporting their authority, and sometimes correcting their miscarriages of justice".[39] Like the other conciliar courts, the High Commission offered certain advantages over the ordinary tribunals: unlike the ordinary ecclesiastical courts its jurisdiction was nation-wide[40] and it could fine and imprison, something they were unable to do. In addition its procedures were cheaper and less dilatory.

The Act of the Long Parliament had the effect of confining ecclesiastical jurisdiction where it had formerly belonged, namely in the courts of the Archbishop of York and Canterbury and the courts of the Bishops. After the Restoration, the section which had taken coercive and corrective jurisdiction from those courts was repealed in turn and the Archbishops and Bishops etc. confirmed in the exercise of the entire jurisdiction they had exercised before the Act of the Long Parliament.[41] The Restoration Parliament's Act, however, took care to save those clauses in 16 Car. I, c. 11 concerning the High Commission or the erection of some like court by Commission and to confirm the repeal of s.8 of Elizabeth's Act of Supremacy.[42]

Whether these limitations, both on the creation of ecclesiastical tribunals and other courts with jurisdiction other than common law jurisdiction, are capable of being applied in their entirety to settled colonies is doubtful for in each instance the domestic restrictions presuppose that there is already machinery in existence for administration of the various branches of English law. In newly settled colonies it is not so much a question of creating additional

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[37] The following account is based on 1 *H.E.L.* (7 ed., rev. 1956) 605-11, and G. R. Elton, *The Tudor Constitution* (1960) 217-27.

[38] (1591) 5 Co. Rep. 1a.

[39] 1 *H.E.L.* 608. The "ordinary" jurisdiction of the Commission tended to overshadow its visitorial functions. "Besides its work of supervising the doings of the ordinary ecclesiastical courts, its original jurisdiction was almost co-extensive with that of those ordinary courts. Thus it comprised many various matrimonial matters . . . immorality and simony, plurality, and other clerical irregularities . . . heresy, schism and non-conformity . . ." (1 *H.E.L.* 609). There is no evidence that the Commission assumed testamentary causes jurisdiction (see n. 40 below).

[40] The only ordinary ecclesiastical court which came near to exercising jurisdiction throughout the realm was the Prerogative Court of the Archbishop of Canterbury. This exercised testamentary causes jurisdiction wherever the deceased left *bona notabilia* in more than one diocese of the Province.

[41] 13 Car. II, st. 1, c. 12 (1661).

[42] James II erected a High Commission in defiance of the legislation. This abuse of the prerogative prompted inclusion in the Bill of Rights, 1689 (1 Will & Mary, sess. 2, c. 2) of an Article condemning "the Commission for erecting the late court of Commissioners for ecclesiastical clauses and all other commissions and courts of like nature" as "illegal and pernicious".

courts of justice as one of constituting courts where there was none before. This differentiating circumstance, it is submitted, *prima facie* renders the English rule limiting the prerogative to the creation of common law courts inapplicable. This is not to suggest that the domestic limitations are without relevance or that the prerogative to constitute colonial courts is unlimited. In colonies governed by English law, the Crown at no time could have been possessed of power to erect courts other than those with jurisdiction to administer the laws of England in force in the colony.[43] To have allowed it any greater power in this respect would have run counter to the overriding doctrine laid down in *Calvin's Case*, that once English law has been extended to a colony the Crown is powerless to alter it. Moreover, in constituting in a settled colony courts to administer English law in force there, the Crown presumably did not, for the same reason, possess authority to lay down forms of proceeding contrary to those prescribed by law for courts of corresponding jurisdiction in England except possibly where local circumstances rendered English forms wholly inapplicable.

Let us now consider what principles can be distilled from the practices which were followed in erection of courts in the American colonies.

Establishment of Courts in the American Plantations

Authority to constitute courts in the so-called royal provinces usually was delegated by the Crown to colonial Governors. Under their Commissions the Governors were invested with general power to erect courts, the manner in which such power was to be exercised being described in instructions issued under the Sign Manual. Instructions by themselves, it should be noted, were deemed ineffective to invest in a colonial Governor any part of the royal prerogative.[44] The power to establish a criminal court in Newfoundland, the Attorney-General, Sir Dudley Ryder, advised the Lords Commissioners for Trade and Plantations,[45] "cannot be granted by instruction, or any otherwise than under the great seal, and, therefore, if thought advisable to be granted at all, ought to be inserted in the Governor's commission; but the manner of his exercising such power may be prescribed and limited by instructions, for any breach of which he will be answerable to His Majesty".[46]

The power to create colonial courts also was claimed by colonial assemblies,

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[43] It is of interest to note that in modern law one of the criteria for determining the applicability of rules of English law is whether at the relevant time the colony possessed the judicial machinery necessary for operation of the English law. See *Quan Yick* v. *Hinds* (1905) 2 C.L.R. 345; *Mitchell* v. *Scales* (1907) 5 C.L.R. 405. Taken to its logical conclusion, this conception of applicability would mean that unless a colony possessed from the outset a court of equitable jurisdiction, the rules of equity would not be capable of being applied.

[44] Instructions were considered to be in the nature of "private rules which are not to be communicated even to the respective Councils, but upon particular occasions, and not to be exposed to public view". See J. H. Smith, *Appeals to the Privy Council from the American Plantations* (1950) 215-16, 597 *et seq.* The Governor has none of the powers of the sovereign save those expressly delegated to him by his Commission (*Cameron* v. *Kyte* (1835) 3 Knapp at 343-4). Unlike the Instructions, his Commission is a public document. See 11 *H.E.L.* 48.

[45] Commonly referred to as the Board of Trade, the Commissioners were first appointed in 1696 and were charged with general supervision of colonial administration. It lacked executive authority and its decisions had to be given effect to by the King in Council. See Smith, *op. cit.* 132-4; 11 *H.E.L.* 70-2.

[46] Opinion dated 27/3/1759—Forsyth, *op. cit.* 172. See also Charles Clark, *Colonial Law* (1834) 421-2.

and colonial statutes establishing courts were enacted.[47] However, at no time before the secession of the American colonies did the Crown concede that the mere existence of an assembly or the enactment of colonial legislation on courts diminished in any way the royal prerogative. In this the Crown was supported by the opinions of its Law Officers. The Attorney-General, Edward Northey, for example, advised in 1703 that although by Charter the General Assembly of Massachussets Bay had been given power to erect courts in the colony, the Crown thereby did not relinquish its prerogative to create a court of equity.[48] Fifty years later the Crown was advised by the Law Officers to disallow an Act of the Jamaican legislature for appointment of Commissioners of Nisi Prius and for extending the jurisdiction of Justices of the Peace on the ground that it was "so great an encroachment upon the royal prerogative, to which the creating or establishing courts of justice belongs".[49] Shortly afterwards more resolute steps were taken to ensure that prerogative instruments rather than colonial acts would be used for the erection of colonial judicial systems.[50] Instructions issued to the Governors of new royal colonies were specific that it should be the Governor who should establish the courts.[51] A memorandum prepared for the Privy Council by the Lords Commissioners for Trade and Plantations in 1760, states:

> The Governor of every Colony not incorporated by Charter nor vested by Grant in particular Proprietors, is impowered by his Commission under the Great Seal, to erect Courts of Judicature; And accordingly, in the infancy of the Colonies, Courts of Judicature were established under that Authority, which Courts have in most of them been confirmed and their Proceedings regulated by Provincial Laws ratified by the Royal Approbation. But in Colonies of a later Establishment as Nova Scotia and Georgia, the Courts of Judicature exist, and act under the Appointment of the Governor in virtue of his Commission.[52]

For the most part the courts constituted by the Crown in the American plantations were modelled both in their jurisdiction and procedures after established English courts. The most significant differences related to the manner in which some of the courts were constituted. "In some places", Sir William Holdsworth writes,[53] "the Governor, or the Governor in Council, acted as a Court of Exchequer, as a court of probate, and as a court for matrimonial causes. In many colonies the Governor and Council were the highest court of appeal in the colony, and sometimes the Governor or the Governor and Council sat as a court of Chancery, and administered an equitable jurisdiction." Equitable jurisdiction appears to have been claimed by colonial Governors in virtue of the clauses in their Commissions giving them custody of the public seal of the colony. This seal corresponded with the Great Seal of which the Lord Chancellor was custodian. After the Restoration, courts of admiralty

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[47] A. B. Keith, *Constitutional History of the First British Empire* (1930) 255-7. George A. Washburne, *Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684-1776* (1923) 21.

[48] George Chalmers, *Opinions of Eminent Lawyers* (2 ed. 1858) 194-5.

[49] *Id.* (Vol. 2, 1 ed.) 106-7; *cf.* 4 *Acts of Privy Council (Colonial Series)* (hereafter cited "*A.P.C. (Col.)*") 254.

[50] L. W. Labaree, *Royal Government in America* (1930) 375.

[51] Samples of these Instructions are reprinted in L. W. Labaree, 1 *Royal Instructions to British Colonial Governors* (1935) 298 *et seq.*

[52] 4 *A.P.C. (Col.)* 430-1.

[53] 11 *H.E.L.* 59.

jurisdiction were established in certain of the seaboard colonies in virtue of Commissions from the Lords of the Admiralty constituting the Governors Vice Admirals, with power to adjudicate in courts of vice-admiralty. In the 18th century the ordinary jurisdiction was supplemented by Imperial legislation conferring jurisdiction over piracy, and over offences against the Acts of Trade.[54]

Not until a relatively late period was the prerogative power to constitute colonial courts disputed. In 1712 the Assembly of New York protested against the creation of a Chancery Court by the Governor and resolved that the use of the prerogative for this purpose was "contrary to law, without precedent, and of dangerous consequence to the liberty and properties of the subjects".[55] Possibly the colonial legislators had in mind the English decisions holding the Crown incompetent to create additional courts of equity. At all events, their sentiments were not shared by the Lords Commissioners for Trade and Plantations, who advised the Governor as follows:[56]

> Her Majesty has an undoubted right of appointing such and so many courts of judicature in the plantations as she shall think necessary for the distribution of justice.

Once the Lords Commissioners had so ruled, for practical purposes, that was the end of the matter. Had the colonial legislature sought to invoke its own legislative authority to override the Governor, almost certainly the Lords Commissioners would have advised the King in Council to disallow the legislation, as the Council clearly was entitled to do. It should perhaps be added that in considering objections such as those raised by the New York Assembly and in reviewing colonial legislation, the Lords Commissioners normally took advice from their standing counsel.[57] Not infrequently, when a matter was referred by the Lords Commissioners to the Privy Council committee,[58] a further opinion would be taken from the Law Officers of the Crown. Official rulings on the scope of the prerogative cannot therefore always be dismissed as having been taken without some inquiry into the constitutionality of the Crown's actions.

Although at no time did the Crown relinquish its claim to be the chief architect of colonial judicial systems, the Instructions given in the 18th century to the Governors of those colonies in which English law had been ordained as the norm of decision invariably directed that the courts to be constituted by the Governors should be as near as possible like English courts. The Governor of Georgia, for example, was enjoined in 1754, to take care "that no greater powers be vested in" the courts of justice of the colony "than are vested in our courts of justice in this Kingdom and that the methods of proceeding in such courts be as near as may be agreeable to the methods and rules of proceeding in our courts here".[59] It seems not unlikely that this clause in the Instructions was inserted on the advice of the Law Officers. A legal opinion given in 1738 by the Attorney-General and Solicitor-General, Sir Dudley Ryder (later Lord Chief Justice), and Sir Thomas Strange (later Master of the Rolls), on the establishment of a Court of Exchequer in South Carolina, proceeds on the assumption that the Crown could not do otherwise than adopt the English

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[54] *Id.* 60; Keith, *op. cit.* 261-2.

[55] 1 *Jo. of Proc. of Gen. Ass. of New York* 224, as quoted by Labaree in *Royal Government in America* 380. See Labaree 378-80ff.

[56] 5 *New York Colonial Documents* 333 as quoted by Labaree in *Royal Government in America* 380.

[57] First appointed in 1718.

[58] After 1696, a committee of the whole.

[59] Labaree, 1 *Royal Instructions to British Colonial Governors* 298 para. 426.

system as the norm. The Law Officers conceded "that the Crown has, by the prerogative, power to erect a Court of Exchequer in South Carolina, which may be done by letters patent under the seal of the province, by virtue of his Majesty's commission to the Governor for that purpose".[60] But, they continued, this Court should have the same powers as the court of the same name in England and "the proceedings in such new erected court should be agreeably as near as may be, to the practice here".[61]

The extent to which the Crown was prepared to submit to such a restriction on its prerogative is evidenced by the stand taken in regard to the powers of colonial Courts of Appeal to reverse jury verdicts in common law actions. Under English common law procedure, a jury verdict might, of course, be reversed on a motion for a new trial before the *banco* court in which the action had originated. There was no appeal against the jury's findings in the strict sense of that term and the judgment based on the verdict was reviewable by a higher court only upon a writ of error. Upon such a writ, judgment below was reversible for error on the face of the record. The record upon which a court of error determined whether the judgment below should stand contained nothing of the evidence upon which the jury based its verdict with the result that reversal of judgments for error appearing on the face of the record was restricted to errors of law. Generally speaking, Colonial Courts of Appeal in America consisting of the Governor (or in his absence, the Lieutenant-Governor) and Council, had confined their review of common law judgments to cases of error of law only, as clearly was contemplated by the Instructions issued to the Governors. In the revised Instructions of 1753 the words "in cases of error" which had appeared in previous Instructions were omitted entirely. The Lieutenant-Governor in New York colony interpreted this as extending the jurisdiction of the Court of Appeals and accordingly when the occasion arose, which it did in *Forsey* v. *Cunningham*, issued a writ directing the Chief Justice of the Supreme Court to bring up proceedings to the Governor and Council.[62]

This the Chief Justice declined to do. Since no writ of error had issued, he explained to Lieutenant-Governor Colden the only possible complaint the appellant could have was with the jury's verdict, and with this the Court of Appeals was powerless to interfere. The Lieutenant-Governor declined the Chief Justice's advice, the effect of which was to spark off a public controversy which was to preoccupy legal minds in the colony for several years. Briefly stated, the viewpoint of the judges and their supporters was this: though by its prerogative the Crown could create colonial courts, in New York, a colony governed by English law, courts of common law jurisdiction created by the Crown must be so constituted as to preserve common law forms of proceeding. The Instructions to the Governor, it was conceded, spoke of "appeals" to the Governor and Council, but the term "appeals", it was argued, had been used in a non-technical sense and in common law cases comprehended review only of errors on the record. Colden, though no lawyer himself and on this occasion denied the support of his Attorney-General, replied most ingeniously thus: in England, he admitted the Crown would have been powerless to effect a change in English procedure such as that he contended for in the new Instructions, but domestic

[60] Forsyth, *op. cit.* 169.
[61] *Id.* 170.
[62] For the following account of the case the author is greatly indebted to J. H. Smith, *op. cit.* 383-416. See also Labaree, *Royal Government in America* 409-19.

limitations on the prerogative in regard to the administration of justice did not extend to the colonies and the Crown could provide for different forms of proceeding adapted to the circumstances of each colony.

In January, 1765, Cunningham, the appellant, petitioned the Lieutenant-Governor and Council for leave to appeal to the King in Council. Members of the provincial Council, who in opposition to Colden had consistently taken the view that appeal did not lie to the Court of Appeals, dismissed the petition. Later in the year, application was made direct to the King in Council for special leave to appeal both against the order of the Lieutenant-Governor and Council and the Supreme Court judgment. At first glance, the advice tendered by the Lords Committee of the Privy Council appears to support the views advanced by the Lieutenant-Governor. It was not advisable, the Committee reported, that appeals should be admitted direct from the Supreme Court and that therefore His Majesty should order that the Lieutenant-Governor allow an appeal to the Court of Appeals. J. H. Smith in his account of the case, conjectures that "appeal" was used not in the technical sense. At all events, when proceedings were again set in motion in New York to have the jury verdict reviewed in the Court of Appeals, the Supreme Court took the same uncompromising stand as it had done before and refused to comply with the Lieutenant-Governor's writ for transmission of the proceedings below. A stalemate had been reached and at this point the appellant appears to have given up the struggle.

Meanwhile, however, the Board of Trade was in the process of preparing a draft of Instructions to the newly appointed Governor of New York, Sir Henry Moore, and had taken the occasion to make certain comments on the effect of the controversial article in the Instructions of 1753. The omission of the words limiting appeals to "cases of error only" had not, the Board thought, altered the scope of judicial review at all. The principle confining review by the Court of Appeals to such cases was one of such long standing that no specific words to that effect were needed. But to quieten doubts it was recommended that the omitted words be restored. On receiving the Board's draft Instructions, the Lords Committee took the precaution of seeking the opinion of the Law Officers, Charles Yorke (later Lord Chancellor) and William De Grey (later Chief Justice of Common Pleas). The tenor of their advice is outlined by J. H. Smith:[63]

> . . . the 1753 alteration did not vary the sense of the instruction as it stood previous to that time. The words "in cases of error only" appeared to have been struck out of the instructions as superfluous and improper. For, it was asked, in what cases could an appeal lie but "in cases of error only"? That is, error of law, upon the record of a judgment given in a court of common law, wherein according to English procedure the evidence of the facts upon which the jury gave their verdict did not appear, and errors both in law and fact upon the face of an interlocutory or decretal order of a court of equity, where the evidence was in writing and the court judges of both law and fact.

The strength of colonial attachment to traditional English procedures is also shown in the submissions of the representatives of the Connecticut government in the celebrated trial of the *Mohegan Indians* v. *Connecticut*.[64] The trial

[63] Smith, *op. cit.* 409.
[64] *Id.* 422 *et seq.*

took place before commissioners appointed by the Privy Council at the behest of the Indians who, it was claimed, had been deprived of certain tracts of their land in contravention of the treaty obligations assumed by the colonial government. Under their Commission of 1704 the commissioners were empowered to inquire into the complaints and to determine them according to law and equity. Despite the fact that before recommending that the commission issue the Lords Commissioners for Trade and Plantations had taken the precaution of obtaining the advice of the Attorney-General, Edward Northy, on the constitutionality of such a Commission and had been informed by him that the Crown had it within its power to erect colonial courts of justice, the Connecticut government took the objection that a Commission conferring authority to hear and determine in a summary way questions respecting freehold titles was in direct contravention of 16 Car. I, c. 10 (1640), and was, therefore, illegal. The commissioners nevertheless proceeded with their inquiry and in August, 1705, adjudged that the Mohegans be restored to four tracts of land of which they had been deprived. Shortly afterwards, the government of Connecticut took the case on appeal to the Queen in Council, again urging the illegality of the Commission. Although the Lords Committee on other grounds recommended that a Commission for review should issue, the propriety of the original Commission was confirmed. The Committee, which included amongst its number Chief Justices Holt and Trevor, seems to have been of the view that, since the dispute was between a sovereign nation and a colonial government and not between English subjects, it could not be determined according to English law; the inference being that had the Mohegans not enjoyed the status of a sovereign nation and had the issue been between English subjects, the Commission would have been invalid.

This was not the first or last occasion on which 16 Car. I, c. 10 figured in colonial protestations against the use of the prerogative to institute judicial authority. Towards the end of the 18th century some critics were even claiming that the statute deprived the King in Council of jurisdiction to entertain appeals in real actions and by the same token rendered the exercise of judicial power by colonial Governors and their Councils unconstitutional.[65]

Writing in 1764, Thomas Pownall, whose opinion, as has been noted, was influential in Barron Field's thinking on the problem, observed that the power of the Crown to create colonial courts

> is, I believe, universally disputed, it being a maxim, maintained by the colonists, that no court can be erected but by the act of the legislature. Those who reason on the side of the Crown say that the Crown does not, by erecting courts in the colonies, claim any right of enacting jurisdiction in those courts, or the law whereby they are to act. The Crown names the Judge, establishes the Court, but the jurisdiction is settled by the laws of the realm. The reasoning of the colonists would certainly hold good against the erection of any new jurisdiction, established on powers not known to the realm; but how can it be applied to the opposing the establishment of courts the laws of whose practice, jurisdiction and powers are already settled by the laws of the realm, is the point in issue and to be determined. It will then be fixed beyond dispute, whether the crown can in the colonies, erect without the concurrence of the legislature, courts of chancery,

[65] *Id.* 208, 210.

exchequer, king's bench, common pleas, admiralty and probate or ecclesiastical courts.[66]

Pownall's opinion may be taken as fairly representative of official attitudes towards the ambit of the prerogative during the 18th century and it is borne out by the gubernatorial Instructions and the Law Officers' opinions. It is worth noticing also that although the extent of the prerogative was never submitted for adjudication by the Privy Council sitting on plantations appeals, cases did proceed to that tribunal which had begun in colonial courts of equity and other non common law jurisdictions. Surely, if there had been any real doubt of the competence of the Crown to create such courts, objections to the jurisdiction exercised by them would have found their way at one time or another to the supreme appellate tribunal, or else the Council itself would have drawn attention to the deficiency in power. Colonial appeals were not, as sometimes is supposed, disposed of by legally untrained personnel. After 1696 the committee of the Privy Council sitting on plantation appeals invariably included among its number one or two of the Chief Justices.[67]

Creation of Colonial Courts in the Second Empire

In the period intervening between the revolt of the American colonies and the Privy Council's decision *In re the Lord Bishop of Natal*, a number of important changes took place in regard to the doctrinal bases of prerogative power in the overseas dominions and in Imperial administrative practices. As observed in the introductory part of this article, there was an increasing readiness to regard newly founded colonies which had not been acquired as a result of conquests of or cessions from European powers as colonies to which the laws of England, so far as applicable, extended *ipso vigore*. But even in conquered colonies it now appeared that the Crown's prerogatives were not as extensive as once supposed. In 1774 Lord Mansfield had ruled that once legislative institutions had been granted or promised to a conquered colony the Crown no longer had any power to make laws for that colony. Also it seemed that when the British government had made up its mind to embark upon any major task of constitution-making for the colonies, it would no longer rely solely on the royal prerogative to give effect to its designs, but almost always would seek parliamentary approbation. This had been done both in British India[68] and in Canada.[69]

These changes could not but react upon contemporary legal opinions about the authority of the Crown to erect colonial courts without parliamentary sanction. Bentham, as we have seen, categorically denied that the Crown could erect courts in New South Wales save by authority of Parliament. The Quebec Act, 1774, he contended, had established the principle that "whatever was done in the way of establishing subordinate powers of *legislation*, was in *that* case, as well as in the case of *judicature*, done either by parliament itself, or by authority given therein to the Crown by parliament".[70] What Bentham, of course, failed to take account of was the fact that something more general in its application than the Quebec Act would have been needed to divest the

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[66] Pownall, *op. cit.* I, 107.
[67] Smith, *op. cit.* 323-4.
[68] 13 Geo. III, c. 63 (1773); 24 Geo. III, sess. 2, c. 25 (1784).
[69] 14 Geo. III, c. 83.
[70] Bentham, *op. cit.* 258.

Crown altogether of prerogative power to erect colonial courts, assuming such power to exist and that s.17 of the Act expressly saved the prerogative to create courts of civil, criminal and ecclesiastical jurisdiction. As regards the civil courts in New South Wales it might have been argued that since Parliament had expressly invested the Crown with authority to erect a criminal court in the colony, inferentially it had thereby precluded the Crown from constituting other courts. But even this interpretation probably would not have been acceptable to the courts of the period for, it was said:

> Acts of Parliament which would divest the King of his prerogatives, his interests or his remedies, in the slightest degree, do not in general extend to, or bind the King, unless there be express words to that effect.[71]

Not until much later were the courts prepared to imply suspension of prerogative power from the fact that a statute had supplied the Crown with authority co-extensive with the prerogative.[72]

In contrast to Bentham, James Stephen, Jnr., counsel to the Colonial Office, apparently had no doubts as to the competence of the Crown to erect courts of justice in New South Wales. Stephen's opinion regarding the prerogative as a source of authority for the erection of colonial courts is contained in his advice on the legality of a Proclamation promulgated by Governor Macquarie in November, 1818, investing the New South Wales magistracy with jurisdiction to entertain actions for recovery of servants' wages.[73] Similar legislation investing limited civil jurisdiction in Justices of the Peace had been passed in England in 1747[74] but, doubts having been raised as to its applicability in New South Wales, Macquarie had sought to meet the problem by promulgation of local legislation along the lines of the English statute.[75] In the Governor's Court, the Judge-Advocate subsequently had confirmed the view that the English Act did not extend to the colony but he had also ruled that the Governor lacked authority to confer civil jurisdiction on the magistrates. The Proclamation to that effect was, he said, repugnant to the Second Charter of Justice which had constituted the Governor's Court as the only competent to adjudicate civil claims for less than £50.[76] Judge-Advocate Wylde's decision thus assumes the validity of the Second Charter so far as it relates to the Governor's Court.

Although he agreed in result with Wylde, Stephen approached the problem in a rather different way. In his view, the crucial issue was whether the Crown could legislate for settled colonies at all. This he doubted, but, he continued:

> The validity of the Proclamation of the 21st of Novr., 1818, may perhaps . . . be defended on a different ground. I conceive that it is the prerogative of the Crown to create Courts for the administration of the law in the Colonies, provided that the constitution of such Courts does not deviate from that of the corresponding tribunals in England, further than the peculiar circumstances of the Colony may require. Now it may be said that, by conferring on the Magistracy in the case of servants' wages, a jurisdiction similar to that with which Justices of the Peace are invested in similar cases in England, the Governor was only calling into exercise

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[71] Chitty, *op. cit.* 383. See also Sir Dudley Ryder's opinion of 30/1/1749—Forsyth, *op. cit.* 170-1.
[72] *A.-G.* v. *De Keyser's Royal Hotel* (1920) A.C. 508.
[73] *H.R.A.* IV/i, 412-14.
[74] 20 Geo. II, c. 19.
[75] *H.R.A.* IV/i, 325.
[76] *H.R.A.* I/x, 634 *et seq.*

> this branch of the royal prerogative. To this argument, I do not know that a satisfactory answer could be given, had the Governor been authorized by his Commission to exercise this power.[77]

In point of fact Governor Macquarie had not been so authorised and a colonial Governor, it was well established, had no authority to exercise any part of prerogative power unless it be delegated to him by his Commission.[78]

There was nothing, it will be observed, in Stephen's opinion remotely suggesting that in creating colonial courts the Crown was inhibited in the same way as it would have been if it had erected courts within the realm. The only substantial restriction on the prerogative which he mentioned was that which the Law officers before him had insisted upon, namely that the Crown should, as far as local circumstances permitted, design colonial courts along English lines. Perfunctory though his treatment of the subject may be, Stephen's exposition carries as much weight as any other of the period. His, at least, was illuminated by a close-hand acquaintance with Imperial administrative practice and precedent[79] and was also one upon which those responsible for advising the Crown could be expected to act. One also should not overlook the fact that in his analysis of the legality of the Governor's Proclamation, Stephen had expressed a somewhat conservative estimate of the ambit of prerogative power[80] which suggests that he would not have ventured so liberal an appraisal of royal authority to constitute colonial courts unless the precedents unequivocally supported it.

Stephen's opinion however does not entirely square with the opinions of other of the Crown's Law Officers. In concluding his opinion on whether it was competent for the Crown to appoint a second Supreme Court judge in New South Wales, Sir John Richardson observed that although His Majesty "may by his Prerogative erect new Courts for the administration of the Common Law, I apprehend that he cannot erect a Court armed, as this Court (meaning the Supreme Court) is, with Equitable, Ecclesiastical and Piratical Jurisdiction, without the authority of an act of Parliament".[81] Such authority had, of course, been supplied,[82] but on what he based his opinion Richardson did not say. Possibly it was taken from *Coke's Institutes*. At all events, it may be dismissed as an ill-considered one: Richardson recognized that the issue on which his advice had been requested did not require examination of the extent of the prerogative and for that reason he probably did not give the matter more than cursory attention.

The same criticism cannot, however, be made of Sir James Scarlett's and Sir N. C. Tindal's joint opinion of 1827 on the power of the Crown to create the office of Master of the Rolls in Upper Canada,[83] a colony in which by a local enactment of 1792, English law had been declared to be the rule of decision in cases regarding property and civil rights.[84] In stating the case for opinion of the Law Officers, Lord Goderich adverted to the circumstances

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[77] *H.R.A.* IV/i, 415.
[78] *Cameron* v. *Kyte* (1835) 3 Knapp, at 343-4.
[79] Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 32, 41-65.
[80] The correctness of his opinion on this question is discussed in the author's "Prerogative Rule in New South Wales, 1788-1823" shortly to be published in *R.A.H.S. Jo. & Proc.*
[81] Richardson to Under Sec. Hay, 18/3/1826—*H.R.A.* IV/i, 638-9.
[82] By 4 Geo. IV, c. 96 (1823).
[83] Forsyth, *op. cit.* 172-4.
[84] W. P. M. Kennedy, *Documents on the Canadian Constitution, 1759-1915* (1918) 227.

which had led to the preparation of draft Letters Patent for appointment of a Master of the Rolls. Hitherto, equitable jurisdiction had reposed in the Governor, his custody of the seal of the colony having "been considered to invest him with the office of chancellor, but . . . the governors of Upper Canada (had) always declined assuming the functions of chancellor. . . ." Great inconvenience had resulted from "the want of a court authorized to enforce the executions of trusts, and to protect the property of infants", and this had been represented to his Majesty's government. After consideration of the proposed draft for the Letters Patent, the Law Officers advised that their investigations left them

> in considerable doubt, whether his Majesty lawfully can, by letters patent under the great seal, or in any other manner without the intervention of Parliament, or of the local legislature, create any new judge in equity, by whatsoever name he may be called, in Upper Canada; that the office of Master of the Rolls in England is a very ancient office, deriving its authority and jurisdiction from usage, and the various relations by which that office is connected with the general establishment of the courts both of equity and common law; that the same office and the same relations, much less the same fees and emoluments, could not be transferred to Canada by the mere creation of an office of that name, which would, nevertheless, be there a new office, the functions of which ought to be specified in the law which authorized, or in the patent which created it. . . .

It would be more expedient and would avoid confusion if the intended equity judge be designated Vice Chancellor to the Governor and made "his deputy for the desired purpose to which it is supposed the Governor's authority may be usefully employed in a court of equity". But whatever was done should be done by the aid of the Imperial Parliament or the local legislature.

Nowhere in their opinion did the Law Officers cite any authority for their conclusions, but in all probability they were guided by the English rule that the Crown is not permitted to create *new* courts of equity. No question was raised as to the correctness of the assumption that the Governor, as custodian of the colonial seal, already possessed equitable jurisdiction, nor does it appear that any significance was attached to the fact that the colonial legislature, established under the Constitution Act, 1791,[85] had received power to make laws for the peace, welfare and good government of the colony. This legislature, the Law Officers agreed, had power to create an additional equity judge, but there is no hint that this might have been regarded as the critical factor in determining the extent of the Crown's authority.

The existence or non-existence of local legislative institutions since has been held to be a most important criterion in determining the legality of Letters Patent constituting colonial courts. *In re the Lord Bishop of Natal*[86] it was held that "after a colony or settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that Colony or Settlement as it does to the United Kingdom".[87] Thus, the Board continued, "although the Crown may in its prerogative establish Courts to proceed according to the Common Law, yet . . .

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[85] 31 Geo. III, c. 31, s. 2.
[86] (1864-5) 3 Moo. P.C. (N.S.) 115.
[87] *Id.* 148.

it cannot create any new court to administer any other law. . . ."[88] Whether the applicability of the domestic limitations on the prerogative depended in any way upon the nature and extent of the legislative powers conferred on the local assembly, the Privy Council did not say, but this must surely be of some relevance. The domestic limitations presuppose that what power the Crown lacks is compensated for by the omnicompetence of Parliament. A colonial legislature possessing plenary power to legislate for the peace, welfare and good government occupies a comparable status but the same cannot be said of a legislature whose legislative power extends only to specific matters not including the constitution and regulation of courts of justice. Unless, therefore, the local legislature has been invested with power sufficiently wide as to allow for legislation on colonial courts, it seems doubtful whether the mere existence of a local legislature abrogates any part of the prerogative.

It is interesting to compare the Privy Council's ruling in 1864 with that of Lord Mansfield's, nearly a century before, in relation to the Crown's prerogative to legislate for conquered colonies. After a conquered colony had received or been promised a representative legislature of its own, the Crown, Lord Mansfield had ruled in *Campbell* v. *Hall*, no longer could legislate for that colony.[89] As I have endeavoured to establish elsewhere,[90] this ruling has relevance not only for conquered colonies governed by foreign law but also for colonies in which English law is applied. Similarly, though *In re the Lord Bishop of Natal* related to Letters Patent for a conquered colony, for the purposes of the decision little significance appears to have been attached to this factor. The distinction between legislating for colonies and constituting colonial courts, the Judicial Committee no doubt appreciated, was too fine a one to be maintained, and therefore they chose to apply to the latter the same fundamental principle as Lord Mansfield had applied to the former.

Colonial Courts of Ecclesiastical Jurisdiction

Whether it is open to the Crown to create colonial courts of ecclesiastical jurisdiction and if so subject to what limitations is a problem which presents special difficulties. These difficulties arise firstly from the fact that the statutory authority supplied by s.8 of Elizabeth's Act of Supremacy for appointment of ecclesiastical commissioners for the dominions was taken away by 16 Car. I, c. 11 (1640), and secondly from the fact that there is some uncertainty as to how much, if any, of the ecclesiastical law of England was transported to those of the overseas dominions which were to be governed according to English law. If the Crown can create only such courts as are needed to administer the law in force in a colony, and if ecclesiastical law can form no part of the inherited law of a settled colony, then clearly the Crown cannot by its prerogative constitute in such colonies courts of ecclesiastical jurisdiction.

If, of course, the Crown had no power to constitute colonial courts of ecclesiastical jurisdiction other than that which it derived from s.8 of Elizabeth's Act of Supremacy, the repeal of that section by s.1 of 16 Car. I, c. 11 (1640), and the confirmation of that repeal by the Restoration Parliament, would have prevented the Crown from issuing ecclesiastical commissions for the dominions though not perhaps Letters Patent investing ecclesiastical juris-

[88] *Id.* 152.
[89] Lofft. 655; 1 Cowp. 204; 20 St. Tr. 239.
[90] "Prerogative Rule in New South Wales, 1788-1823" *loc. cit.*

diction in colonial Archbishops, Bishops and Archdeacons. As has been noted, the judges of the Queen's Bench in *Caudrey's Case*[91] were of the opinion that even without the Act of Supremacy the Crown could have erected the High Commission, from which it would seem to follow that if 16 Car. I, c. 11, had merely repealed s.8 of the Act of Supremacy and had not taken the further step of prohibiting the creation in England and Wales of a court like the High Commission, the Crown could still have appointed ecclesiastical commissioners for both the realm and the dominions. In *Roper's Case*,[92] Coke repudiated *Caudrey's Case* so far as it had assumed the prerogative as a source of authority for the High Commission, but, it must be emphasized, he said nothing about the authority of the Crown independently of statute, to appoint ecclesiastical commissioners for the colonies. If the Crown's authority to appoint such commissioners did not depend on statute, the repeal of s.8 of the Act of Supremacy clearly revived the prerogative and nothing in s.4 of 16 Car. I, c. 11, could diminish it in any way. Under s.4 the Crown was prohibited from erecting courts like the High Commission, but this prohibition applied only in *England and Wales.*

Not until the late 19th century was it even hinted that 16 Car. I, c. 11, and 13 Car. II, c. 12, might have deprived the Crown of power to issue Letters Patent for the exercise of ecclesiastical jurisdiction in the overseas dominions. As we have seen, by their Commissions, Governors of the royal provinces in America and the West Indies normally were invested with at least testamentary causes jurisdiction and sometimes also matrimonial causes jurisdiction.[93] Even when such jurisdiction was not conferred expressly on the Governor it was not unusual for him to assume the jurisdiction belonging to an Ordinary. Although he thought it unnecessary to decide the point, Lord Tenderden, C.J., in *Basham* v. *Lumley*[94] said that though nothing in the Governor of Bermuda's Commission "peculiarly relates to the power of ordinary, yet I think that his general authority as Governor embraces it". His Lordship, it is interesting to note, had no quibble with the submission of the Solicitor General, Nicolas Tindal—shortly afterwards appointed Chief Justice of the Common Pleas—that Bermuda was a settled colony to which the settlers had carried at least part of the ecclesiastical law of England.

In *Long* v. *Bishop of Cape Town*[95] and *In re the Lord Bishop of Natal*[96] the Judicial Committee of the Privy Council held that after a colony had received legislative institutions of its own, it was not open to the Crown to confer coercive jurisdiction on a Bishop in the colony. On the question whether such jurisdiction, indeed any ecclesiastical jurisdiction, might have been conferred on a colonial Bishop or any one else in the colony before the grant of local legislative institutions, the Board equivocated. In one part of the opinion in the latter case, it is stated that "in a Crown colony properly so called (mean-

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[91] 5 Co. Rep. 1a.
[92] 12 Co. Rep. 45.
[93] C. Clark, *Colonial Law* 32, 59, 129, 141, 166, 171-2, 191, 210, 222, 232, 358, 380, 389.
[94] (1829) 3 Car. & P. 489 at 495; 2 St. Tr. (N.S.) 322. In this case action was brought against the Governor of Bermuda for assault and false imprisonment. The plaintiff, a church-warden, had refused to appear on a summons by the Governor (issued in his capacity as Ordinary) to show cause why he should not deliver up certain accounts following which the Governor ordered that he be taken into custody until the accounts were handed over. The Governor, it was held, had no authority to imprison and in any event had failed to proceed in a regular manner, that is, by citation.
[95] (1863) 1 Moo. P.C. (N.S.) 411.
[96] (1864-5) 3 Moo. P.C. (N.S.) 115.

ing, no doubt, one without a local legislature) a Bishopric may be constituted and ecclesiastical jurisdiction conferred by sole authority of the Crown. . . ."[97] Later on, however, the Board dealt with 16 Car. I, c. 11, and 13 Car. II, c. 12, and with respect to this legislation observed that there is "no power in the Crown to create any new or additional ecclesiastical Tribunal or jurisdiction"[98] and, further, that no "Ecclesiastical Tribunal or jurisdiction is required in any Colony or Settlement where there is no Established Church . . ."[99] One gains the impression that the Board took the view that the English statutes referred to applied equally before and after the establishment of the local legislature. Such a construction of the statutes however disregards the limitation of s.4 of 16 Car. I, c. 11, to England and Wales and also overlooks the fact that although s.1 of that Act repealed s.8 of the Act of Supremacy, it did not expressly prohibit issue of ecclesiastical Commissions for the dominions. Moreover it erroneously assumes that the legislation forbade creation of new Bishoprics and other episcopal offices.[100] Such an effect cannot be imputed to the statutes; their effect seems only to have been to stipulate that if the Crown intended to invest in any person or body ecclesiastical jurisdiction to be exercised within the realm, it could do so only by appointment to known ecclesiastical offices and by investing in the occupants of such offices the jurisdiction ordinarily attaching to the office.

In saying that the Crown has no power in the absence of statutory authority to erect ecclesiastical courts in colonies where the Church of England is not the established church, the Board did not discuss the conditions which must be satisfied before it can be said that the Church of England is established in a colony, nor did it indicate in whom authority to establish the Church in a colony might reside. The term "establishment" in this connection seems not to have acquired any special legal significance but, according to Lord Selborne, it "consists essentially in the incorporation of the law of the Church into that of the realm, as a branch of the general law of the realm, though limited as to the causes to which, and the persons to whom, it applies; in the public recognition of its Courts and Judges, as having proper legal jurisdiction, and in the enforcement of the sentences of the Courts, when duly pronounced, according to law, by the civil power".[101] Some writers would add other criteria such as, that the Church of England is the official religion and that it enjoys privileges and obligations not shared by denominations.[102] But on any such tests it is clear that to say that the power of the Crown to establish colonial courts of ecclesiastical jurisdiction depends on whether or not the Church of England has been established in the colony, is to beg the question. To deny the Crown prerogative power to constitute in a colony ecclesiastical courts having jurisdiction over all persons in the colony irrespective of their denomination, is virtually to deny to the Crown competence to establish the Church of England in any colony. If this is the proper inference to be drawn from the

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[97] *Id.* 151-2.
[98] *Id.* 154.
[99] *Id.* 152-3.
[100] The power to constitute colonial Bishoprics and dioceses was upheld in *R.* v. *Eton College* (1859) 8 El. & Bl. 610 at 635 and by Lord Romilly, M. R. in *Bishop of Natal* v. *Gladstone* (1866) L.R. 3 Eq. 1. After the case, however, the Crown by degrees abandoned the former practice of appointing colonial Bishops by Letters Patent and in 1875 the practice was dropped entirely (R. J. Phillimore, *Ecclesiastical Law* (2 ed. 1895) 1786).
[101] Quoted in R. Border, *Church and State in Australia, 1788-1872* (1962) 52.
[102] *Ibid.* 53.

Board's decision it would seem that yet another qualification must be added to the Crown's prerogative to erect courts in newly acquired colonies, namely, that no courts of ecclesiastical jurisdiction may be constituted there unless by Imperial Statute the Church of England is declared to be the established church or express authority is given for the erection of such courts.

The absence in a colony of an established Church of England not only had the effect of curtailing the power of the Crown to constitute courts there, but, so the Board said, excluded the application there of the ecclesiastical law. "(I)n the case of a settled colony," they said, "the Ecclesiastical Law of England cannot for the same reason be treated as part of the law which the settlers carried with them from the mother country."[103] This had not been the view of Lord Ellenborough,[104] nor, it seems, Lord Tenterden.[105] Whether by ecclesiastical law the Board meant only the law then administered in the church courts in England is not clear, but any other construction would have the result of excluding altogether from the birthright and inheritance of British subjects in settled colonies, the rules which, before the establishment in 1857 of the Divorce and Probate Courts, had been administered in the Courts Christian in exercise of their testamentary and matrimonial causes jurisdiction, a result certainly not consistent with previous practice. Having regard to the fact that what the Board was immediately concerned with were Letters Patent conferring coercive jurisdiction on a colonial Bishop, it seems reasonable to infer that their remarks about ecclesiastical tribunals in colonies were meant to apply only to courts constituted by episcopal officers or their delegates. Such tribunals could not be incorporated within the State system of courts in the sense that they might exercise jurisdiction over all persons within the diocese regardless of their denomination, or enforce their orders without aid from the secular courts.[106] But it did not follow that testamentary or matrimonial causes jurisdiction might not be given by the Crown, as was the normal practice, to a purely secular officer such as the colonial Governor. In conferring limited jurisdiction of this type on state tribunals, it hardly could be said that thereby the Crown had "established" the Church of England in the colony.

The Civil Courts in New South Wales and Van Diemen's Land

Why the Imperial government should have obtained statutory authority for the creation of a criminal court in New South Wales but should have relied on the royal prerogative as the source of authority for creation of the civil part of the colonial judicature, is something which never has been explained satisfactorily. Soon after the decision was made that the eastern part of New Holland be set aside as a place to which convicted felons might be transported, the Imperial Act, 27 Geo. III, c. 2 (1787), was passed which, after reciting the purposes for which New South Wales was to be settled and the possibility that it might "be found necessary that a colony and a civil Government" should be established there, proceeded to empower the Crown to authorise the Governor to convene a criminal court. This court was to consist of the Judge-Advocate and six naval or military officers, and was to have jurisdiction to

[103] (1864-5) 3 Moo. P.C. (N.S.) 115 at 152-3. See also *Ex. p. the Rev. George King* (1861) Legge 1307.
[104] *R.* v. *Brampton* (1808) 10 East 282 at 288.
[105] *Basham* v. *Lumley* (1829) 3 Car. & P. 489; 2 St. Tr. (N.S.) 322.
[106] See *Bishop of Natal* v. *Gladstone* (1866) L.R. 3 Eq. 1 at 40-1.

try and punish "all such outrages and misbehaviours as, if committed within this realm, would be deemed and taken, according to the laws of the realm, to be treason for misprison thereof, felony or misdemeanour. . . ."

Although the need for some tribunal to try criminal offenders probably was felt to be more urgent than the establishment of any civil courts, it is improbable that the home government dismissed out of hand the possibility that at some time in the future civil courts would be needed. A more feasible explanation of the omission in the Act of any reference to civil jurisdiction is that it was assumed that if and when the occasion arose, the Crown's prerogative would be sufficient for the purpose. There is good reason why the precaution should have been taken of obtaining statutory authority for the Court of Criminal Judicature. In a settlement populated almost exclusively by transportees and their custodians, the ordinary procedure for prosecution and trial of criminal offenders, involving as it did grand and petty juries, obviously was unworkable. The Act provided for summary trial before a panel of naval or military officers presided over by the Judge-Advocate, a form of proceeding totally alien to the common law. Having regard to the repeated insistence in previous years that colonial courts established by or under authority of the Crown, conform in their jurisdiction and mode of proceeding with known English forms, it is not surprising that the New South Wales criminal court should have been given statutory backing.

Within a few months of the enactment of 27 Geo. III, c. 2, Letters Patent, usually referred to as the First Charter of Justice, were passed authorising the Governor to convene not only the Court of Criminal Judicature contemplated by the Act, but also a Court of Civil Jurisdiction and a Court of Appeals.[107] The Court of Civil Jurisdiction was to be holden before the Judge-Advocate and two fit and proper persons and was to have "full power and Authority 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 Contract, Trespasses, and all manner of other personal pleas whatsoever". In addition the Court was invested with power to grant probate of wills and administration of the personal estates of intestates dying within the settlement. Appeals from judgments of the Court might be taken before the Governor and, if the debt or thing in demand exceeded the value of £300, further appeal might be taken to the King in Council.

Experience showed the organization of civil jurisdiction described above unsatisfactory in several respects and, after representations by both the Governor and the Judge-Advocate, the home government agreed to certain changes which were incorporated in a second Charter of Justice, dated 1814.[108] This continued the Court of Criminal Judicature but replaced the Court of Civil Jurisdiction by three civil courts, Governor's and Lieutenant-Governor's Courts for New South Wales and Van Diemen's Land respectively and a Supreme Court. The first two of these courts were to be held before the Judge-Advocate or in Van Diemen's Land, the Deputy Judge-Advocate, and two fit and proper persons appointed by the Governor, or in Van Diemen's Land, by the Lieutenant-Governor. The jurisdiction of each was limited to common law actions in which the sum in dispute or the value of the land claimed was not

[107] *H.R.A.* IV i, 9.
[108] *H.R.A.* IV i, 77.

in excess of £50, while the procedure was to be of a summary variety. The Supreme Court was to consist of a judge appointed by His Majesty and two magistrates appointed by the Governor, was to have jurisdiction in all common law actions except where the cause of action did not exceed £50, and in addition testamentary and equitable jurisdiction. Besides these alterations in the arrangement of civil jurisdiction, the Court of Appeals was reconstituted and its jurisdiction curtailed. Appeals from judgments or decrees of the Supreme Court might be heard by the Governor assisted by the Judge, but only in cases where the debt or thing in demand exceeded the value of £300 or where the judgment or decree appealed against was not unanimous and had been protested against by the Supreme Court.

It will be observed that, contrary to the practice which had been followed in the American plantations, the Crown did not trust the formulation of the judicial arrangements for the colony to the Governor, but retained it firmly under the control of the Imperial authorities. This applied both to inferior and superior courts. By their Commissions each of the Governors received authority to constitute and appoint Justices of the Peace, coroners, constables and other necessary officers and ministers "for the better administration of justice and putting law into execution".[109] In addition, the First and Second Charters of Justice directed that the Judge-Advocate, the Governor, and Lieutenant-Governor be Justices of the Peace *ex officio* "and that all and every such Justice or Justices of the Peace" should "have the same power to keep the Peace, arrest, take Bail, bind to good Behaviour, suppress and punish Riots, and to do all Other Matters and Things" in the settlement as Justices of the Peace had in England within their respective jurisdictions.

In terms of Jurisdiction, the First and Second Charters of Justice did not attempt to confer on the colonial courts powers any wider than those enjoyed by English courts of the day nor did they contemplate that the colonial courts should decide except according to any other law but the laws of England in force in the colony. The infinite variety of English courts was not reproduced, but neither had this been done elsewhere in the Empire. No major deviation from precedent was involved in the combination of the jurisdictions of several English courts in a single colonial court for the rules administered in each could still be administered separately and apart from one another.[110] Whether, under the Second Charter, common law and equity were intended to be so administered, is a difficult point. After delineating the common law jurisdiction of the Supreme Court and the procedure to be followed in common law actions, the Charter went on to state that it should "be lawful for the said Court to give Judgement and sentence according to Law and Equity". If this provision was to mean anything at all, presumably it meant that in common law actions the Supreme Court could entertain defences and replications on equitable grounds, something which no English common law court could then do. So major a departure from English practice would surely have not been within the competence of the Crown to introduce without the concurrence of Parliament!

This was not the only respect in which the Second Charter essayed to

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[109] Governor Phillip's Second Commission, April, 1787—*H.R.A.* I i, 4.

[110] See Instructions to Governors of Nova Scotia, 1749-56 in Labaree, 1 *Royal Instructions to British Colonial Governors* 299-300, para. 300. The Governor was authorised to erect a principal court having common law jurisdiction in cases where the amount at stake was above £5; the same court was also to be a court of chancery.

modify English practices. As under the First Charter, the trial of common law actions was of a summary character before judges and assessors rather than before judges with juries. In the Court of Civil Jurisdiction, the Governor's and Lieutenant-Governor's Courts actions were to be commenced by written complaint whereupon the court was to issue a warrant setting out the substance of the complaint and directing the Provost Marshall to summon the defendant to appear or, if the amount at stake exceeded a certain sum, to bring the defendant or take bail for his appearance at a certain time and place. Judgment could be given in default of appearance. Procedure in the Supreme Court was much the same; the only real differences were that after the complaint had been filed, the defendant was summonsed to appear, and only after default of appearance could a warrant for his arrest issue. Further, no judgment could be given in default of appearance.

The disparities between originating and mesne processes in England and the colony were not sufficiently great to warrant a finding that in these facets of civil procedure the Crown had legislated contrary to common law forms. In England, original writs had all but disappeared by the end of the 18th century, their place having been taken by judicial writs issued out of the King's Bench, Common Pleas or Exchequer of Pleas. These writs served not only to inform the defendant of the cause of action alleged against him but also authorized the sheriff to bring the defendant before the court to answer the charge or take bail for his appearance. Other forms of mesne process, for example, distraint and attachment, virtually had become defunct. At common law, it was impossible in personal actions to obtain judgments by default. This rule was modified by statute in 1725,[111] but only in cases where the debt or damages claimed was not in excess of £10. There is no apparent reason why the common law rule as altered by statute should not have applied in New South Wales, and the clauses in the First and Second Charters of Justice allowing for judgments in default of appearance possibly were for that reason invalid.

It is of interest to note that in his report of 1821 on the judicial establishments of New South Wales and Van Diemen's Land, Commissioner J. T. Bigge found no great variance between the procedure of the Supreme Court at common law and English common law procedure. Although the judge, Field, J., had declined to apply the strict letter of the English rules, indeed had endeavoured to streamline proceedings, in fundamentals he found the Court's practice and procedure a faithful copy of the English.[112]

The major divergence from English practice occurred in the mode of trial. The idea of trial before a judicial officer assisted by two lay nominees probably was taken from the Charters of Justice for Gibraltar.[113] The first of such Charters, passed in 1721, had empowered the Judge-Advocate together with two merchants, or any two of them, including the Judge-Advocate, to sit as a court to hear and determine in a summary way all personal pleas and to give judgment according to justice and right. Two more Charters supplementing the First were passed in 1727 and 1740; in 1817 a fourth was granted repealing the three former Charters and constituting a Court of Civil Pleas consisting of a judge who, with two resident inhabitants of the town to be appointed by him, should hear and determine all pleas, real and personal, where the amount at

[111] 12 Geo. I, c. 29, s. 1.
[112] The Bigge report, *op. cit.* 7-8.
[113] Charles Clark, *Colonial Law* (1834) 675 *et seq.*

issue was not less than ten dollars, according as near as possible to the laws of England. Neither in the Gibraltar nor the New South Wales Charters was any explicit direction given as to the respective roles of the judges and their lay assistants. As Bigge described it, Field, J.'s practice in the New South Wales Supreme Court was to take notes of the evidence and then charge the magistrates sitting on the case with him. On questions of law, the Judge expected the magistrates' concurrence, but on questions of fact, the character of witnesses, and in matters of account, the views of the magistrates were actually solicited and sometimes deferred to.

Whether it was within the power of the Crown to establish such a mode of trial is debateable. In England, jury trial in common law actions was guaranteed by law in the sense that once a plaintiff had elected to sue in Trespass, Case or Ejectment, trial before judge and jury followed as of course and could not be waived either by the court or by agreement between the parties.[114] The fact that precedent existed in Gibraltar for exclusion of jury trial is of little moment, for Gibraltar had been acquired by conquest from a European power and the Crown as a result had unfettered discretion in deciding what parts of English law, if any, were to apply there. In New South Wales, English law applied *ipso vigore*, subject, of course, to the qualification that no rules of English law were to be treated as part of the colony's law if they were incapable of being applied there. Not for one moment was it disputed that the civil disabilities which English law imposed on persons attainted of felony applied equally in England and New South Wales and among these disabilities numbered incapacity to serve on juries. Only a pardon under the Great Seal could remove this.[115] If the majority of the population was unqualified for jury service, could it be said then that the English rules ordaining jury trial were reasonably capable of being applied in the colony?

No firm conclusion can be reached as to the validity of that part of the Second Charter of Justice establishing the Supreme Court as a court of equity. Hitherto, as has been noted, the fact that colonial Governors by their Commissions had been invested with custody of the public seal of the colony had been construed as giving them equitable jurisdiction co-extensive with that of the Lord Chancellor. Though the New South Wales Governors also had custody of the Great Seal of the colony, no attempt appears to have been made by them to assume equitable Jurisdiction. But this had also been the case in Upper Canada, yet the Law Officers in 1827 had questioned the competence of the Crown to pass Letters Patent establishing the office of Master of the Rolls, seemingly on the ground that this would be tantamount to creating an *additional* court of equity which the Crown was incompetent to do.

As regards the mode of proceeding in the equity jurisdiction of the New South Wales Supreme Court, there could have been little room for complaint about the Letters Patent. They directed the Court to "administer Justice in a summary way according or as near as may be to the Rules and Proceedings of our High Court of Chancery in Great Britain, upon a Bill filed to issue Sub Poenas and other processes under the Hand and Seal of the Judge of the said Supreme Court to compel the appearance and answer upon Oath of the parties therein complained against, and obedience to the decrees and orders of the said Court of Equity in such manner and to such form and to such

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[114] Jury trial was recognised by 13 Ed. I, st. 1, c. 30 (1285).
[115] *Bullock* v. *Dodds* (1819) 2 B. & Ald. 258.

effect as our High Chancellor of Great Britain, or as near the same as Circumstances will admit".

The provisions of the First Charter of Justice regarding testamentary causes jurisdiction were most perfunctory. Nothing more was said than that the Court of Civil Jurisdiction should have "full power and Authority to Grant probates of Wills and Administration of the personal Estates of Intestates dying within" the settlement. The Second Charter was more explicit at least in respect of the persons to whom probate, letters of administration, with or without a will attached, might be granted, but gave no indication whether the practice in all cases should follow that in England. The only reference to English practice occurs in a clause directing that administrators give security by bond "with Condition in the form usually given in our Courts Ecclesiastical in England, or as near thereto as the Nature and Circumstances of the Case will admit".

In view of the fact that jury trial had been excluded, the inference is that appeals to the Court of Appeals in all cases were to be appeals *stricto sensu*, that is to say, that review was to be had not only of rulings on points of law, but also of findings of fact. The only dispute that appears to have arisen over the nature of the review process related to the Court's competence to receive new evidence. "The records of appeals to the Governor show", writes one author,[116] "that they were frequently conducted as a rehearing of the action with fresh evidence being taken upon interrogatories." This practice was frowned on by the Colonial Office. As the Secretary of State, Earl Bathurst, explained to the Governor, Sir Thomas Brisbane, in 1823:

> The proper function of a Court of Appeal is to review the decisions of an inferior Court, that is to say, to decide whether the judgment of that Court was right or wrong upon the facts in evidence before it. To admit new Evidence is to institute a new Trial, not to review a trial already concluded.[117]

This was not the only aspect of colonial appeals procedure that attracted adverse comment. The provisions in the Second Charter of Justice regarding appeals to the King in Council also came in for criticism. Under the First Charter, appeals from the Court of Appeals to the Privy Council had been confined to cases where the debt or thing in demand exceeded the value of £300. Several changes were made by the Second Charter: in cases where the debt or thing in demand did not amount to £3,000 the decision of the Court of Appeals was to be final. Thereby, Field, J. thought, the Crown had deprived subjects of their right of appeal to the King in Council which, according to *Christian* v. *Corren*,[118] the Crown was not entitled to do. What appears in the report of this case, Lord Brougham pointed out,[119] is not the Privy Council's advice but rather the reporter's, Peere Williams', submissions to it. The Board's opinion in the case, his Lordship added, proceeded on the narrow ground that the royal Charter in question had not purported to take away the right of appeal. In any event he saw "nothing contrary to the right of the subject, as

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[116] The Hon. R. Else-Mitchell, "The Foundation of New South Wales and the Inheritance of the Common Law" (1963) 49 *R.A.H.S. Jo. & Proc.* at 7.

[117] *H.R.A.* I xi, 71; see also *H.R.A.* I x, 725 *et seq.*

[118] (1716) 1 P. Wms. 329; cited with approval in *Cuvillier* v. *Aylwin* (1832) 2 Knapp. 72.

[119] *Reg.* v. *Alloo Paroo* (1847) 5 Moo. P.C. 296.

involved in the exercise of that prerogative of the Crown, having independently of the Statutes laid down the right in that particular form",[120] that is to say, by regulating exercise of the right of appeal and by delegating the power to give leave to appeal to colonial courts. All the First and Second Charters of Justice attempted to do was to prescribe unappealable minima, and in this respect they followed a practice which had existed from as early as 1696. Clauses in gubernatorial Instructions prescribing such minima did not, the Attorney-General, Edward Northey, advised early in the 17th century,[121] prevent the King in Council from allowing writs of error or appeals from judgments and decrees of colonial courts in cases under the value prescribed in the Instructions. In cases where no appeal was allowed by the Instructions, appellants had no appeal as of right or by right of grant, but could, nevertheless, petition the King in Council for special leave to appeal. Nothing in the First and Second Charters, it is submitted, could have been construed as depriving subjects of this privilege or the Crown of its prerogative to entertain their petitions for the exercise of royal grace and favour.

[120] *Id.* 303-4.
[121] Smith, *op. cit.* 225.