HISTORICAL RECORDS
OF
AUSTRALIA.
COMMONWEALTH OF AUSTRALIA.

HISTORICAL RECORDS

OF

AUSTRALIA.

SERIES IV.
LEGAL PAPERS.

SECTION A. VOLUME I.
1786–1827.

Published by:
THE LIBRARY COMMITTEE OF THE COMMONWEALTH PARLIAMENT.
1922.
SYDNEY:
WILLIAM APPLEGATE GULICK, GOVERNMENT PRINTER.
1922.
EDITORIAL NOTE.

In this series, the papers have been divided into two sections for the convenience of the student. In section A, the papers relating to the development and growth of the constitution are printed; in section B, the papers relating to the administration of justice, etc.

The history of government in Australia may be divided into four main epochs, 1788–1823, 1824–1856, 1856–1900, 1901—. The first epoch terminated with the granting of a constitution, the second with the establishment of responsible government, and the third with the formation of the Commonwealth. In this volume, the papers, belonging to section A relating to the first or pre-constitutional epoch, are printed, together with the papers prior to the passing of the statute, 9 Geo. IV, c. lxxxiii, in July, 1828. In the introduction, however, the first epoch only is discussed.

FREDK. WATSON.
INTRODUCTION.

THE DEVELOPMENT OF THE CONSTITUTION.

The colonization of Australia began in the year 1788 by the formation of the settlement on the shores of Sydney cove under Arthur Phillip, but for thirty-five years a large part of the system of government, then inaugurated, was unconstitutional. During this period, there were two serious defects; the powers of legislation and taxation assumed by the governors were illegal, and the whole administration of civil justice was unauthorised by act of parliament. Exclusive of the military and the civil staff, in 1800 about one-fifth, in 1810 about one-half, and in 1820 17,391 out of a total of 30,140 of the population were free. It is remarkable, therefore, that the system was tolerated for so lengthy a period without serious protest, if the arrest and deposition of Governor Bligh are excepted, which were due more to personal than to large public motives.

When the English crown took possession of the territory of New South Wales in 1788, it was acquired not by conquest or cession, but was occupied as desert and uninhabited lands. Title by occupation was claimed to practically half the continent of Australia, i.e., from the east coast to the 135th meridian of east longitude, and to the island of Tasmania, although its insularity was then unknown. A large part of the lands thus claimed had been discovered by other nations, but, as enunciated* in 1824 when settlement commenced in the northern territory, “it is admitted, tho’ not provided for in the Law of Nations, that Occupancy is a stronger title than priority of discovery.”

But, although New South Wales was to be regarded as a colony acquired by settlement, its position was not that of an ordinary settled colony. After the loss of the American colonies, it became necessary to provide for the removal of offenders sentenced in England to transportation beyond the seas. An act, 24 Geo. III, c. lvi, was passed to authorise the King-in-council to nominate the place or places, “either within his Majesty’s dominions or elsewhere out of his Majesty’s dominions,” to which such offenders

* See page 752, volume V, series III.
should be transported. Under this act, by two orders-in-council dated 6th December, 1786, “the eastern coast of New South Wales, or some one or other of the islands adjacent,” was designated as such a “place.”

After the issue of these two orders, the act,* 27 Geo. III, c. ii, was passed to establish “a colony and a civil government” in the said “place.” By this act, the King was authorised to erect a court of criminal jurisdiction; but no authority was given to erect a court of civil jurisdiction, or to confer any large or special powers on any governor to be appointed.

Before the passing of this act, Arthur Phillip had been appointed governor of the proposed colony by a brief commission,† which merely defined his territorial jurisdiction and commanded him to assume the administration as governor. A civil staff had also been appointed, by commission‡ as lieutenant-governor, deputy judge-advocate, chaplain, surgeons, etc., and, by these commissions, they were subject “to the Rules and Discipline of War.” It was evidently the intention to establish a military form of government, somewhat similar to a military occupation. Even after the passing of the act to establish a civil government, no change was made in the form of the commissions, until E. Bent was appointed§ deputy judge-advocate in the year 1809, when reference to the rules and discipline of war was omitted.

After the act, 27 Geo. III, c. ii, was passed, a full commission and instructions to Arthur Phillip, as captain-general and governor-in-chief, and a charter of justice|| were granted in April, 1787, by which a civilised government was authorised on the continent of Australia.

This second commission to A. Phillip, with the extension of power granted to him in 1790 to remit sentences¶ on convicts, and the commissions to his five successors, J. Hunter, P. G. King, W. Bligh, L. Macquarie and Sir T. Brisbane, were similar to one another; and the powers conferred on the governors thus remained unaltered for a period of thirty-five years. The powers conferred by these commissions were extensive in themselves: but, as they were interpreted subsequently, they made the governor an absolute autocrat.

* See page 3 et seq. † See page 1, volume I, series I.
‡ See page 1. § See page 46.
¶ See page 2 et seq., volume I, series I, and page 6 et seq. in this volume.
|| See page 208 et seq., volume I, series I.
INTRODUCTION.

The territorial jurisdiction of the governor was defined as extending from the southern extremity of the island of Tasmania to the northern extremity of the east coast of Australia at Cape York; from the east coast as far inland as the 135th meridian of east longitude; and over "all the islands adjacent in the Pacific Ocean" between the latitudes of Cape York and of South Cape in Tasmania. The jurisdiction over the "islands adjacent" was variously interpreted. In the years 1811 and 1814, Governor Macquarie claimed jurisdiction over Tahiti and New Zealand by the appointment of justices of the peace, and, in 1820, deputy judge-advocate Wylde expressed doubts as to his jurisdiction in the island of Tasmania, as that island lies adjacent to the southern and not to the eastern coast.* No decision, however, was given on the questions raised in this period.

The powers of the governor were defined by his commission.† These powers were (1) to keep and use the public seal; (2) to administer oaths; (3) to appoint justices of the peace, coroners, constables and other necessary officers for the better administration of justice; (4) to grant pardons for all offences except treason and wilful murder; (5) to grant reprieves and to remit fines; (6) to grant custody of idiots and lunatics and their estates; (7) to levy armed forces for defence; (8) to execute martial law; (9) to erect fortifications; (10) to control naval discipline; (11) to punish offences committed on shore by men of the navy; (12) to control expenditure; (13) to grant lands; and (14) to establish fairs, markets, ports and harbours.

He was ordered to take certain oaths, by one of which members of the Roman Catholic church were debarred from holding office. Another oath was for enforcing obedience to the laws respecting trade and the plantations; but it was not until the year 1825 that James Stephen, jr., noted that this oath was inapplicable, as the laws of trade affecting the old colonies did not apply to a colony lying to the eastward of the Cape of Good Hope,‡ i.e., within the area included under the privileges granted to the East India company.

* See notes 7 and 45.
† In this period, the offices of captain-general and governor-in-chief were not created by separate letters patent, and it was therefore necessary to define the powers of the governor in the commission or letters patent issued to each governor.
‡ See page 592.
In the event of the death or absence of the governor, the government devolved on the lieut.-governor, or, if he also was dead or absent, on the senior military officer in the colony.

The commission to a governor was elaborated by instructions. In 1787, Governor Phillip received his first instructions, and, in 1790, additional instructions relating to land grants. Excluding the special clauses relating to the formation of the settlement, these instructions combined formed practically those given to Phillip’s five immediate successors. These instructions related to the management of the commissariat, the supply of live stock, the products of convict labour, exploration, intercourse with natives, religious observances, the importation of spirits, the prevention of foreign intercourse, land grants, the assignment of convicts, the formation of townships and towns, the endowment of churches and schools, and the fees to be paid on land grants.

Letters patent* for establishing courts of civil and criminal jurisdiction, and for constituting a vice-admiralty court, were issued in April and May, 1787.

For the civil and criminal jurisdictions, one judicial officer, the deputy judge-advocate, was appointed, and for the vice-admiralty court a judge. Both these offices were given to officers of the marines. David Collins, the deputy judge-advocate, was a captain, who had passed most of his life on active service, and had no judicial experience. As the office was purely a civil one, it seems probable, by the selection of a military man, that it was intended just as the executive government was military in character, the legal system should be somewhat in accordance with military rules and practice. The judge in vice-admiralty was Robert Ross, major commanding the detachment of marines, which formed the guard for the infant settlement.

The courts of civil and criminal jurisdiction were entirely novel in character, and, at a later period, the opinion was given that the King had no power to erect the civil court as it was not authorised by an act of parliament.†

The court of civil jurisdiction was constituted by the deputy judge-advocate and two fit and proper persons residing in the colony, to be nominated by the governor, or, in his absence, by the lieut.-governor, “or of any two of them (whereof the Judge-

* See pages 6 et seq. and 13 et seq.  † See pages 321 and 858.
Advocate to be one)." It was empowered "to hear and determine in a Summary way all pleas, concerning Lands, Houses, Tenements and Hereditaments, and all manner of interests therein, and all pleas of Debt, Account or other Contracts, Trespasses, and all manner of other personal pleas whatever," and to grant probates and letters of administration. In effect, the court was granted jurisdiction over every class of civil action, and no distinction was made between common law and equity. This extensive jurisdiction was granted to three men, entirely without judicial training, with power to determine causes in a summary way. Suits might be instituted by any person or persons against any other person or persons residing or being within the settlements. The process was simple. On a complaint in writing, made by a plaintiff, the court issued a warrant under the hand and seal of the deputy judge-advocate to the provost-marshal, containing shortly the substance of the complaint, and commanding him to summon the defendant. If the value of the demand exceeded £10, the provost-marshal was ordered to bring the defendant personally into court, or to take bail for his appearance, and to demand security for the due performance of any judgment that might be given by the court. At the trial of the cause, witnesses were examined on oath, and their evidence reduced to writing and signed by them. The court then gave "Judgment and Sentence according to Justice and Right," and issued a warrant of execution, if necessary, against the goods and chattels of the defendant. For want of sufficient distress, the court was empowered to imprison the defendant. If the defendant was the successful suitor, he had similar remedies.

Either party, who was aggrieved by any judgment or decree, had a right of appeal to the governor, who was authorised to sit as a court of appeal, and to issue processes of summons and execution, similar to the civil court. But no appeal to the governor was admitted, unless notice was lodged within eight days of the judgment of the civil court.

If the debt or thing in demand exceeded in value £300, an appellant, being aggrieved at the decree of the governor, might appeal to the privy council, provided notice of appeal was lodged within fourteen days of the decree of the governor.

As has already been noted, this court was constituted without any statutory authority, and, by the letters patent, there was to be no
appeal to the King-in-council, unless the matter in dispute exceeded £300 in value. The powers of the governor in this civil jurisdiction were large. He appointed two out of the three persons, who constituted the court, and new appointments were made for each separate sessions. This power of patronage gave him great influence. In the court of appeal also, the judgment of the governor was absolute, when the matter in dispute was below £300 in value. It was evidently intended to make the governor the fountain head.

The court of criminal jurisdiction was constituted by the deputy judge-advocate, together with six officers of "our Sea and Land Service," convened, as occasion required, by a precept issued by the governor, or, in his absence, by the lieut.-governor. When the court assembled, the deputy judge-advocate administered the oath to the six members, each of whom was in full uniform, to "make true deliverance between his Majesty the King and the prisoner brought before them, and to give true judgment according to the evidence," an oath similar to that administered to jurors. But no right of challenge was permitted. The oath was then given to the deputy judge-advocate by the senior officer. The deputy judge-advocate presided, regulated the procedure, and advised the members of the court on any legal points. But, in finding the verdict and determining the sentence, he possessed a vote only the same as each of the six members.

Jurisdiction was given over all crimes under the laws of England; but, by the statute 27 Geo. III, c. ii, the court was limited to sentencing prisoners to two forms of punishment only—in capital cases, death, and in all others, corporal punishment.

The procedure was simple. The charge against any offender was reduced into writing and exhibited by the deputy judge-advocate, who also acted as prosecutor in cases for the crown. Witnesses were examined on oath, and the prisoner conducted his own defence. When evidence was concluded, the court retired to consider the judgment, which was obtained by a majority of the votes of the persons constituting the court. Whereupon the court was reopened, and judgment pronounced according to the laws of England, "as nearly as may be, considering and allowing for the Circumstances and Situation of the Settlement." In capital cases, the concurrence of five persons sitting in judgment was required before execution of the sentence. If four persons only were in
favour of a judgment of guilty, the proceedings were transmitted to England for consideration. In cases not involving the death sentence, a simple majority was required. The execution of any capital sentence required the approval of the governor, or, in his absence, of the lieut.-governor.

This constitution placed the deputy judge-advocate in a very anomalous position. Like a committing magistrate, he examined the evidence for the prosecution and decided whether a prisoner should be tried. He then drew up the indictment. At the trial, he exhibited this indictment, and, as president of the court, had a vote in deciding questions as to its legality. Although president, he prosecuted on behalf of the crown, and, in deciding the verdict, he was with each of the members virtually one of seven jurymen.

This court had a marked similarity to a court-martial, and many of the colonists regarded it as such. The nature and form of the proceedings intensified this opinion. The members assembled in full uniform; the court met at 10 a.m., and regularly adjourned at 3 p.m.; the title of the presiding member was a military one; the method of administering oaths to the members was the same; and the members of the court were convened by an order signed by the brigade-major. But, at the same time, the position of the deputy judge-advocate was entirely different, as, in a court-martial, such officer had no voice or vote in the judgment of the court, whereas in this criminal court he had.

The powers of the governor in the criminal jurisdiction were also large. He could pardon in all cases, treason and wilful murder excepted. He could reprieve. The nomination of the six members gave him extensive influence. He could convene the criminal court, when he desired; and thus the duration of imprisonment of persons awaiting trial was entirely at his discretion.

These letters patent, which formed the first charter of justice, were undoubtedly ill-conceived, were without precedent in previous colonial history, and were universally condemned by competent critics including the select committee of the House of Commons on transportation in the year 1812. The want of statutory authority for the civil jurisdiction may have been an oversight. But, in the criminal jurisdiction, it was surely not the intention of parliament, by passing the statute, 27 Geo. III, c. ii, to establish principles so contrary to English justice, as to deprive accused persons, even.
though they might be transported felons, of the right of challenge
or other safeguards of English justice, especially as the laws of
England might be modified to suit local circumstances at the dis­
cretion of the court. Nevertheless this criminal jurisdiction was
maintained until the year 1824, and the civil jurisdiction until the
year 1815.

As a kind of understudy to the governor, a lieut.-governor was
appointed prior to the passing of the statute, 27 Geo. III, c. ii. This office was first conferred on Robert Ross, major commanding
the detachment of the marines, and subsequently on the officers
commanding the regiments quartered at Sydney, although, in the
year 1799, P. G. King recommended the appointment of a civilian.
Except in the absence of the governor, the office became a sinecure,
as the governors were averse to the delegation of any of their
powers.

Governor Phillip arrived in Port Jackson in the evening of the
25th of January, 1788, and, on the 7th of February following, the
official documents were read, by which a system of government
was established for the colony. The detachment of marines, the
civil staff and the convicts were assembled, and the deputy judge-
advocate read Phillip's commission as captain-general and gov­
ernor-in-chief, the statute 27 Geo. III, c. ii, and the letters patent
for the erection of courts of justice.

In the colony thus constituted, the governor was supreme, and
continued to be so for thirty-five years. Although a civil govern­
ment was established, it was intentionally clothed with an "appear­
ance of military restraint," which was maintained for three
decades, as noted by Earl Bathurst in 1815.* The "appearance," how­
ever, was rather an accomplished fact, as all civil officers were
appointed by commissions of military type until the year 1809, and
it was not until the year 1818 that an opinion† was given that they
were not liable to trial by court-martial. The governor was the
sole executive power; as judge in the court of appeal and con­
vener of the courts, he was the supreme judicial power; and he
soon assumed uncontrolled legislative power and powers of taxa­
tion. In fact, he was a king and parliament combined. The evils
of such vast powers, concentrated in one man, are noted later,
and were fully developed under Governor Macquarie.

* See page 171. † See page 320.
INTRODUCTION.

Under Governors Phillip and Hunter, the evils of these vast powers were not apparent, although they were soon subject to criticism. The first colonists were the convicts, their guards, and a small civil staff. The position at this period was aptly summarised by F. Forbes in 1827 as follows*:—"The first government of the colony was that of a gaol, and the first law little more than prison discipline. In a new country such as this was at the landing of the expedition under Governor Phillip, the second object, after providing for the care and correction of the prisoners, was that of procuring sustenance; every thing necessarily centred in the governor as the *primum mobile* of the machine; the police, the roads, the market, the importation of supplies, the cultivation of provisions, and even the prices of every article of daily consumption, were regulated by the orders of the governor; these phirmans entered into some of the minutest matters of domestic life, and gradually became so familiar to the inhabitants, that instances are to be found of domestic quarrels being referred to the fountain head of authority, and there settled with all the form and sanction of legal supremacy. This was a very natural order of things; a government, situated like that of New South Wales, necessarily became patriarchal."

Early in Phillip's government there was criticism of and resistance to his vast powers. Five months after the colony was founded, Watkin Tench, a captain of marines, transmitted an account of the formation of the settlement to England, which was published† in 1789. With the exception of two lieutenants, none of the officers of marines were aware of the provisions of the act, 27 Geo. III, c. ii, until it was read in public at Sydney cove on the 7th of February. Tench noted that the mode of administering justice differed essentially from that of English courts of law, and from the customs and usages of military tribunals; but he defended the new system by stating, "Let not the novelty of it, however, prejudice any one so far as to dispute its efficacy and the necessity of the case, which gave it birth." Tench also noted the omission to provide that general courts-martial might consist of a smaller number of officers than thirteen, as provided in the marine mutiny act.

The omission to give Phillip authority to convene general courts-martial for the trial of marines was actively agitated in October,

*See page 688. †"A Narrative of the Expedition to Botany Bay."
INTRODUCTION.

1788, when the officers of the marines refused to try an officer for neglect of duty.* This omission was never remedied, as it was decided to send the New South Wales corps to relieve the detachment of marines, when Phillip's report was received in England.

In April, 1789, a protest was made by the officers of the marines against the duty of sitting as members of the criminal court. The protest was referred to England; but, in 1791, counsel gave their opinion that service as members of the court was part of the duty of officers quartered in the colony.†

In November, 1789, the power of the governor to issue general orders at his own discretion was challenged over the regulations appointing a night-watch. In August, some well behaved convicts had been appointed as a night patrol. A few weeks later, a private of marines was arrested. Major Ross protested against such an arrest by convicts, and, in November, Governor Phillip repealed the objectionable regulation.‡

Governor Phillip's labours were strenuous. No subject or no detail was too small to pass unnoticed under his watchful eye. All daily orders were issued by him with the exception of the purely battalion orders of major Ross. He fixed the rations; he granted permission for marriage; he authorised the assistance to settlers; he made the necessary appointments to the different gangs for public labour; by periodical visits to Rose hill, he was personally cognisant of all details in agricultural progress. He summoned the courts, and reviewed and modified the punishments ordered by the criminal court and the bench of magistrates. This concentration of power was resented by the lieut.-governor, R. Ross, who complained that he was not conversant with the details of government. In 1790, probably to prevent open friction, Phillip sent Ross as lieut.-governor to Norfolk island.

Norfolk island was formed in the year 1788 as a settlement dependent on New South Wales. The disadvantages of its distance from the control of the governor and the jurisdiction of the courts was early recognised. In March, 1790, H.M. ship Sirius, with a cargo of provisions, was lost on a reef off the island. Robert Ross, as lieut.-governor, thereupon proclaimed martial law,

*See page 90 et seq., volume I, series I.
†See pages 107 et seq. and 224 et seq., volume I, series I.
‡See page 134 et seq. volume I, series I.
and maintained it for four months. Governor Phillip approved of
the proclamation; but, as the execution of martial law was a power
conferred on a governor only, Ross' action was illegal. This is
an example of the powers that might be assumed by a dominating
personality, when removed from superior control.

The difficulties of the administration of criminal justice, caused
by the distance of Norfolk island from Sydney, were remedied by
the passing of the act,* 34 Geo. III, c. xlv. By this act, Norfolk
island was withdrawn from the jurisdiction of the criminal court
at Sydney, and a court of criminal judicature was authorised to
consist of a deputy judge-advocate, appointed by royal commis­sion
for the island, and four officers of "His Majesty's Forces by
Sea or Land," to be convened from time to time by precept of the
lieut.-governor of the island. The procedure and the powers of
the lieut.-governor in this court were similar to the procedure and
the powers of the governor in the criminal court at Sydney.

In December, 1792, Phillip sailed for England, and the adminis­tration
was assumed by lieut.-governor F. Grose by virtue of the
concluding clause in Phillip's commission. Grose was the officer
commanding the New South Wales corps, which had relieved the
detachment of marines. In December, 1794, he was succeeded by
W. Paterson, the senior officer of the corps, who administered the
government until the arrival of Governor Hunter in September,
1795.

Under Grose and Paterson, the officers of the New South Wales
corps experienced their first taste of power, a power which had
an important influence over the public affairs of the colony prior
to the year 1810. The main objective of many officers of the
corps was the acquisition of landed estates, and of wealth by a
monopoly of trade which was principally in spirits. Phillip could
not have left the territorial waters before the abolition of the
limited form of civil government established by him was com­menced by Grose. Grose abolished the jurisdiction of the deputy
judge-advocate and the civil magistrates, established a preferential
ration for the military, allowed the military officers to engage
in the spirit traffic, and neglected all religious observances. The
changes were so prompt, and were such direct reversals of previ­ous
practice, that it seems probable that they had been privately
discussed and originated by the military officers before Phillip's

* See page 24 et seq.
departure. In effect, Grose established a government by the military and for the military, which was continued by Paterson. This action was an excellent example of the power which might be used or abused by an administrator in New South Wales.

In September, 1795, John Hunter assumed office as governor. He promptly restored the civil power and reinstated the civil magistrates; but in doing so he encountered the active and determined opposition of the military. This opposition was shown, as Hunter stated* in 1796, by "frequent indirect and some direct attempts . . . to annoy the civil officers officiating as magistrates, with a view to lessening that respect and influence over the minds of the lower orders so highly necessary in our situation." The opposition of certain persons was so pronounced that Hunter proposed† that he should be granted the power to deport undesirables from the colony, a power which was subsequently assumed by Governor Macquarie.

In May, 1798, the first lawyer, Richard Dore, to hold a commission as deputy judge-advocate, arrived in the colony and assumed office. His career in the colony was brief, as he died in December, 1800. During this period, he endeavoured to introduce innovations in the administration of justice. He established fees in his office, and claimed the right to issue writs‡ without reference to the civil court. He based his claim on an order, passed at his initiative by a court sitting in August, 1798, which further empowered him alone to grant probates and letters of administration. He held that this order of court was irrevocable, but it was _ultra vires_ under the terms of the charter of justice. In March, 1799, the trial of Isaac Nichols§ was a manifest miscarriage of justice, and demonstrated the introduction of party feeling into the law courts. This trial provoked much criticism. A judgment of guilty was pronounced, in which Dore and three military members of the court concurred against the opinion of three naval members. Nichols was sentenced to fourteen years' transportation to Norfolk island, and to work in the gaol gang until transported. Dore claimed that the sentence was immediately operative without a warrant from the governor, as required by the charter of justice. Hunter suspended the sentence, and the military officers took the

* See page 671, volume I, series I.  † See page 674, volume I, series I.  ‡ See page 259 et seq., volume II, series I.  § See page 279 et seq., volume II, series I.
serious step of protesting against the exercise of the royal prerogative.* This trial demonstrated the extreme measures, which the military party were prepared to adopt in opposition to the executive power.

In May, 1798, a new precedent was established by the issue of a dormant commission to P. G. King as acting governor in the absence of Hunter from the colony. By Hunter's commission, succession was granted to the lieut.-governor, or, in his absence, to the senior military officer on the station. The duly appointed lieut.-governor, F. Grose, had left the colony in December, 1794, but the senior military officer was superseded in favour of P. G. King.

During Hunter's regime, the practise of issuing government and general orders and proclamations was brought under official cognizance by their regular transmission in series to the secretary of state. When received in England, no comment or criticism was made. This system was commenced under the patriarchal government of Phillip, who issued orders for the regulation of the small community under his control. It was continued and extended, until the governor exercised the power of issuing proclamations, controlling the jurisdiction of magistrates, regulating the validity of deeds relating to land transfers, etc., imposing penalties for crimes, ordering the minutest details of civil life, deporting undesirables, creating a coinage, imposing taxation, etc. In fact, the governor assumed powers of legislation, uncontrolled and entirely on his own initiative, as great as those which are the prerogative of parliament and greater than those of the King. It is probable that this power was a natural development of the patriarchal orders of Phillip, associated with a knowledge of previous precedents in the American colonies.†

Hunter was succeeded by P. G. King as acting governor in September, 1800. In February, 1802, King received a full commission as captain-general and governor-in-chief, and held office until August, 1806. During this period many reforms were officially and unofficially agitated.

In July, 1801, the trial‡ of James Marshall drew attention to the probable bias of military members of the criminal court, when

* See page 342 et seq., volume II, series I.  † See note 22.  ‡ See page 188 et seq., volume III, series I.
a brother officer was involved. Marshall was tried by a court composed of the deputy judge-advocate, one naval officer and five officers of the N.S.W. corps. He was indicted on two charges of assault on E. Abbott and J. Macarthur, two captains in the corps. On the first charge, he was fined £50 and sentenced to be imprisoned for twelve months; and, on the second charge, a special verdict was found. King remitted the sentence on condition that Marshall sailed for England, and found recognizances to appear for sentence in England. In commenting on the trial, King recommended the alteration of the constitution of the criminal court by substituting “six commissioned officers of the civil establishment, sea or land forces,” for “six of His Majesty’s sea or land forces.” He stated that such a change would inspire confidence in the decisions of the court. In his trial, Marshall claimed the right of challenge, but, after consideration, this was disallowed by the court. King reconvened the court to consider the grounds of challenge, but the court refused to do so. Counsel subsequently gave an opinion* that this interference with the court by King was illegal.

In May, 1802, W. Balmain, who had been a surgeon on the staff of Governor Phillip, made a statement,† which illustrated the feelings of dissatisfaction then prevalent with the courts of justice, and detailed proposed reforms.

In 1803, Jeremy Bentham published a remarkable pamphlet, entitled “A Plea for a Constitution.”‡ His criticism was based on the system of government, prior to September, 1796, as detailed by D. Collins in his “Account of the English Colony in New South Wales,” published in 1798. He commented strongly on the illegality of the orders and proclamations issued by the governors, of the forcible detention of expirees, and of the detention of expirees with forced labour. He claimed that the governors had committed breaches of the *habeas corpus* and several transportation acts, and had transgressed the provisions of the *magna charta*, the petition of right, and the declaration of rights. He stated that the illegalities of the government were so numerous that an immediate inquiry was necessary. This pamphlet had no immediate effect.

* See page 43, volume IV, series I. † See page 35 et seq. ‡ See page 883 et seq.
Prior to the year 1806, J. Macarthur also informed King that he had obtained counsel's opinion,* that the orders and proclama-
tions of the governors were illegal.

In August, 1803, King again advocated reforms in the law
courts.† He urged the necessity of appointing a legal man as
deputy judge-advocate, an office which was held by R. Atkins
after the death of R. Dore. He stated that, under his government,
the members of the civil court had occasionally been chosen by lot
from the officers, civil, military and naval, and respectable free
men, but that a trained lawyer was needed to inspire confidence in
the decisions of the court and to assist the governor in the court
of appeal. The want of confidence in the civil court had in-
creased the business of the court of appeal, and King admitted
that a naval man like himself, as judge in appeal, could not decide
with the abilities and form of a lawyer. In the criminal jurisdic-
tion, he proposed to make "respectable merchants or other
inhabitants, who came to the colony free," eligible as members of
the court.

During the administration of King, two lieut.-governments were
established in Tasmania, one in the south of the island under
lieut.-governor Collins at Hobart town, and the second in the
north under lieut.-governor Paterson at Port Dalrymple. These
lieut.-governments were entirely independent of one another, but
were subordinate to the government at Sydney. Collins received
a royal commission and instructions in England, Paterson a com-
mision and instructions from P. G. King. Neither of these lieut-
governors had any independent powers except in the control
of expenditure, both having the right to draw bills on the English
treasury. The administration of justice in both settlements fell
within the jurisdiction of the civil and criminal courts at Sydney.

King was succeeded by W. Bligh in August, 1806. He closed
his administration by a gross abuse of power with the connivance
and for the pecuniary benefit of Bligh. Bligh made his official
landing on the 8th of August, and ipso facto King's commission
was revoked, and Bligh's was in force, as captain-general and
governor-in-chief with custody of the public seal. Nevertheless
Bligh did not assume the government until the 13th, and, on the
10th, King signed and sealed with the public seal three grants of

* See page 43 et seq. † See page 350 et seq., volume IV, series I.
INTRODUCTION.

land to Bligh.* It seems probable that there was some private agreement between the two governors, for, in January, 1807, Bligh granted the wife of King 790 acres, the grant to be known as "Thanks." The indifference of the English government to colonial affairs seems to be indicated by the fact that only one of these four grants was revoked.

In October, 1807, Bligh reported† the state of colonial opinion on the administration of justice. He wrote that "the superior people now look with concern on the Civil and Criminal Courts as established by the Patent, and are particularly desirous that the Military may have nothing to do in the Jurisprudence of the Country, either as Magistrates or Jurors. . . . The Civil Court they think confined to too few members: to both Courts, they attach partiality in decision, which, to a greater number of Jurors, such censure could not be attributable." Bligh advocated the introduction of British forms of justice, the appointment of a lawyer as deputy judge-advocate, and the erection of law courts in Tasmania.

King had endeavoured but failed to check the liquor traffic, and to control the influence and rapacity of the officers of the New South Wales corps and their adherents. But King had conciliated many by his grants of land and indulgences. Bligh tried to succeed where King had failed, and conciliated few as he made but three land grants. He attempted to correct abuses and to administer the government with a discipline similar to that of the quarter-deck, and his administration terminated in his arrest and deposition in January, 1808. The immediate cause of these events was the trial‡ of John Macarthur. At this trial, an important innovation was allowed by the military members of the court, though probably under bias. Macarthur claimed the right to challenge the deputy judge-advocate, before he was sworn as president of the court, and the members of the court admitted the challenge.

Major Johnston, J. Macarthur, N. Bayley, R. Townson, J. Blaxland, G. Blaxcell and T. Jamison were, according to the opinion of counsel,§ guilty of conspiracy and high misdemeanour for participation in the arrest and imprisonment of Bligh, and Johnston and J. Foveaux liable to court-martial on a charge of mutiny.

* See page 619 et seq.  
† See page 221 et seq., volume VI, series I.  
‡ See page 221 et seq., volume VI, series I.  
§ See page 47.
The deposition of Bligh forced the colonial department to take notice of the agitations for some changes in the administration, but reforms were sparingly given. In 1809, a fully qualified lawyer, Ellis Bent, was appointed as deputy judge-advocate,* and he arrived in the colony with Governor Macquarie, who assumed the administration in January, 1810. Bent was only twenty-six years of age, but, in spite of his youth, his influence was strongly evident in the reform of the civil jurisdiction granted in the year 1814.

Before Governor Macquarie left England, the general conditions of the colony were the subject of comment. In May, 1809, T. W. Plummer wrote to Macquarie as follows†:—"From the defects which are apparent in the system of Government hitherto prevailing in the Colony, and the ill-consequences which have resulted from them, and especially from the absolute omission of Parliamentary sanction to the greater part of the Colonial Government, I deem myself warranted in saying that no case ever occurred, in which the interference of the Legislature was more urgently required, or could be more advantageously applied than in the enactment of an entirely new code of regulations for New South Wales." It is difficult to understand why no immediate action was taken by the secretary of state, when such a strong condemnation could be made by one of the counsel employed by his department. Plummer, at the same time, proposed the establishment of a council with "deliberative, legislative and judicial," but not executive functions, such council to act "as advisers on public measures, as a tribunal of Appeal from the lower Courts of Justice, and especially as a medium of Colonial legislation." The constitution proposed was seven members, viz., "the governor, the lieut.-governor or second in command in the colony, the commander of the naval force on the station, the secretary to the colony or public secretary, the chief judge, and two principal inhabitants." Plummer proposed that the last two members should be selected annually, biennially or triennially from the magistrates, either by election or by seniority. He advocated such a council, because it would relieve the governor from the responsibility of imposing taxes by his sole authority, and from the burden of hearing and deciding appeals.

* See page 46. † See page 197 ct seq., volume VII, series I.
Governor Macquarie administered the government for eleven years and eleven months. During this period, the extremes, to which the power of a governor might be extended, were demonstrated, the necessity for reform was constantly agitated, and the limelight of competent legal criticism for the first time was thrown on the principles and details of the administration of the colony.

Macquarie commenced his government under the most favourable auspices. He carried with him orders for the recall of the New South Wales corps. This regiment and its partisans had been the dominant party in the colony for twenty years, and the leaders of the regiment had acquired enormous influence. By its recall, this power, which had been usually detrimental to the general interests, was broken. For twenty-two years, the government of the colony and the administration of justice had been a question of expediency, and Macquarie was given instructions to examine and report on the necessity for a reconstitution of the law courts.

Macquarie and Bent were not long in the colony before they realised the many defects in the judicial system.

In May, 1810, E. Bent wrote a lengthy report.* He commented adversely on the manifold and complex duties of the deputy judge-advocate in the criminal jurisdiction; on the similarity of the criminal court to a court-martial in constitution and procedure; and on the method of administering the oath to the deputy judge-advocate. To remedy these defects, he proposed the appointment of a lawyer as attorney-general and King's advocate: the introduction of trial by jury and the constitution of the court by a judge and a jury of twelve persons; and the administration of a general oath to the deputy judge-advocate on his first assuming office, in order to avoid such incidents as occurred at the trial of John Macarthur.† He proposed that the jurymen should be selected "from persons who came out free, and from those who had obtained their pardon for a considerable time, or whose sentences were expired and were respectable in their conduct and situation." He also strongly advocated punishment by solitary confinement. In the civil jurisdiction, he reported that the civil court was well adapted "for the purpose of investigating questions of simple debt or breach of Contract; but the very summary

* See page 48 et seq.  † See page xxii.
mode of its proceedings are but ill-suited to the deciding of ques-
tions of a complicated nature, when the interests of third parties
are concerned." He stated that he had found it necessary "to
depart from the strict letter of the Patent, in order to do Justice."
by issuing writs on his own initiative, when the civil court was not
sitting, making them returnable before the next court. This inno-
vation had been attempted by R. Dore* in 1798, but had been
prohibited by Governor Hunter. Bent proposed that there should
be periodical sittings of the civil court; that three or four qualified
attorneys should be encouraged to immigrate; and that the court
should be granted an equity jurisdiction and consist of one, two
or three permanent judges, instead of the deputy judge-advocate
and two members nominated by the governor; as such members
found the duty irksome.

In October, 1811, both Macquarie and E. Bent submitted
detailed proposals for the reform of the legal system; and these
proposals, supported by the recommendations of the select com-
mittee of the House of Commons on transportation in 1812,
formed the basis on which the letters patent, creating new civil
courts in 1814, were drafted.

Macquarie's proposals† were as follows:—

"Criminal Department.

(1) That Trial by Jury (as it prevails in England) should be
established in this colony. (2) That Sessions of Oyer and Ter-
miner and General Gaol Delivery should be held Quarterly by
Virtue of Commissions, issued by the Governor under the Seal
of the Territory. (3) That a person should be sent from England
(an Attorney if possible) in the Character of Clerk of the Peace,
whose Duty it should be to draw up all Indictments of a public
Nature, to attend the Sessions, to preserve all Records, etc., of a
Criminal Nature, to receive Fines, to make out Precepts for the
Appointment of Magistrates, to arraign Prisoners, and to record
Verdicts, etc., etc., etc. (4) That the Sessions should be held by
the Judge. (5) That the Court should Consist of a Judge, a
grand Jury, a petty Jury, a Provost-Marshal or Sheriff, a Clerk of
the Peace, two Barristers, two Attorneys, a Crier, and a Court-
Keeper. (6) That the Judge shall have all such Powers as are
Usually granted.

* See page xviii. † See page 393 et seq., volume VII, series I.
INTRODUCTION.

“Civil Department.—Law Side.

(1) That in this Department there be also Trial by Jury. (2) That the Court shall meet at Certain regular Terms for the Trial of Causes, and also for Hearing of Arguments in Cases, where Special Verdicts may have been found, or where special Cases may have been reserved for the opinion of the Court. (3) That for the present the Judges of this Court should Consist of the Judge of the Colony, who shall be President, and two Magistrates, to sit by regular Rotation. (4) That the Practice of the Court shall be, as nearly as Circumstances will allow, governed by the Practice of the Court of King’s Bench. (5) That the Court shall consist of the Judges, Jury, Provost-Marshal or Sheriff, one Registrar or Prothonotary to enter and keep the Records, etc., two Barristers, two Attorneys, a Crier and a Court-Keeper.

“Civil Department.—Equity Side.

(1) That the same Judges shall sit also as a Court of Equity, hearing and deciding Causes by Bill and Answer, and by Petition, according to the Rules of the Court of Chancery. (2) That there should be a Master, to whom Accounts might be referred, a Registrar, two Barristers, two Solicitors, a Crier and a Court-Keeper. (3) That the Fees in all the Courts should be regulated by those taken in India, or in other His Majesty’s Colonies. (4) That the Judge of the Colony should act as ordinary in granting Probates of Wills, Letters of Administration, etc.”

Macquarie at the same time advocated the granting of a separate charter of justice for Tasmania.

Ellis Bent, in his report,* repeated the defects in the judicial system, which he had noted in his letter of May, 1810, and also drew attention to the adverse influence of the right of appeal to the privy council from judgments of the civil court. By the charter of justice, the right of appeal was granted in all causes, where the matter in dispute exceeded in value £300. He stated that this right was rapidly undermining the credit of the colony. The reason of this was the length of time—usually three years—which elapsed before a decision on appeal could be obtained. The result was that debts of more than £300 were regarded as debts of honour, and successful suitors in the civil court were willing to compound on almost any terms to avoid an appeal to the privy council. Bent also commented on the subordination of the deputy

*See page 57 et seq.
judge-advocate to the governor. At a later date (1815), he stated* that Macquarie had ordered him to wait every morning at govern­ment house to receive commands like any member of the staff, and that he was not allowed to go more than seven miles from Sydney without Macquarie's special permission. For the immediate re­form of the judicial system, Bent proposed that a supreme court of judicature should be established, "consisting of One Judge (being a Barrister of not less than five years' standing) and two persons to be chosen by rotation from the magistrates of the Terri­tory. That in this Court should be vested full power to exercise all Civil, Criminal and Ecclesiastical Jurisdiction, to form such rules of practice and rules for the Process of the Court, as might be found necessary to the due administration of Justice. That this Court should be a Court of Record, and also a Court of Oyer and Terminer and Gaol delivery for the Territory of New South Wales; and that the Judge of this Court should, in the exercise of his Functions, be perfectly independant of the Executive Power of the Colony, and removable only at the pleasure of His Majesty expressed through his Ministers." Bent further proposed that grand juries of twenty-three free residents and petty juries of twelve should be introduced into the criminal jurisdiction; and that all convicts should be tried by the superintendent of police, excepting for capital crimes to be tried by the criminal court. In the civil jurisdiction, he advocated trial by jury in causes at com­mon law, and the limitation of the right of appeal to cases "where the debt or demand in dispute exceeded the value of £6,000." He also proposed the abolition of the summary jurisdiction of the civil court, and that this court should be guided in its decisions by the common and statute law of England unless modified by a colonial ordinance, which, he suggested, should be drafted by an officer of and registered in the supreme court.

In July, 1812, the select committee on transportation submitted its report to parliament. This committee strongly condemned the system of criminal jurisdiction, and endorsed Ellis Bent’s pro­posals for reform. It recommended the erection of courts in Tas­mania. It criticised the system of colonial ordinances, issued on the personal responsibility of the governor, and suggested the appointment of an advisory council, even if the power of such council was limited to "that of protesting against any measures of the Governor, of which they might disapprove, and of transmit­ting their protests to the Secretary of State."

*See page 127.
When these reports were received, the secretary of state decided to introduce some reforms, but, notwithstanding the general condemnation of the criminal jurisdiction, the reforms were ultimately restricted to the erection of new civil courts.

In November, 1812, the secretary of state, Earl Bathurst, proposed* the erection of three courts, a supreme court, a governor's court, and a similar court for Tasmania. The governor's court and the court for Tasmania were to have the same constitution as that of the existing court of civil jurisdiction, but with no power to take cognizance of any suits, where the matter in dispute exceeded in value £50; no appeal was to be allowed from the decisions of these courts. The supreme court was to consist of a chief justice and two magistrates of the territory, chosen in rotation by the governor, and to have criminal and equity, as well as civil, jurisdiction. The opinion of the majority was to control the decision of the supreme court; but, if the chief justice was in the minority, and he protested against the decision and recorded his protest, an appeal was to be permitted to the governor assisted by the deputy judge-advocate. Appeals to the privy council were proposed, when the matter in dispute exceeded in value £3,000, provided the appellant first paid the amount of his debt into court, or surrendered the property to trustees to be named by the court. Bathurst proposed to encourage solicitors to immigrate, and to defer for further consideration the introduction of trial by jury, as he considered it advisable that any alterations should be gradually introduced. In the same letter, Bathurst proposed to restrict the powers of the governor to recommendations only for pardons, and objected to the advisory council, proposed by the select committee, as it might cause dissensions in the colony and weaken the power of the governor. Bathurst concluded by asking Macquarie's opinion on the proposed changes.

In his reply† in June, 1813, Macquarie proposed (1) that the office of deputy judge-advocate should be abolished, and an assistant or puisne judge appointed with similar functions; (2) that the supreme court should consist of a chief justice and assistant or puisne judge, instead of a chief justice and magistrates chosen by rotation; (3) that trial by jury should be established in all criminal proceedings; (4) that, in all civil cases exceeding £50,

* See page 672 ct seq., volume VII, series I.
† See page 774 ct seq., volume VII, series I.
the supreme court or either of the judges should have power at discretion to order trial by jury; (5) that, except in capital cases, all convicts should be tried by magistrates; (6) that the assistant judge should be chairman of the quarterly sessions of magistrates; and (7) that jurymen should be chosen from free settlers, expirees and emancipists. At the same time, Macquarie protested against the proposed advisory council and the withdrawal from the governor of the right to grant conditional pardons.

Before this reply from Macquarie was received in England, the new patent of justice was drafted. The letters patent* passed the great seal on the 4th of February, 1814.

By these letters, that portion of the letters patent granted in 1787 was revoked, which related to the erection of the court of civil jurisdiction. Three courts of civil judicature were established, viz., the governor's court, the supreme court and the lieut.-governor's court.

The governor's court was virtually a continuation of the old court of civil jurisdiction with certain limitations. As in the former court, it was constituted by the deputy judge-advocate and two residents, nominated by the governor, or, in his absence, by the lieut.-governor, and its procedure was summary. Unlike the former court, its judgments were final, and there was no appeal from its decisions. Suits originating between residents of Tasmania, and suits in which the debt or thing in dispute exceeded £50 in value, were excluded from its jurisdiction. The process of the new and old courts was similar.

The supreme court was formed to overcome the objections of E. Bent to the summary jurisdiction of the old civil court. It was constituted by a judge, appointed by royal commission, and two magistrates, nominated for each sessions by the governor, or, in his absence, by the lieut.-governor. It was constituted a court of record. The jurisdiction was defined as over "all Pleas concerning Lands, Tenements, 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, except where the Cause of Action shall not exceed £50 Sterling." The procedure in common law was similar to that of the former court of civil jurisdiction, subject to the exclusion of summary methods. Where the debt or thing in demand exceeded £300 in

* See page 77 et seq.
value, a suitor was granted the right of appeal from decisions of the supreme court to the governor, or, in his absence, to the lieut.-governor, sitting in court of appeal, assisted by the deputy judge-advocate. The processes of summons and of execution in the court of appeal were similar to those of the supreme court. The decisions of the court of appeal were final, when the debt or thing in demand did not exceed £3,000 in value. When a larger sum was involved, the appellant had a right of appeal to the privy council, provided he gave approved security for double the value of the debt or thing in demand.

The lieut.-governor's court was similar in constitution and procedure to the governor's court, with its jurisdiction limited to suits originating in Tasmania in which the debt or thing in demand did not exceed £50 in value. A deputy judge-advocate was appointed for this court, and the lieut.-governor nominated the members.

A probate and equity jurisdiction was granted to the supreme court and the procedure was defined. But no criminal jurisdiction, as suggested by Bathurst in 1812, was granted. The supreme court also was authorised to frame rules of practice and appoint officers of the court.

As suggested by E. Bent, the deputy judge-advocate and judge were ordered to take general oaths of office in the presence of the governor or lieut.-governor.

These letters patent, like those of 1787, were granted entirely without statutory authority. They were received in the colony in July, 1814, and promulgated on the 12th of August following, J. H. Bent, a brother of E. Bent, being appointed judge. The reforms granted were received with immediate and continued adverse criticism.

The position of the deputy judge-advocate under this charter for the administration of civil justice was probably unique in history. Earl Bathurst stated* that "the Continuance of a Judicial officer, who bore a commission exclusively Military, and who, tho' a Military officer, was by the Charter placed above the Civil Judge," had received due consideration. The deputy judge-advocate held office as president of the criminal court and chairman of the inferior civil court, held precedence over the judge of the supreme court, and assisted the governor in hearing appeals from the decisions of that court.

* See page 171.
In October, 1814, two months after its promulgation, E. Bent wrote a criticism* of the new charter, in which he protested against the status established for the deputy judge-advocate. He anticipated confusion by the non-concurrent jurisdictions of the governor’s and supreme courts, and considered that the two civil courts were unnecessary. He thought the charter defective in omitting to provide an admiralty jurisdiction for the supreme court and criminal and superior civil courts for Tasmania, and in neglecting to define the duties of the deputy judge-advocate in the court of appeal. He suggested the abolition of appeals to the governor and the restriction of appeals to the privy council. In this letter, Bent also noted the necessity for some form of legal recognition of the colonial ordinances, issued by the governor on his own initiative in the form of government and general orders and proclamations.

In replying to this criticism,† Earl Bathurst stated that the time was inopportune for introducing radical reforms, but, when it was decided to erect the island of Tasmania into a separate colony, reforms in the administration of justice would be considered. In reference to the colonial ordinances, Bathurst begged the issue by stating that they rested on the same foundation that they had ever stood since the first formation of the colony.

At the first sittings of the supreme court in May, 1815, the judiciary came into open conflict with the executive power over the admission of ex-convicts to practise as attorneys in the court. The question involved was practically the so-called emancipist policy of Governor Macquarie. Shortly after his arrival in the colony, Macquarie enunciated the principle‡ that: “long-tried good Conduct should lead a Man back to that Rank in Society, which he had forfeited, and do away, in as far as the Case will admit, All Retrospect of former bad Conduct.” This principle was approved in the abstract by every humanitarian and by the select committee on transportation in 1812. But, in putting it into practice, Macquarie failed. Prior to his arrival, with two exceptions, a rigid barrier had been raised between all who had arrived free in the colony, and those who had been landed under a sentence of the law. Eleven days after assuming the government, Macquarie

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* See page 100 et seq.  † See pages 171 and 172.  ‡ See page 276 et seq., volume VII, series I.
appointed an ex-convict, Andrew Thompson, and seven months later another, Simeon Lord, to the magistracy. These appointments were made apparently without any special reasons in favour of the two men. Macquarie at a later date made two more similar appointments to the magistracy, and selected certain ex-convicts for special favour. He entertained them at government house, and endeavoured to force them into the society of the military and others. In this policy, Macquarie failed; and he was ordered to remove those he had appointed from the magistracy. Under the first charter of justice, certain ex-convicts were allowed to practise as attorneys in the court of civil jurisdiction owing to the want of qualified solicitors. When the second charter of justice was granted, two solicitors were appointed for practise in the new courts. According to the evidence* of G. Grossley, Macquarie had ascertained that J. H. Bent, the judge, intended to refuse admission as attorneys in the supreme court to ex-convicts, who had been guilty of infamous crimes. Macquarie sent for Crossley and E. Eagar, both ex-convicts, and informed them that he was diffident about forcing their admission. Nearly three weeks before the supreme court opened, Crossley and Eagar submitted petitions to Macquarie, praying admission to practise as attorneys in the court, and these petitions were actually made at the request of Macquarie according to an affidavit† by Crossley. Twelve days before the supreme court opened, Macquarie forwarded these petitions to J. H. Bent, with a strong recommendation in favour‡ of their prayer. It seems probable that Macquarie intended to make a test case of these applications as part of his emancipist policy. But, even allowing for the peculiar constitution of the colony, it was a serious step for the executive power to attempt to influence the judiciary, and Macquarie's action was strongly resented by J. H. Bent. The supreme court was opened in May, and, as part of its first business, petitions for admission to practise from Crossley, Eagar and G. Chartres, another ex-convict, first came officially under the cognizance of the court. Against the opinion of W. Broughton and A. Riley, the members of the court appointed by Macquarie, J. H. Bent resolutely declined§ to grant the prayer of the petitioners. J. H. Bent thereupon adjourned the court, pending reference of the question to England: and in consequence the supreme court was closed until the year 1817.

* See page 766. † See page 162. ‡ See page 489 et seq., volume VIII, series I. § See page 144 et seq.
J. H. Bent's action was undoubtedly correct; but Macquarie had already committed himself by the appointment of ex-convicts to the magistracy, and thereby rendered such persons eligible, not merely as attorneys, but as actual members of the bench of the supreme court.

When the question was referred to England, Earl Bathurst was determined to support the governor at all costs, and he had no alternative but to recall J. H. Bent; but, at the same time, he informed Macquarie* that "the Remonstrances of Mr. J. Hart Bent against the Employment of Convicts in the Confidential Situation of Attornies was proper."

At the same time (April, 1816), Bathurst recalled the deputy judge-advocate, Ellis Bent; but, before the letter of recall was received at Sydney, E. Bent had died. E. Bent had come into conflict with Governor Macquarie over drafting the port regulations. As part of the system of colonial ordinances, issued on the personal initiative of the governor, Macquarie desired to proclaim a new series of port regulations, and submitted a draft of them to E. Bent for redrafting in legal phraseology. E. Bent protested against certain sections of them as illegal. But Macquarie refused to accept some of E. Bent's objections, whereupon E. Bent refused to frame the regulations according to Macquarie's plan. Macquarie reported† the dispute to Earl Bathurst, and Bathurst, determined to support Macquarie, recalled E. Bent. Subsequently in the year 1823, the whole of Macquarie's port regulations, as proclaimed in 1819, were held to be illegal by J. Stephen, jr., the counsel to the colonial department.‡

Governor Macquarie's autocratic policy towards the judiciary was similar to the methods he adopted in his general administration. Early in his career, he realised that the rule of a governor was virtually, to quote the words of J. H. Bent, "quod gubernatori placet, legis habet vigorem." During his long administration, Macquarie developed an inordinate love of power, and he resisted every attempt to change the policy of the colony as an encroachment upon his authority. When the legality of any of his proclamations or orders was questioned, he resented it, and, in consequence, quarrelled with every judge.

* See page 108, volume IX, series I.
† See page 394 et seq., volume VIII, series I, and page 122 et seq. in this volume.
‡ See page 486.
Macquarie developed the system of orders and proclamations, which were issued entirely at his own discretion, and he thereby exercised legislative powers as large as those of parliament. Examples* may be quoted. By proclamation, in 1813, he created a coinage; in 1817, he established the registration of real property titles; in 1818, he imposed fines on anyone neglecting to take out probate or letters of administration in deceased estates; in 1818, he gave the magistrates power to enforce penalties under general orders; in 1819, he issued port regulations, which, as noted before, were held to be illegal; and also, in 1818, he gave the magistrates jurisdiction in disputes about wages and between master and servant. On the last proclamation, J. Stephen, jr., gave his opinion† that the governor of New South Wales had no powers of legislation, and therefore the whole of Macquarie's orders and proclamations were illegal. Macquarie also imposed numerous taxes and customs duties, all of which counsel in 1819‡ advised were illegal.

As he claimed unlimited powers of legislation, it is not surprising that he claimed sovereign powers in other spheres. In 1817, he granted a charter of incorporation to the bank of New South Wales, which in the following year counsel advised was null and void;§ he forcibly deported a Roman Catholic priest and an ex-military officer as undesirable immigrants;|| he regarded commerce as forbidden by law and only tolerated by government, and granted licenses to import;|| he authorised or prevented marriages;¶ he compelled the clergy to read his proclamations in church;¶ he ordered the flogging of free people without investigation;¶ he proposed the pardoning of convicts to celebrate the appointment of Sir Thomas Brisbane, his successor, and inferentially his own departure;¶ he claimed jurisdiction over Tahiti and New Zealand; he exercised unlimited control over the expenditure of the colonial revenues.**

The powers and patronage exerted by Macquarie were well illustrated in the case of the schooner Traveller.†† The schooner arrived in Port Jackson in the year 1816, and Macquarie granted the master permission to trade. A few days later, the Revd. B.

* See pages 70, 219, 319, 323 and 325. † See page 414. ‡ See page 330.
§ See page 320. || See pages 301 and 206.
¶ See pages 687, 285, 287, 208 et seq. and 402. ** See page 818.
†† See page 187.
INTRODUCTION.

Vale, a chaplain on the staff, seized the schooner for breach of the navigation and plantation laws. Vale was advised by W. H. Moore, one of the solicitors appointed by the crown. When he heard of the seizure, Macquarie released the schooner from restraint, ordered a court-martial on Vale, and suspended Moore. Macquarie took these drastic steps without knowing whether the seizure was legal or not, for, in reporting* the case to Earl Bathurst, he requested an act of indemnity, if necessary. For his treatment of Vale and Moore, Macquarie was censured† by Earl Bathurst.

In 1816, a petition to the house of commons was prepared protesting against Macquarie’s government.‡ Macquarie bitterly resented this, and cancelled the indulgences of all signatories to the petition. For thus resisting the inalienable right of a subject to petition parliament, Macquarie was again censured by Earl Bathurst.§ The fear felt for Macquarie’s power is well illustrated by a notice|| issued by S. Terry in 1817 relating to this petition.

Macquarie controlled the government as a general might control an army. He expected all senior officials, including the deputy judge-advocate, to wait on him daily for commands, and he forbade any of them to travel more than seven miles from Sydney without his permission. Just as he attempted to control the judiciary, he effectually controlled the bench of magistrates. He issued instructions‡ to the bench to regulate their proceedings. In the issue of spirit licenses, his methods were those of an autocrat. Such licenses were granted by the bench; but, before their issue, Macquarie drew up a list, and the magistrates were restricted merely to granting licences** to the names in that list.

Macquarie’s love of power was felt in Tasmania. When he assumed the government, there were two administrations in the island, independent of one another, which were under the control of and received instructions from Macquarie. In 1812, under instructions from England, Macquarie issued a proclamation†† whereby the settlements at Port Dalrymple were made subordinate to the lieut.-governor at Hobart town. But Macquarie had exercised absolute control over the two separate governments for

* See page 45, volume IX, series I. † See pages 312 and 333.
‡ See page 213.
§ See pages 824, volume IX, and 16 et seq., volume X, series I.
|| See page 223. ‡ See page 337. ** See page 131.
†† See pages 623 and 624, volume VII, series I.
two and a half years, and probably resented any limitation on his powers. He therefore adopted the practice of giving orders direct to the commandant at Port Dalrymple, and thus to some extent nullified the union of the settlements under the lieut.-governor at Hobart town. He gave instructions to the lieut.-governors, by which all power remained centred in himself; and, when the lieut.-governor received authority to locate lands to settlers, Macquarie neutralised the value of the concession by regarding such locations as mere recommendations. Two incidents in Tasmania in this period illustrated the evils of the concentration of vast powers in a governor or lieut.-governor. Bushranging was prevalent in the island, and all attempts to suppress it had failed. In May, 1814, Macquarie, on his personal responsibility, issued a proclamation whereby he offered a pardon to any bushranger, returning to his lawful occupation before the 1st of December following, for all crimes committed with the exception of wilful murder. This proclamation was tantamount to a license to commit any crime, wilful murder excepted, for a period of six months. If there had been an adviser to the governor, the proclamation would surely not have been issued. In April, 1815, the lieut.-governor, T. Davey, proclaimed martial law, an action which was entirely ultra vires.

Macquarie's autocratic methods caused vigorous opposition, and adverse reports on his administration were transmitted to England. In 1817, Earl Bathurst severely criticised the administration; and, in the following year, the hon. H. Grey Bennet, M.P., published a pamphlet strongly condemning Macquarie's conduct. At length, the English government decided to take action, and, in January, 1819, J. T. Bigge was appointed a commissioner to enquire into the general state of the colony. But some further precedents and agitations in the colony, before Bigge arrived, must be noted.

In the year 1813, G. Molle, lieut.-colonel commanding the 46th regiment, was appointed lieut.-governor by commission. This commission created a new precedent. It was no longer a military
commission* as granted to Molle's predecessors; reference to the rules and discipline of war was omitted; and it was purely a commission as a civil lieut.-governor. The succession to the administration in the absence of the governor was specifically mentioned, and not dependent, as formerly, on the governor's commission. Throughout his administration, Macquarie resented any assumption of power by the lieut.-governor,† and Bigge reported that the office was useless,‡ and advised its abolition.

In November, 1815, J. H. Bent wrote§ to Earl Bathurst suggesting reforms in the administration of justice. He noted, as defects in the letters patent, that there was no power of appointment to fill vacancies in judicial offices; that difficulties would arise in the supreme court from a want of concurrent jurisdiction with the governor's court in all cases under £50; that no provision was made for the absence of defendants; that the procedure of the supreme court was inapplicable to Tasmania; and that there was no power to issue writs of habeas corpus. He proposed that one court, a supreme court, should be established, to consist of a chief justice and two or more judges, with similar powers, privileges and precedence, as the judges of the courts of King's Bench in England; that the court should be a court of civil and criminal jurisdiction; that, in civil jurisdiction, any two judges should form the court; that there should be no appeal, except in cases exceeding the sum of £—, and then only to the privy council; that it should be a court of equity, and have the granting of probates and letters of administration; that, in criminal jurisdiction, one or more judges should form the court, with a jury of five naval or military officers in New South Wales, and three in Tasmania; that the court should hold sessions of Oyer and Terminer and general gaol delivery; and that sittings in both jurisdictions should be held in Tasmania once a year.

After the recall of E. and J. H. Bent, J. Wylde and B. Field were appointed deputy judge-advocate and judge, and assumed office at the end of 1816 and the beginning of 1817. These judicial officers soon realised the defects in the administration of justice and the system of government. Before these officers left England, Bathurst proved his determination to maintain Macquarie as the supreme power. Wylde applied for instructions

* See page 1. † See pages 389 et seq. and 395 et seq. ‡ See page 881. § See page 155 et seq.
relative to the admission of ex-convicts as attorneys, but was merely referred to Macquarie for them.* In 1816, T. S. Amos applied for permission to immigrate as a solicitor, but was told that the permission must be obtained from Macquarie.

In December, 1816, Wylde adversely commented† on the manifold and complex duties of the deputy judge-advocate, and proposed the appointment of a clerk of the peace to relieve him. Macquarie gave immediate effect to this suggestion. In March, 1817, Wylde reported defects‡ in the charter on the question of domicile of plaintiff and defendant in civil suits, and its inadequacy in relation to Tasmania. The question of domicile was submitted‡ to counsel in England. In September, 1817. Wylde held that civil officers, although holding military commissions, were not liable to trial by court-martial, and this opinion was supported by counsel.§ In December, 1817, a difference of opinion arose between Wylde and Field relative to the jurisdiction of the supreme court,∥ when the verdict was under £50, a question which had been anticipated by E. Bent in 1815. In February, 1818, Field held that the duties imposed by Macquarie were illegal, and counsel endorsed this opinion.¶ In November, 1818, Field advised the passing of statutes to legalise the collection of duties and the letters patent erecting civil courts;** and, in February, 1820, Macquarie requested an act of indemnity for the duties imposed.

Whilst these defects were recorded by the judiciary and Macquarie was exercising his autocratic powers, agitations for reform were gaining strength in the colony. In March, 1819, Macquarie transmitted a petition†† to the Prince Regent in council, signed by twelve hundred and sixty-one free inhabitants. In this petition, the objections to the criminal jurisdiction were reiterated, and a prayer was made for the introduction of trial by jury in both civil and criminal courts, and for the removal of restrictions on commerce and trade.

J. T. Bigge arrived in the colony in September, 1819, and, until his departure in March, 1821, conducted an inquiry into all the details of administration in New South Wales and Tasmania. Bigge obtained many reports from competent officers.

* See page 204. † See page 324 et seq., volume IX. series I. ‡ See pages 230 et seq. and 243 et seq. § See pages 251 and 320. || See pages 271 et seq. and 278 et seq. ¶ See pages 278 and 330. ** See page 321. §§ See page 55 et seq., volume X. series I.
INTRODUCTION.

In October, 1820, Field submitted a report,* in which he noted nine defects in the charter of justice and suggested eight amendments. The defects noted were (1) in the ecclesiastical jurisdiction with respect to letters *ad colligenda*; (2) the want of provision for the absence of defendants in lawsuits; (3) the want of power (a) to sue for debts due to the crown, (b) to appoint guardians of infants and lunatics, (c) to appoint commissioners of affidavits, and (d) to take bail in certain cases; (4) the absence of matrimonial jurisdiction; (5) the necessity for the exemption of high officials from arrest and trial; and (6) the necessity for evidence in writing in cases of appeal. The reforms proposed were (1) the erection of one supreme court with civil, criminal, ecclesiastical and admiralty jurisdiction, the civil court to consist of one judge and two magistrates, and the criminal court of the same judge and six naval or military officers; (2) the abolition of the distinction between civil causes under and over £50; (3) power to grant writs of *habeas corpus*, and full criminal, ecclesiastical and admiralty jurisdictions as in England; (4) the abolition of fees to the judge and officers of the court; (5) the trial of all prisoners committed by magistrates; (6) the erection of courts of requests; (7) control of courts of requests, magistrates and peace officers by the supreme court; and (8) provision for vacancies in offices.

In July, 1821, Wylde submitted his report† to Bigge. He protested against the powers of the governor in convening the courts, when he desired, and in the appointment of members. He enumerated as defects in the criminal jurisdiction, the complex duties of the deputy judge-advocate; the analogy of the court to a court-martial; the trial of free persons by a summary jurisdiction intended for prisoners; the power of four members to convict and five to execute the utmost rigour of the law; the want of a right of challenge; the duty of the deputy judge-advocate as a grand jury; the absence of timely redress in case of injustice; the power of members to decide against the legal opinion of the judge; the task of the deputy judge-advocate possibly to give judgments, as the organ of the court, against his own opinions; the possibility of members trying their brother and superior officers; and the members' ignorance of local conditions and of the character of witnesses, appearing before the court. In the governor's court, he objected to the governor's power of appointment of members, and,

* * See page 858 et seq. † See page 354 et seq.
as its judgments were without appeal or redress, to the decisions of the majority of the members occasionally against the opinion of the deputy judge-advocate. In the supreme court, he considered the practise and procedure too complicated, and the want of legal knowledge in its members and its jurisdiction in Tasmania serious defects. Additional jurisdiction was required to issue writs of *habeas corpus*, to hear appeals from the summary jurisdiction of magistrates, to order the maintenance of natural-born children, and to exercise summary control in matters of contempt. He strongly opposed the governor sitting in court of appeal, thus giving a naval or military officer the disposal, without appeal, of property in suit to the amount of £3,000. He also noted the difficulty of applying the statute law of England in the colony. As necessary reforms, he proposed that one court should be erected as a court of record to be called the "supreme court," and to be composed of a chief justice and two puisne judges, with full civil, criminal, ecclesiastical and admiralty jurisdictions; that this court should have a general control over magistrates, an equity jurisdiction, and the power to grant probates and letters of administration; that the court and judges should have similar powers, privileges and precedence with the judges of the court of King's Bench in England; that two judges should form a court; that there should be no appeal, except in cases exceeding the sum of £3,000, and then only to the privy council; and that one of the puisne judges should act as a master in equity. He proposed the exemption of high officials from prosecution. In Tasmania, he proposed a court to consist of a judge and two magistrates for the trial of causes under the value of £100, or four magistrates when over that value, with the right of appeal to the supreme court at Sydney, when the matter in dispute exceeded £200 in value. He also advocated a limited system of trial by jury.

In April, 1820, the cause Eagar, E., *v.* Field, B., was tried in the governor's court. The action* was for the recovery of fees, but the judgment struck at the foundations of part of the civil life of the community. Eagar had been a transport,* but had received an absolute pardon from the governor. Field pleaded

* See page 355 *et seq.*, volume X, series I.

† All persons, who arrived in the colony under a sentence of transportation, were known technically as transports. As a free immigrant might be convicted of a criminal offence after his arrival, it is evident that all convicts were not transports.
that such a pardon did not remove the disabilities and incapacities, consequent upon attainder, and that Eagar was not in a capacity to maintain any action in a court of justice. The court allowed this plea. In September, 1820, in a suit, Eagar, E., v. de Mestre, P., the supreme court gave a judgment "That Persons, arriving in this Colony under Sentence of Transportation, and afterwards receiving Instruments of Absolute and Conditional Remission of such Sentence, pursuant to the Act of Parliament, 30 Geo. III, c. xlvii, were not thereby restored to any Civil Rights of free Subjects, Unless and until their names should be inserted in some General Pardon under the Great Seal of England; but, on the contrary, that they shall remain Convicts attaint, incapable of taking by Grant or Purchase, holding or conveying any property, real or Personal, of suing in a Court of Justice, or of giving Evidence therein." This judgment was supported by counsel,* and affected the whole class of emancipists, many of whom had acquired wealth. The extraordinary position arose from the omission to insert in a general pardon the names, transmitted regularly by the governors, of those convicts whose sentences had been remitted. In his report to Bigge in July, 1821, Wylde proposed† that an act of grace should be passed to remedy the omission; and, in October, 1821, Macquarie transmitted a petition,‡ signed by numerous emancipists, praying redress.

After his return to England, J. T. Bigge submitted reports in May, 1822, and January, 1823, on the administration of the colony; but, before these reports were received, Governor Macquarie was recalled, and Sir Thomas Brisbane assumed the government in December, 1821.

In these reports, Bigge considered that the time was inopportune for the introduction of trial by jury; but, if it was introduced into the civil court, it should be limited to questions of fact at the request of both parties to the suit. He endorsed the report by B. Field on the defects in the charter and Field's proposed amendments. He proposed that the judgment of the members of the supreme court should be confined to questions of fact, and the decision of the judge on questions of law and points of practice should be final and independent. In the criminal jurisdiction, he recommended that a separate criminal court should be erected

* See page 419 et seq. † See page 384. ‡ See page 549 et seq., volume X, series I.
in Tasmania; that the criminal court should be held quarterly to obviate the objections to the power of the governor to convene it; that a right of challenge should be given to the prosecutor or prisoner on the ground of interest only; that one and the same judge should preside in the criminal as in the civil court; that the offences, not capital, of convicts should be tried by a bench of magistrates; that the judge of the criminal court should have power to issue writs of habeas corpus, and that punishments should solely remain at his discretion and not with the members; that the number of members should be increased from six to seven, and that the judge should have no vote in the verdict; that an attorney-general should be appointed to prepare indictments and to prosecute. He suggested also the grant of a commission for trying all offences and misdemeanors committed on the high seas; and the erection of courts of conscience for the summary decision of matters under £10. In effect, Bigge proposed that criminal trials should be held by a judge and jury of military officers. He also proposed the passing of an act to restore civil rights to emancipists. Field considered* such an act unnecessary, as the only admissible evidence of convict attaint was the record of conviction, and no court would permit every opposite party twelve months to procure such record.

After receiving these reports and being aware of the agitations in the colony, the secretary of state decided that it was necessary to pass an act for the better government of and administration of justice in the colony. But, before the act was passed, further events and agitations occurred, which must be noted.

At the beginning of the year 1822, Wylde held that the proclamation giving magistrates jurisdiction over wages disputes was invalid. This rendered the magistrates liable to prosecution.† Wylde's opinion was supported by counsel in England.‡

In the middle of the same year 1822, charges were made against H. G. Douglass, a magistrate at Parramatta. These charges§ originated with the party antagonistic to Sir Thomas Brisbane, and were political in their initiation.

In March, 1823, Earl Bathurst informed Sir Thomas Brisbane that he had decided to abolish the offices of judge-advocate and

* See page 423 et seq. † See page 633 et seq., volume X. series I. ‡ See page 412 et seq. § See page 556 et seq.
judge; to appoint one judge and an attorney-general; and to confer statutory authority on the governor to enact colonial ordinances.

The emancipists, who had petitioned for redress of their grievances, had subscribed funds to send a representative to England to support the petition. E. Eagar was appointed, and was recognised by the colonial department, as certain proposed clauses in the New South Wales bill were submitted to him.* In April, 1823, he submitted a lengthy statement† in criticism of the reforms proposed by J. T. Bigge, and submitted proofs in support of the allegations in the petition. Owing to the complex duties and consequent bias before trial of the deputy judge-advocate, he stated two innocent men had been executed. Owing to the absence of a right of challenge, a prosecutor in the criminal court had acted also as member of the same court, and partiality had been shown by members towards brother officers on their trial or as prosecutors. He protested against the appointment of magistrates as members of the supreme court, because the limited choice available had resulted in members being parties to suits tried before them. He strongly advocated the introduction of trial by jury, and submitted many arguments in its favour. He opposed the military juries and the restriction of the right of challenge to the ground of interest, proposed by Bigge in the criminal court, because of the general objections to the military in that court. He objected to the trial by jury, proposed in the civil court, because no two suitors would ever agree to it.

The New South Wales bill,‡ 4 Geo. IV, c. xcvi, was drafted by Francis Forbes, at that time one of the counsel to the colonial department, and was submitted to the criticism of James Stephen, jr., before it was presented to parliament. It was based largely on the recommendations of J. T. Bigge.

Probably the first points considered are printed on page 417 et seq. These points were (1) the revision of the indemnity act passed to legalise taxes imposed by the governor; (2) the jurisdiction proposed for magistrates; (3) the remission of sentences by the governor and the restoration of civil rights to former remittees; (4) power for the governor to proclaim ordinances not repugnant to the laws of the realm at the recommendation and

* See page 481. † See page 441 et seq. ‡ See page 647 et seq.
with the consent of magistrates; (5) power for the governor to deport undesirables; (6) sanction for a charter of justice; (7) provisions defining the powers and jurisdiction of the supreme court; and (8) a short system of insolvent law upon the principle of the judicature act, 49 Geo. III, c. xxvii, of Newfoundland.

The fourth and fifth proposals were not included in the act. In the draft of the bill, it was provided that the supreme court should administer justice according to the laws of England, so far as they could be applied, and the local ordinances of the governor, so far as those ordinances were not repugnant to the laws of England; the fourth proposal quoted above was also included. These provisions gave the supreme court power over the ordinances. In order to prevent a clash between the governor and the court, it was proposed that instructions should be given to the governor to submit all ordinances to the chief justice before enactment, and that former ordinances should be coded and certified by the chief justice. In May, 1823, the draft was submitted* to James Stephen, jr. He objected to the clauses as drafted relative to (1) the remission of sentences by the governor; (2) the status of expirees; (3) the legality of indictments; (4) trial by jury, when requested by both plaintiff and defendant; and (5) the power for the governor to banish undesirables. In May, 1823, Forbes submitted objections† to the proposed legislative powers of the governor and magistrates, which he stated were without precedent in colonial history. In consequence of the criticism, and because the draft of the bill "contained a whole code of laws, which were deemed so complex and unfit for discussion in Parliament, it was suddenly determined to weave a legislative power into body of the act. . . . In consequence of the resolution thus suddenly adopted, many clauses were retained, which should have been expunged; such for example as the clauses relating to courts of Sessions and Requests, the declaring of insolvencies, foreign attachments, and other matters of purely local moment."‡

On the 19th of July, 1823, the statute, 4 Geo. IV, cap. xcvi, was passed. By its provisions, the King was authorised to grant charters of justice for New South Wales and Van Diemen's Land (Tasmania) respectively; to institute criminal courts in any new settlements; to extend trial by jury by an order-in-council; to

* See page 476 et seq. † See pages 480 and 481. ‡ See page 746.
constitute a legislative council in New South Wales; to appoint places for the reception of offenders; and to erect Van Diemen's Land (Tasmania) into a separate colony with distinct jurisdiction. The statute also provided that the governor should institute courts of requests; that the acts of indemnity for taxation imposed by the governors should be perpetual; that remissions of sentences by the governors should have the same effect as pardons under the great seal; that surgeons of convict ships might punish convicts; that persons assisting in the escape of convicts were guilty of a misdemeanor; and for the regulation of merchant seamen, and of artificers and others under indentures.

The act was limited in operation to the 1st of July, 1827, or until the end of the next session of parliament.

The passing of this act was the most important event in the first fifty years in Australian history. To quote the words of F. Forbes,* "I consider it as a given point that, since the passing of the New South Wales act, the policy of Great Britain towards this settlement is upon the broad basis of her colonial policy; that the laws of England are essentially the laws of New South Wales; that the government is essentially an English government; and that the Courts are essentially the Courts at Westminster."

The provisions of the act were made effective by the issue of a warrant† for a charter of justice for Tasmania, dated 18th August, 1823, by the grant of a charter‡ of justice for New South Wales, dated 13th October, 1823, and by the issue of a mandamus§ for the legislative council of New South Wales, dated 1st December, 1823.

A constitutional government was thus for the first time established on the continent of Australia.

FREDK. WATSON.

* See page 690.
† See page 478 et seq., volume IV, series III.
‡ See page 509 et seq.
§ See page 195, volume XI, series I.
OFFICIAL PAPERS

RELATING TO

FIRST COMMISSION* OF GOVERNOR PHILLIP.

12th October, 1786.

[12 Oct.

COMMISSION* OF DEPUTY JUDGE-ADVOCATE COLLINS.

GEORGE R.

GEORGE THE THIRD, by the Grace of God, King of Great Britain, France and Ireland, Defender of the Faith, etc. To Our Trusty and Well beloved Captain David Collins, Greeting. We do by these Presents constitute and appoint you to be Deputy Judge-Advocate in the Settlement within Our Territory called New South Wales. You are, therefore, carefully and diligently to discharge the Duty of Deputy Judge-Advocate, by doing and performing all and all manner of things thereunto belonging. And you are to observe and follow such Orders and Directions from time to time, as you shall receive from Our Governor of Our said Territory for the time being, or any other your Superior Officer, according to the Rules and Discipline of War.

Given at Our Court at St. James's, the Twenty-fourth Day of October, 1786, in the Twenty-sixth Year of Our Reign.

By His Majesty's Command, Sydney.

COMMISSION* OF LIEUT.-GOVERNOR ROSS.

GEORGE R.

GEORGE THE THIRD, etc., to our Trusty and Well-beloved Major Robert Ross, greeting:—

We, reposing especial trust and confidence in your loyalty, courage and experience in Military affairs, do, by these presents,
constitute and appoint you to be Lieutenant Governor of the Settlement within our Territory called New South Wales. You are, therefore, as Lieutenant-Governor, to take the said Settlement into your care and charge, and carefully and diligently to discharge the duty of Lieutenant-Governor thereof by doing and performing all and all manner of things thereunto belonging; And We do hereby strictly charge and require all our Officers and Soldiers, who shall hereafter be in our said Territory, and all others whom it may concern, to obey you as our Lieutenant-Governor thereof; and you are to observe and follow such Orders and Instructions from time to time, as you shall receive from Us, our Governor of our said Territory, or any other your superior Officer, according to the Rules and Discipline of War, in pursuance of the trust we do hereby repose in you.

Given at Our Court at St. James's the twenty fourth day of October, 1786, in the Twenty sixth Year of Our Reign.

By His Majesty's Command, 

SYDNEY.

WARRANT for DAVID COLLINS as JUDGE-ADVOCATE OF MARINES.

WHEREAS we have thought fit to appoint you to officiate as Judge Advocate to the Detachment of His Majesty's Marine Forces, ordered to proceed to Botany Bay on the Coast of New South Wales for the protection of the Settlement intended to be formed at that place; You are hereby authorized and directed to officiate as Judge Advocate accordingly at all such Courts Martial as shall be there held for the Trial of any Officers Commissd. Officers or Private men, belonging to the said detachment, pursuant to an Act of Parliament now in force for the Regulation of His Maj.'s Marine Forces while on Shore, and any other Act of Parliament in that behalf, which shall hereafter be in Force, and to such Rules, articles and Regulations, as now are or shall hereafter be established by the Lord High Admiral or Commissrs. for executing the Office of Lord High Admiral for the time being, during the continuance of the power and authority hereby given to you as aforesaid; And for your care and trouble in executing the said Employment, We do hereby grant unto you an allowance after the rate of Ten Shillings per day to be paid you quarterly by the Paymaster of Marines, and to commence on the date hereof.

Given etca. and the Seal etca. the 1st of Jany., 1787.

HOWE. J. L. GOWER.
C. BRETT.

* Note 2.
STATUTE, 27 GEORGE III.

THE ACT OF PARLIAMENT, 27 GEORGE III, CAP. II.

WHEREAS by an Act* made and passed in the twenty-fourth year of his present Majesty's reign, intituled, An Act for the effectual transportation of felons and other offenders, and to authorise the removal of prisoners in certain cases, and for other purposes therein mentioned, it is enacted that, from and after the passing of that Act, when any person or persons at any Sessions of Oyer or Terminer or Gaol Delivery, or at any Quarter or other General Session of the Peace to be holden for any county, riding, division, city, town, borough, liberty, or place, within that part of Great Britain called England, or at any Great Session to be holden for the County Palatine of Chester, or within the Principality of Wales, shall be lawfully convicted of grand or petit larceny, or any other offence for which such person or persons shall be liable by the laws of this realm to be transported, it shall and may be lawful for the Court before which any such person or persons shall be convicted as aforesaid, or any subsequent Court holden at any place for the same county, riding, division, city, town, borough, liberty, or place respectively, with like authority, to order and adjudge that such person or persons so convicted as aforesaid shall be transported beyond the seas for any term of years not exceeding the number of years or terms for which such person or persons is or are or shall be liable by any law to be transported; and in any such case it shall or may be lawful for his Majesty, by and with the advice of his Privy Council, to declare and appoint to what place or places, part or parts, beyond the seas, either within his Majesty's dominions, or elsewhere out of his Majesty's dominions, such felons or other offenders shall be conveyed or transported: And such Court as aforesaid is thereby authorised and empowered to order such offenders to be transferred to the use of any person or persons, and his or their assigns, who shall contract for the due performance of such transportation.

And when his Majesty, his heirs and successors, shall be pleased to extend mercy to any offender or offenders who hath or have been or shall be convicted of any crime or crimes, for which he, she, or they is or shall be by law excluded from the benefit of clergy, upon condition of transportation to any place or places, part or parts, beyond the seas, either for terms of life or any number of years, and such extension of mercy shall be signified by one of his Majesty's Principal Secretaries of State, it shall be lawful for any Court, having proper authority, to allow such offender or offenders the benefit of a conditional pardon, and

* Note 3.
(except in cases where such offenders shall be authorised by his Majesty to transport himself, herself, or themselves) to order the transfer of such offender or offenders to any person or persons who shall contract* for the due performance of such transportation, and his or their assigns, for such and the same term of years for which any such offender or offenders shall have been ordered to be transported, or for such term of life or years as shall be specified in such condition of transportation.

And whereas his Majesty, by two several Orders-in-Council,† bearing date respectively on the sixth day of December, 1786, hath judged fit, by and with the advice of his Privy Council, to declare and appoint the place to which certain offenders, named in two lists to the said several Orders-in-Council annexed, should be transported for the time or term in their several sentences mentioned, to be the eastern coast of New South Wales, or some one or other of the islands adjacent.

And whereas Sir James Eyre, Knight, and Sir Beaumont Hotham, Knight, two of the Barons of his Majesty's Court of Exchequer of the degree of the coiffe, according to the authority to them given by the said statute, did, on the thirtieth day of December, 1786, order that the said several offenders, in the said several lists to the said several Orders-in-Council annexed, should be transported to the place and for the time and terms aforesaid.

And whereas it may be found necessary that a colony and a civil Government should be established in the place to which such convicts shall be transported, under and by virtue of the said Act of Parliament, the said two several Orders of Council, and other the said above-recited Orders, and that a Court of Criminal Jurisdiction should also be established within such place as aforesaid, with authority to proceed in a more summary way than is used within this realm, according to the known and established laws thereof.

Be it therefore enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, that his Majesty may, by his Commission under the Great Seal, authorise the person to be appointed Governor, or the Lieutenant-Governor in the absence of the Governor, at such place as aforesaid, to convene from time to time, as occasion may require, a Court of Judicature for the trial and punishment of all such outrages and misbehaviours as, if

* Note 4.  † Note 5.
committed within this realm, would be deemed and taken, accord-
ing to the laws of this realm, to be treason or misprision thereof,
felony or misdemeanor, which Court shall consist of the Judge-
Advocate, to be appointed in and for such place, together with
six officers of his Majesty’s forces by sea or land:

Which Court shall proceed to try such offenders by calling
such offenders respectively before that Court, and causing the
charge against him, her, or them respectively to be read over,
which charge shall always be reduced into writing, and shall be
exhibited to the said Court by the Judge-Advocate, and by
examining witnesses upon oath, to be administered by such
Court, as well for as against such offenders respectively, and
afterwards adjudging by the opinion of the major part of the
persons composing such Court, that the party accused is or is
not (as the case shall appear to them) guilty of the charge, and
by pronouncing judgment therein (as upon a conviction by
verdict) of death, if the offence be capital, or of such corporal
punishment not extending to capital punishment, as to the said
Court shall seem meet; and in cases not capital, by pronouncing
judgment of such corporal punishment, not extending to life or
limb, as to the said Court shall seem meet.

II. And be it further enacted that the Provost-Marshal, or
other officer to be for that purpose appointed by such Governor
or Lieutenant-Governor, shall cause due execution of such judg-
ment to be had and made under and according to the warrant of
such Governor or Lieutenant-Governor in the absence of the
Governor, under his hand and seal, and not otherwise.

Provided always that execution shall not be had or done on
any capital convict or convicts unless five persons present in
such Court shall concur in adjudging him, her, or them, so
accused and tried as aforesaid, to be respectively guilty, and until
the proceedings shall have been transmitted to his Majesty and
by him approved.

III. And be it so enacted by the authority aforesaid that the
said Court shall be a Court of Record, and shall have all such
powers as by the laws of England are incident and belonging to
a Court of Record.

SECOND COMMISSION* OF GOVERNOR PHILLIP.

2nd April, 1787.

[A copy of this commission will be found on page 2 et seq.,
volume 1, series 1.]

* Note 1.
1787.
2 April.
Warrant for charter of justice.

HISTORICAL RECORDS OF AUSTRALIA.

WARRANT FOR THE CHARTER OF JUSTICE.

Charter for Establishing Courts of Civil and Criminal Jurisdiction on the Eastern Coast of New South Wales

George the third, by the Grace of God, King of Great Britain, France, and Ireland, Defender of the Faith.

To Our Right Trusty and well beloved Councillor Edward, Lord Thurlow, Baron Thurlow, Our Chancellor of Great Britain, Greeting. We will and Command that under Our Great Seal of Great Britain (remaining in your Custody) you cause that Our Letters to be made Forth patent in form Following:— George the third, by the Grace of God, King of Great Britain, France, and Ireland, defender of the Faith. To All to whom these presents shall come, Greeting. Whereas, by virtue of An Act of parliament,* passed in the Twenty Fourth Year of the Reign, We have judged fit, by and with the advice of Our Privy Council, by two several Orders,† bearing date respectively on the sixth day of December, one thousand, seven hundred and eighty six, to declare and appoint the place to which certain Offenders should be transported for the time or Terms in their several Sentences mentioned, to be the Eastern Coast of New South Wales, or some one or other of the Islands adjacent. And Whereas We find it Necessary that a Colony and Civil Government should be Established in the place, to which such Convicts shall be transported, and that sufficient Provision should be made for the Recovery of Debts, and for determining of private Causes between party and party in the place aforesaid. We, taking the same into our Royal Consideration and being desirous that Justice may be Administered to all our Subjects, have, of Our especial Grace, certain Knowledge and mere Motion, thought fit to grant, ordain, direct and appoint, and by these presents Do, for Us our Heirs and Successors, Will, Grant, Ordain, Direct and Appoint that there shall be within the place aforesaid a Court to be called the Court of Civil Jurisdiction; and that such Court shall consist of the Judge Advocate for the time being, together with two fit and proper persons, Inhabiting the said place, to be appointed from time to time by Our Governor or, in Case of his Death or Absence, by Our Lieutenant Governor for the time being, or of any two of them (whereof the Judge Advocate to be one); to which Court, We do hereby give 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 Contracts, Trespasses, and all manner of other

* Note 3. † Note 5.
CHARTER OF JUSTICE.

personal pleas whatsoever. And Wee do further Will, Ordain and Grant to. the said Court full power and Authority to Grant probates of Wills and Administration of the personal Estates of Intestates dying within the place or Settlement aforesaid. And Our further Will and pleasure is and Wee do, by these presents, for Us, our Heirs and Successors, Direct, Ordain and Appoint that, upon Complaint to be made in writing to the said Court by any person or persons against any other person or persons residing or being within said place, of any Cause of Suit, The said Court shall or may Issue a Warrant in Writing under the Hand and Seal of the said Judge Advocate for the time being to be directed to the provost Marshall, or such other Officer as shall be appointed by Our Governor, to Execute the process thereof, which Warrant shall contain shortly the Substance of the Complaint, and shall either command such Officer to Summon the Defendant or Defendants to appear, or in case the Value of the Demand be Ten pounds or upwards (of which Oath shall first be made) Command him to bring his, her or their Body or Bodies, or take Bail for his or their Appearance before the said Court at a certain Time and place, therein to be named, to Answer to the said complaint, and to find Sufficient Security for his, her or their performance of such Judgment, Sentence or Decree, as shall be pronounced thereupon, or finally given upon an Appeal; and upon Appearance, Arrest or Non Appearance, or Return by the Officer that the Defendant or Defendants cannot be found, Wee do hereby, for Us, Our Heirs and Successors, Ordain, Direct and Authorize the said Court to proceed to the Examination of the Matter and cause of such Complaint, and upon due proof made thereof, either upon the Oath or Oaths of any Witness or Witnesses in Writing, to be by him, her or them Subscribed (for which purpose Wee do by these presents empower and require the said Court to Administer an Oath to such Witnesses as shall be produced by either party, Plaintiff or Defendant) or by the Voluntary Confession of such Defendant or Defendants, to give Judgment and Sentence according to Justice and Right, and to award and Issue out a Warrant or Warrants of Execution, under the Hand and Seal of the said Judge Advocate for the time being, for levying the Duty adjudged or decreed to the party or parties Complainant, together with Costs of Suit upon the Goods and Chattles of such Defendant or Defendants, and to cause Sale to be made of the said Goods and Chattles, rendering to the party the Overplus, if any be; and, for want of sufficient distress, Wee do hereby for
1787.

2 April.

Warrant for charter of justice.

Jurisdiction and procedure of court of civil jurisdiction.

Governor or lieut.-governor to sit as court of appeal.

Us, Our Heirs and Successors, give full Power and Authority to the said Court to Imprison the Defendant or Defendants until Satisfaction be made by him, her or them to the plaintiff or plaintiffs of the duty decreed, together with the Costs; and, in Case Judgment should be given for the Defendant or Defendants, Wee do hereby likewise give full power and Authority to the said Court to Award Costs to the said Defendant or Defendants, and to Issue the like process of Execution for the same, as in Cases where Costs are awarded to any plaintiff or plaintiffs. And, if either party shall find him or themselves aggrieved by any Judgment or Decree to be given or pronounced by the said Court, Our Will and Pleasure is that he, she or they shall and may Appeal to the Governor of the Eastern Coast of New South Wales and the parts adjacent, or in Case of his Death or Absence to the Lieutenant Governor for the time being, whom Wee do hereby Empower and Authorize to hear and determine the same, and to Issue process of Summons to answer to such Appeal, and the like process of Execution as the said Court is hereby directed and empowered to Issue. And, if either party shall find him, her or themselves aggrieved by the Judgment or Determination of the said Governor, in any Case where the Debt or thing in Demand shall exceed the value of three hundred pounds and not otherwise, Our Will and pleasure also is that such party so aggrieved may Appeal to Us, or Our Heirs and Successors in Council. And Wee do further Will and Ordain that no Appeal shall be Admitted from the Judgment of the said Court, unless the same shall be interposed within Eight days after the said Judgment, nor from the Judgment of the superior Court unless the same shall be interposed within fourteen Days after the Judgment of such superior Court. And further that the said Court may proceed in a Summary way, by Foreign Attachment of Goods, Debts and Effects of Debtors in the hands or possession of other persons residing in the place aforesaid. And Wee further Will and Ordain that all Complainants, at whose Suit any persons shall be Imprisoned, shall make an Allowance to each of such Defendants after such Rate for every Day, so long as such Defendants shall be kept in prison, as the said Court shall direct; and, in default of payment thereof for one week, such person shall be Discharged out of the prison, and such Discharge out of prison shall be a discharge of the Debt, unless the Complainant shall, before any new proceeding against such Defendants, pay or Tender to them all the Arrears of such Allowance from the time of the last payment to the time of such new proceeding. Provided always that such Defendants do make Oath before the Judge Advocate to his Satisfaction that he hath not any Estate or Effects sufficient to
maintain himself with Necessaries in the prison, otherwise that such Allowance be not made to him. And Whereas it is necessary that a Court of Criminal Jurisdiction should also be Established within the Colony or Settlement aforesaid with Authority to proceed in a more Summary way than is used within this Realm according to the known and Established Laws thereof; And Whereas, by An Act of Parliament* passed in this present Year of Our Reign, It is Enacted that his Majesty may, by his Commission under the Great Seal, Authorize the person to be appointed Governor or the Lieutenant Governor in the Absence of the Governor of such place as aforesaid, to Convene from time to time, as occasion may require, a Court of Judicature for the Trial and Punishment of all such Outrages and Misbehaviours, as, if Committed within this Realm would be deemed and taken according to the Laws of this Realm to be Treason or Misprision thereof, Felony or Misdemeanour, which Court shall consist of the Judge Advocate to be appointed in and for such places, together with Six Officers of His Majesty's Forces by Sea or Land, which Court shall proceed to try such Offenders by calling such Offenders respectively before that Court, and causing the Charge against him, her or them to be read over, which Charge shall always be reduced into Writing, and shall be Exhibited to the Court by the Judge Advocate and by Examining Witnesses, upon Oath to be Administered by such Court, as well for as against such Offenders respectively; and afterwards adjudging by the Opinion of the Major part of the persons composing such Court that the party accused is or is not (as the Case shall appear to them) guilty of the Charge, and by pronouncing Judgment therein (as upon a Conviction by Verdict) of Death, if the Offence be Capital, or of such Corporal punishment not extending to Capital punishment, as to the said Court shall seem meet; and, in Cases not Capital, by pronouncing Judgment of such Corporal punishment not extending to Life or limb as to the said Court shall seem meet. And that the provost Marshall, or other Officer to be for that purpose appointed by such Governor or Lieutenant Governor, shall cause due Execution of such Judgment to be had and made under and according to the Warrant of such Governor, or Lieutenant Governor in the Absence of the Governor, under his hand and Seal and not otherwise. Provided always that Execution shall not be had or done on any Capital Convict or Convicts, unless five persons present in such Court shall concur in adjudging him her or them, so accused and Tried as aforesaid, to be respectively guilty, until the proceedings shall have been Transmitted to His Majesty, and by him approved. And that the said Court shall be a Court of

* Note 6.
1787.
2 April.
Warrant for charter of justice.

Warrant for charter of justice.

Criminal court to be court of record.

Constitution of criminal court.

Jurisdiction.

Procedure.

Record, and shall have all such powers as by the Laws of England are incident and belonging to a Court of Record. Now Know ye that We, upon full Consideration of the promises and of Our especial Grace, certain Knowledge and mere Motion, have thought fit to Grant direct and appoint, and, by these presents, We do accordingly for Us, Our Heirs and Successors, Grant, Direct, Ordain and Appoint that there shall be within the Settlement and Colony aforesaid a Court, which shall be called the Court of Criminal Jurisdiction, and We do hereby create, direct and constitute the said Court of Criminal Jurisdiction to be a Court of Record; And that our said Court of Criminal Jurisdiction shall have all such powers as are incident to a Court of Record by the Laws of that part of Our Kingdom of Great Britain called England. And We further Will, Ordain and appoint that the said Court of Criminal Jurisdiction shall consist of Our Judge Advocate for the time being, together with such six Officers of our Sea and Land Service as our Governor, or in case of his Death or Absence Our Lieutenant Governor, shall, by Precept Issued under his hand and Seal, convene from time to time for that purpose. And that the said Court of Criminal Jurisdiction shall have power to Enquire of, hear, determine and punish all Treasons or Misprision thereof, Murders, Felonies, Forgeries, Perjuries, Trespasses and other Crimes whatsoever, committed in the place or places aforesaid, such punishment so to be Inflicted being according to the Laws of that part of Our Kingdom of Great Britain called England, as nearly as may be, considering and allowing for the Circumstances and Situation of the place and Settlement aforesaid and the Inhabitants thereof. And it is Our further Will and pleasure that Our said Court of Criminal Jurisdiction shall proceed to try all Offenders by calling them respectively before such Court and causing the Charge or Charges against him, her or them respectively, when reduced into Writing and exhibited by Our Judge Advocate to be read over to such Offender or Offenders respectively, and by Examining Witnesses, upon Oath to be Administered by the said Court of Criminal Jurisdiction, as well for as against such Offenders respectively; and that the said Court shall adjudge, by the Opinion of the Major part of the persons composing the same as aforesaid, that the party accused is guilty or not guilty of the Charges so Exhibited as aforesaid; And, if adjudged Guilty, that the Court shall proceed to pronounce Judgment of Death, if the Offence be Capital, in like manner as if the prisoner had been found Guilty by Verdict of a Jury in that part of Our Kingdom of Great Britain called
England, or by pronouncing Judgment of such Corporal Punishment, not extending to Capital Punishment, as to the said Court or the Major part of the persons composing the same shall seem meet; And, in Cases not Capital by the Laws aforesaid, by pronouncing Judgment of such Corporal Punishment not extending to Life or Limb, as the said Court, or the Major part of the persons composing the same, shall seem meet. And it is Our further Will and Pleasure, and Wee do hereby Ordain, direct and Appoint that Our Provost Marshall, or such other Officer as shall be Appointed for that purpose by Our Governor or in Case of his Death or Absence by Our Lieutenant Governor for the time being, shall cause due Execution to be had and made of such Judgments, as aforesaid, according to the warrant of Our Governor or in his Absence of Our Lieutenant Governor for the time being, under their Hands and Seals respectively, and not otherwise. And Wee do hereby Ordain and direct that Execution of any Judgment of Death shall not be had or done on any Offender or Offenders, unless five persons, present Sitting in Judgment in Our said Court of Criminal Jurisdiction, shall concur in adjudging such Offender or Offenders, so accused and Tried as aforesaid, to be respectively Guilty until the proceedings in the Trial of such Offender or Offenders shall have been Transmitted to Us, Our Heirs and Successors, and Our or their pleasure shall have been Signified thereupon; and that Execution be not done in any Capital Case whatever without the Consent of Our said Governor, or in Case of his Death or Absence of Our Lieutenant Governor; and in Case the Execution shall be Suspended that the said Governor or Lieutenant Governor shall apply to Us, Our Heirs or Successors, for Our or Their direction therein. And Our further Will and pleasure is that all and every the Members of Our said Court of Civil Jurisdiction respectively shall, before they proceed to Sit in Judgment, severally make Oath well and truly to Try the several Issues brought before them, and to give true Judgment according to the Evidence, and that all and every the Members of Our said Court of Criminal Jurisdiction shall in like manner make Oath to make true Deliverance between Us, Our Heirs and Successors, and the several prisoners, who shall by them be Tried, and to give a true Judgment according to the Evidence. And Wee do hereby give full power and Authority to Our Judge Advocate for the time being to Administer such Oaths to the respective Members of Our said several Courts. And further Know Ye that Wee, for preserving the peace of Our said Settlement and the Islands thereunto adjacent of Our especial Grace, certain Knowledge and mere Motion, have granted, Ordained,
directed and appointed, and, by these presents, do grant, Ordain, direct and appoint that our present and all Our future Governors and Lieutenant Governors and Our Judge Advocate for the time being shall be Justices of the peace within the said place or Settlement, and that all and every such Justice and Justices of the peace shall 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 with respect to the Inhabitants residing or being in the place or Settlement aforesaid, as Justices of the peace have within that part of the Kingdom of Great Britain called England within their respective Jurisdictions. And these Our Letters patent or the Inrollhnent or Exemplification thereof shall be, as well unto the said Courts respectively, as unto all and every person or persons whomsoever, a Sufficient Warrant and discharge from time to time for all and whatever they shall do or Execute in Pursuance of Our Royal Will and pleasure herein before declared. And Lastly Our will and pleasure is, And Wee do hereby declare that this Our Charter shall be and remain in Force only and untill We shall be pleased to Revoke and determine the same. In Witness ec. Witness Ourself at Westminster, this second day of April, in the Twenty seventh Year of Our Reign.

By Writ of Privy Seal,

YORKE.

WARRANT FOR COMMISSION OF ROBERT ROSS AS JUDGE IN VICE-ADMIRALTY COURT.

By the Commissioners for executing the Office of Lord High Admiral of Great Britain and Ireland, etc.

WHEREAS we have thought fit to appoint Robert Ross, Esqr., to be Judge of the Vice Admiralty Court of the Territory called New South Wales, extending from the Northern Cape or Extremity of the Coast called Cape York in the Latitude of Ten Degrees, thirty seven Minutes South, to the Southern Extremity of the said Territory of New South Wales or South Cape, in the Latitude of Forty three Degrees, thirty nine Minutes South, and of all the Country Inland to the Westward as far as the One Hundred and thirty fifth Degree of East Longitude, reckoning from the Meridian of Greenwich, including all the Islands adjacent in the Pacifick Ocean within the Latitudes aforesaid of 10° 37' South and 43° 39' South; These are therefore to require and direct you to cause Letters Patent to be forthwith issued out of the High Court of Admiralty for the said Robert Ross, Esqr.,
LETTERS PATENT FOR VICE-ADMIRALTY COURT.

accordingly, in His Majesty's Name, in manner and form accustomed, and to continue in force til further Order. For which this shall be your Warrant. Given under our hands and the Seal of the Office of Admiralty, the 18th of April, 1787.

HOWE. J. LEVESON GOWER.

CHS. BRETT.

SIR JAMES MARRIOTT, Judge of the High Court of Admiralty.

By Command of their Lordships,

PHP. STEPHENS.

[Similar warrants bearing the same date were issued for commissions for Andrew Miller and Henry Brewer as register and marshal respectively for the vice-admiralty court.]

INSTRUCTIONS TO GOVERNOR PHILLIP.

25th April, 1787.

[A copy of these instructions will be found on page 9 et seq., volume I, series I.]

LETTERS PATENT CONSTITUTING THE VICE-ADMIRALTY COURT.

GEORGE THE THIRD by the Grace of God of Great Britain France and Ireland King Defender of the Faith. To our trusty and well-beloved Arthur Phillip Esquire our Captain-General and Governor-in-Chief of the territory* called New South Wales extending from the Northern Cape or extremity of the coast called Cape York in the latitude of ten degrees thirty-seven minutes south to the southern extremity of the said territory of New South Wales or South Cape in the latitude of forty-three degrees thirty-nine minutes south and of all the country inland to the westward as far as the one hundred and thirty-fifth degree of east longitude reckoning from the meridian of Greenwich including all the islands adjacent in the Pacific Ocean within the latitude aforesaid of 10° 37' south and 43° 39' south and our Captain-General and Governor-in-Chief of the said territory called New South Wales for the time being,

Robert Ross Esquire, Lieutenant-Governor of the said territory called New South Wales and the Lieutenant-Governor of the said territory for the time being,

Andrew Miller Esquire, Commissary of Stores and Provisions in the said territory called New South Wales, and the Commissary of Stores in the said territory for the time being,

Augustus Alt Esquire, Surveyor of Lands in the said territory called New South Wales, and the Surveyor of Lands in the said territory for the time being,

John Hunter Esquire, second Captain of our ship Sirius, William Bradley Esquire, first Lieutenant, Philip Gidley King

* Note 7.
1787.
5 May.

Letters patent constituting vice-admiralty court.

Recitation of statutes.

Esquire, second Lieutenant, and George William Maxwell, third Lieutenant of the said ship Sirius, Henry Lidgbird Ball Esquire, Lieutenant and Commander of the Supply, armed tender, and all other Captains and Commanders of our ships who are or shall be within the Admiralty jurisdiction of the said territory called New South Wales,

Greeting:

Whereas by an Act of Parliament* made in the eleventh and twelfth year of the reign of our late Royal Predecessor King William the Third intituled an Act for the more effectual suppressing of Piracy (reciting as therein recited) it is amongst other things enacted that all piracies, felonies or robberies committed in or upon the sea or in any haven, river, creek or place where the Admiral or Admirals have power authority or jurisdiction may be examined, enquired of, tried, heard, and determined and adjudged according to the directions of the said Act in any place at sea or upon the land in any of his said late Majesty's islands, plantations, colonies, dominions, forts or factories, to be appointed for that purpose by his said late Majesty's Commission or Commissions under the Great Seal of England, or the Seal of the Admiralty of England, directed to all or any of the Admirals, Vice-Admirals, Rear-Admirals, Judges of Vice-Admiralties or Commanders of his said late Majesty's ships-of-war, and also to all or any such person or persons officer or Officers by name or for the time being as his said late Majesty should think fit to appoint:

Which said Commissioners should have full power jointly or severally by warrant under the hand or seal of them or any one of them to commit to safe custody any person or persons against whom information of piracy, robbery or felony upon the sea should be given upon oath and to call and to assemble a Court of Admiralty on ship-board or upon the land when and as often as occasion should require, which Court should consist of seven persons at the least:

And it is thereby further enacted that if so many of the persons aforesaid could not conveniently be assembled, any three of the aforesaid persons, whereof the president or chief of some English factory or the Governor, Lieutenant-Governor or member of his said late Majesty's Council in any of the plantations or colonies aforesaid or Commander of one of his late Majesty's ships was always to be one (should be one), should have full power and authority by virtue of the said Act to call and assemble any other persons on ship-board or upon the land to make up the number of seven:

* Note 8.
And it is thereby also provided that no persons but such as were known merchants, factors or planters or such as were captains lieutenants or warrant officers in any of his late Majesty's ships-of-war or captains, masters or mates of some English ship, should be capable of being so called and sitting and voting in the said Court:

And it is thereby further enacted that such persons, called and assembled as aforesaid, should have full power and authority according to the course of the Admiralty to issue warrants for bringing up any persons accused of piracy or robbery before them to be tried heard and adjudged, and to summon witnesses and take informations and examinations of witnesses upon their oath, and to do all things necessary for the hearing and final determination of any case of piracy robbery and felony, and to give sentence and judgement of death, and to award execution of the offenders convicted and attainted as aforesaid according to the civil law and the methods and rules of the Admiralty, and that all and every person and persons so convicted and attainted of piracy and robbery should have and suffer such losses of lands, goods, and chattels as if they had been attainted and convicted of any piracies, felonies, and robberies according to a statute* made in the twenty-eighth year of the reign of King Henry the Eighth for tryals of treasons, felonies, robberies, murthers and confederacies committed upon the sea:

Which said first-recited Act by another Act† made in the fifth year of the reign of our late Royal Predecessor Queen Anne, was continued from the expiration thereof for the further term of seven years and from then to the end of the then next session of Parliament which by another Act‡ made in the first year of the reign of our late Royal Ancestor King George the First was revived from the twenty-ninth day of September 1715 and was to be in force during the continuance of that Act which was to continue for five years and from then to the end of the next session of Parliament and which by an Act§ made in the sixth year of the reign of our said late Royal Ancestor King George the First was made perpetual:

And whereas, by one other Act|| of Parliament made in the eighth year of the reign of our said late Royal Ancestor King George the First entituled an Act for the more effectual suppression of Piracy (reciting as therein is recited), It is amongst other things thereby enacted that all and every person and persons therein and thereby declared to be guilty of or accessory or accessories to any piracy felony or robbery shall and may be

* Note 0. † Note 10. ‡ Note 11. § Note 12. || Note 13.
enquired of, heard, determined and adjudged of and for all or any the matters contained in the said last-recited Act according to the said statute made in the eleventh and twelfth years of his late Majesty King William the Third and that all and every person being thereupon attainted and convicted should have and suffer such pain of death and loss of lands goods and chattels as pirates and robbers ought by the said Act of the eleventh and twelfth years of his late Majesty King William the Third to suffer:

Now know ye that in pursuance of the said recited Acts of the eleventh and twelfth year of the reign of his said late Majesty King William the Third and of the eighth year of our said late Royal Ancestor King George the First, of our special grace certain knowledge and meer motion have made constituted and appointed and by these presents do hereby constitute and appoint you the said Arthur Phillip Esquire, and our Captain-General and Governor-in-Chief of the said territory called New South Wales for the time being,

Robert Ross Esquire, and our Lieutenant-Governor of the said territory called New South Wales for the time being,

Andrew Miller Esquire, and the Commissary of Stores and Provisions of the said territory called New South Wales for the time being,

Augustus Alt Esquire and the Surveyor of Lands in the said territory called New South Wales for the time being,

John Hunter, William Bradley, Philip Gidley King, George William Maxwell and Henry Lidgbird Ball Esquires and the Captain and Commander of our ships who are or shall be within the Admiralty jurisdiction of the said territory called New South Wales,

To be our Commissioners at the said territory called New South Wales for the examining, enquiring of, trying, hearing and determining and adjudging according to the directions of the same Acts in any place at sea or upon the land at the said territory called New South Wales, all piracies, felonies, and robberies and all assessories thereunto committed or which shall be committed in or upon the sea or within any haven, river, creek or place where the Admiral or Admirals have power authority or jurisdiction.

And you the said Arthur Phillip Esquire and our Captain-General and Governor-in-Chief of the said territory called New South Wales for the time being,
Robert Ross Esquire and our Lieutenant-Governor of the said territory called New South Wales, for the time being,

Andrew Miller Esquire and the Commissary of Stores and Provisions of the said territory called New South Wales for the time being,

Augustus Alt Esquire and the Surveyor of Lands in the said territory called New South Wales for the time being,

John Hunter, William Bradley, Philip Gidley King, George William Maxwell and Henry Lidgbird Ball Esquires and the Captains and Commanders of our ships who are or shall be within the Admiralty jurisdiction of the said territory called New South Wales,

Our Commissioners at the said territory called New South Wales for the purposes hereinbefore mentioned, We do make, ordain and constitute by these presents, hereby giving and granting unto you our said Commissioners jointly or severally by warrant under the hand and seal of you or any one of you full power and authority to commit to safe custody and person or persons against whom information of piracy, robbery or felony upon the sea as accessory or accessories thereto shall be given upon oath (which oath you or any one of you shall have full power and are hereby authorised to administer):

And to call and assemble a Court of Admiralty on shipboard or upon the land when and as often as occasion shall require, which Court our will and pleasure is shall consist of seven persons at the least, and, if so many of you our said Commissioners cannot conveniently be assembled, any three or more of you whereof you the said Arthur Phillip Esquire, our Captain-General and Governor-in-Chief of the said territory called New South Wales, or the Captain-General and Governor-in-Chief of the said territory for the time being,

Or you the said Robert Ross Esquire, Lieutenant-Governor of the said territory called New South Wales, or the Lieutenant-Governor of the said territory, for the time being,

Or you the said Andrew Miller Esquire, Commissary of Stores and Provisions in the said territory called New South Wales, or the Commissary of Stores and Provisions for the time being,

Or you the said Augustus Alt Esquire, Surveyor of Lands in the said territory called New South Wales, or the Surveyor of Lands in the said territory for the time being,

Or you the said John Hunter Esquire, second Captain of our ship Sirius, William Bradley Esquire, first Lieutenant, Philip Gidley King Esquire, second Lieutenant, and George William
1787.
5 May.

Letters patent constituting vice-admiralty court.

Maxwell Esquire, third Lieutenant, of the said ship Sirius, or you the said Henry Lidgbird Ball Esquire, Lieutenant and Commander of the Supply, armed tender, or a commander of one of our ships (as the place of tryall shall appear) to be always one,

Shall have full power and authority by virtue of the said recited Acts and these presents to call and assemble any other persons on shipboard or upon the land to make up the number of seven.

Provided that no persons but such as are known merchants, factors, or planters or such as are captains, lieutenants or warrant officers in any of our ships-of-war, or captains masters or mates of some English ship, shall be capable of being so called sitting and acting in the said Court.

And our further pleasure is, and We do hereby expressly declare and command, that such persons called and such other persons hereby authorised and assembled as aforesaid, shall have full power and authority according to the course of Admiralty to issue warrants for bringing any persons accused of such piracy, robbery, or felony or as accessory thereto, and to give sentence and judgment of death and to award execution of the offenders convicted and attainted as aforesaid according to the civil law and the methods and rules of the Admiralty:

And that all and every person and persons so convicted and attainted of piracy, robbery, or felony or as accessory thereto, shall have and suffer such losses of lands goods and chattels as if they had been attained and convicted of any piracies, felonies, and robberies according to the aforementioned statute made in the reign of King Henry the Eighth.

And our express will and pleasure is, and We do hereby direct and command that so soon as any Court shall be assembled as aforesaid, either on shipboard or upon the land, this our Commission shall first be openly read and the said Court then and there shall be solemnly and publicly called and proclaimed, and then the President of such Court shall in the first place publicly in open Court take the oath mentioned and appointed to be taken by the said recited Act of the eleventh and twelfth years of the reign of his said late Majesty King William the Third, and such President having taken the oath in manner aforesaid shall immediately administer the same to every person who shall sit and have a vote in the said Court upon the tryal of such prisoner or prisoners as aforesaid.

And lastly We do hereby direct empower and require you our said Commissioners to proceed act adjudge and determine in all things according to the powers authorities and directions of the above-recited Acts and of these presents.
OATHS TAKEN BY GOVERNOR PHILLIP.

And these presents or the entry or registering thereof in our High Court of Admiralty shall be unto you and each and every one of you for so doing a sufficient warrant and discharge.

In witness whereof we have caused the Great Seal of our High Court of Admiralty of England to be hereunto affixed.

Given at London the fifth day of May in the year of our Lord one thousand seven hundred and eighty-seven and of our reign the twenty-seventh.

GODF. LEE FARRANT,
Registrar.

COMMISSION AND INSTRUCTIONS* OF LIEUTENANT P. G. KING AS SUPERINTENDENT AND COMMANDANT AT NORFOLK ISLAND.

[12th February, 1788. 12 Feb.]

[Copies of these documents will be found on page 32 et seq., volume I, series I.]

OATHS† TAKEN BY CAPTAIN PHILLIP AS GOVERNOR.

Oath of Abjuration.

I, ARTHUR PHILLIP, do truly and sincerely acknowledge, profess, testify and declare, in my Conscience before God and the World, that our Sovereign Lord King George is lawful and rightful King of this Realm, and all other His Majesty's Dominions and Countries thereunto belonging. And I do solemnly and sincerely declare that I do believe in my Conscience that not any of the Descendants of the Person, who pretended to be Prince of Wales during the Life of the late King James the Second, and, since his Decease, pretended to be and took upon himself the Stile and Title of King of England by the Name of James the Third, or of Scotland by the Name of James the Eighth, or, the Stile and Title of King of Great Britain, hath any Right or Title whatsoever to the Crown of this Realm, or any other the Dominions thereunto belonging. And I do renounce, refuse and abjure any Allegiance or Obedience to any of them. And I do swear that I will bear Faith and true Allegiance to His Majesty King George, and him will defend to the utmost of my Power against all traitorous Conspiracies and Attempts whatsoever, which shall be made against his Person, Crown or Dignity. And I will do my utmost Endeavour to disclose and make known to His Majesty, and his Successors, all Treasons and Traitorous Conspiracies, which I shall know to be against him or any of them. And I do faithfully promise to the utmost of my Power to support, maintain and defend the Succession of the Crown against

* Note 14. † Note 15.
the Descendants of the said James, and against all other Persons whatsoever, which Succession, by an Act intituled, An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject, is and stands limited to the Princess Sophia, Electoress and Duchess Dowager of Hanover, and the Heirs of her Body being Protestants. And all these Things I do solemnly and sincerely acknowledge and swear according to these express Words by me spoken and according to the plain common Sense and Understanding of the same Words without any Equivocation, mental Evasion or secret Reservation whatsoever. And I do make this Recognition, Acknowledgment, Abjuration, Renunciation and Promise heartily, willingly and truly upon the true Faith of a Christian.

So help me God.

A. PHILLIP.

Sworn and subscribed before me, the Judge Advocate for the Territory of New South Wales, directed and appointed by His Majesty's Commission under the Great Seal of Great Britain to administer the Oath of Abjuration.* At Sydney Cove in the Territory aforesaid, this Thirteenth Day of February in the Twenty Eighth Year of His Majesty's Reign.

DAVID COLLINS, Judge Advocate.

Oath of Assurance.

I, Arthur Phillip, do in the Sincerity of my Heart, assert, acknowledge and declare That His Majesty King George is the only lawful and undoubted Sovereign of this Realm, as well de Jure, that is of Right King, as de Facto, that is the Possession and Exercise of the Government. And therefore I do promise and swear That I will, with Heart and Hand, Life and Goods, maintain and defend his Right, Title and Government against the Descendants of the Person, who pretended to be Prince of Wales during the Life of the late King James, and, since his Decease, pretended to be and took upon himself the Stile and Title of King of England by the Name of James the Third, or of Scotland by the Name of James the Eighth; or the Stile and Title of King of Great Britain, and their Adherents, and all other Enemies, who, either by open or secret Attempts, shall disturb or disquiet his Majesty in the Possession and Exercise thereof.

So help me God.

A. PHILLIP.

(Sworn and subscribed as above with the word "Abjuration" altered to "Assurance.")

* The words in italics were scored through in the original.
The Declaration.

I, Arthur Phillip, do declare that I do believe that there is not any Transubstantiation in the Sacrament of the Lord's Supper or in the Elements of Bread and Wine at or after the Consecration thereof by any Person whatsoever.

A. PHILLIP.

Made and subscribed before me, the Judge Advocate for the Territory of New South Wales, directed and appointed by His Majesty's Commission under the Great Seal of Great Britain to receive the Declaration. At Sydney Cove in the Territory aforesaid, this Thirteenth Day of February in the Twenty eighth Year of His Majesty's Reign.

DAVID COLLINS, Judge Advocate.

Oath of Captain-General, etc.

I, Arthur Phillip, do solemnly swear that I will duly execute the Office and Trust of Captain General and Governor in Chief in and over His Majesty's Territory of New South Wales and its Dependencies, and that I will duly and impartially administer Justice in the said Territory.

So help me God.

A. PHILLIP.

Sworn and subscribed before me, the Judge Advocate for the Territory of New South Wales, directed and appointed by His Majesty's Commission under the Great Seal of Great Britain to administer the Oaths directed in the said Commission to the Person therein appointed to take them. At Sydney Cove in the Territory aforesaid, this Sixth Day of October in the Twenty ninth year of His Majesty's Reign.

DAVID COLLINS, Judge Advocate.

Oath of Governor in the Plantations.

I, Arthur Phillip, do solemnly swear that I will do my utmost that all the Clauses, Matters and Things, contained in any Act of Parliament heretofore made and now in Force, relating to His Majesty's Colonies or Plantations, be punctually and Bona Fide observed according to the true Intent and Meaning thereof.

So help me God.

A. PHILLIP.

(Sworn and subscribed as above.)

* The words in italics were scored through in the original.
1788.

13 Oct.

Sydney Cove, Port Jackson,
13th October, 1788.

To the Question "Whether a General Court Martial, formed of Marine Officers, can assemble by Virtue of a Warrant from His Majesty's Governor in Chief of this Territory, having a Commission to grant the same?"

I reply—

I am of opinion that, being Marine Officers, they cannot comply with the Directions of the Act of Parliament passed for their Regulation, while on Shore in any Part of His Majesty's Dominions, and hold a General Court Martial under the Warrant of His Excellency the Governor of New South Wales.

But when I consider the Time that must elapse before a Remedy can be applied; when I consider how much His Majesty's Service may and must suffer from the Want of a Tribunal to which Officers should be amenable; when I consider that, although the strict Letter of the Law is against their sitting, it has been clearly the Intention of every Branch, and Department of His Majesty's Government, that there should be such a Tribunal in this Country, I am of Opinion that, waving the Privilege of being assembled in Conformity with their own Act of Parliament, they should sit under the Authority of the King's Commission, and Governor of this Territory, throwing themselves, with the strong Plea of Necessity, on the Right Honorable the Lords Commissioners of the Admiralty, for procuring them an Indemnification for their having so acted.

DAVID COLLINS, Judge Advocate.

GOVERNOR PHILLIP TO LORD SYDNEY.

27th October, 1788.

[This despatch and its enclosures reported the protest of the officers of marines against the power of Governor Phillip to assemble a general court-martial; see page 90 et seq., volume I, series I.]

GOVERNOR PHILLIP TO LORD SYDNEY.

5th June, 1789.

[This despatch and its enclosures reported the objections* of the officers of marines to sit as members of the court of criminal jurisdiction; see page 107 et seq., volume I, series I.]

* Note 16.
ADDITIONAL INSTRUCTIONS TO GOVERNOR PHILLIP re LAND GRANTS. 1789.

20th August, 1789.

[A copy of these instructions will be found on page 124 et seq., volume I, series I.]

COMMISSION OF F. GROSE AS LIEUT.-GOVERNOR OF N.S.W.

2nd November, 1789.

[A copy of this commission will be found on page 405, volume I, series I.]

COMMISSION* OF P. G. KING AS LIEUT.-GOVERNOR OF NORFOLK ISLAND. 1790.

GEORGE R.

GEORGE THE THIRD, etc., to our Trusty and Well beloved Lieutenant Philip Gidley King, Greeting:—

We, reposing especial trust and confidence in your loyalty, courage and experience, do, by these presents, constitute and appoint you to be Lieutenant-Governor of Norfolk Island in the Pacific Ocean. You are, therefore, as Lieutenant Governor, to take the said Island into your care and charge, and carefully and diligently to discharge the duty of Lieutenant-Governor thereof by doing and performing all and all manner of things thereunto belonging; And We do hereby strictly charge and require all our Officers and Soldiers, who shall hereafter be in our said Island, and all others whom it may concern, to obey you as our Lieutenant-Governor thereof; And you are to observe and follow such Orders and Instructions from time to time as you shall receive from Us, our Governor of our Territory of New South Wales and the Islands adjacent for the time being, or any other your superior Officer, according to the Rules and Discipline of War, in pursuance of the trust we do hereby repose in you.

Given at Our Court at St. James's, the 28th Day of January, 1790, in the Thirtieth Year of Our Reign.

By His Majesty's Command,

W. W. GRENVILLE.

GOVERNOR PHILLIP TO LORD SYDNEY.

1st February, 1790.

[This despatch and its enclosures reported the protest of major Ross against the control of the night watch† over soldiers; see page 134 et seq., volume I, series I.]

* Note 17.  † Note 18.
HISTORICAL RECORDS OF AUSTRALIA.

1790.
12 Feb.

Administrative friction between A. Phillip and R. Ross.

[Copy of this despatch, detailing administrative friction* between the governor and lieut.-governor, will be found on page 148 et seq., volume I, series I.]

GOVERNOR PHILLIP TO UNDER SECRETARY NEPEAN.

12th February, 1790.

LETTERS PATENT AND INSTRUCTIONS EMPOWERING GOVERNOR PHILLIP TO REMIT SENTENCES.

8th and 15th November, 1790.

8-15 Nov.

Power of governor to remit sentences.

1791.
15 Feb.

Obligation of officers to sit as members of criminal court.

[This legal opinion re the obligation† of military and naval officers to sit as members of the court of criminal jurisdiction will be found on page 224, volume I, series I.]

THE ATTORNEY AND SOLICITOR GENERAL TO LORD GRENVILLE.

15th February, 1791.

[In this despatch, Governor Phillip reported the urgent necessity for a criminal court at Norfolk island; see page 384, volume I, series I.]

GOVERNOR PHILLIP TO RIGHT HON. HENRY DUNDAS.

4th October, 1792.

[These instructions will be found on pages 441 and 442, volume I, series I.]

INSTRUCTIONS RE LAND GRANTS.

31st June, 1793.

[In this despatch, Governor Phillip reported the urgent necessity for a criminal court at Norfolk island; see page 384, volume I, series I.]

COMMISSION‡ OF GOVERNOR HUNTER.

6th February, 1794.

[Copy of this commission will be found on page 513 et seq., volume I, series I.]

ACT OF PARLIAMENT TO ESTABLISH A CRIMINAL COURT AT NORFOLK ISLAND.

Anno Tricesimo Quarto Georgii III Regis. Cap. xlv.

An Act to enable His Majesty to establish a Court of Criminal Judicature§ in Norfolk Island. (9th May, 1794.)

WHEREAS by an Act, made and passed in the Twenty seventh Year of the Reign of His present Majesty, intituled, An Act to enable His Majesty to establish a Court of Criminal Judicature

* Note 19. † Note 16. ‡ Note 20. § Note 21.
on the Eastern Coast of New South Wales, and the Parts adjacent; it is enacted, that His Majesty may, by His Commission under the Great Seal, authorize the Person to be appointed Governor, or the Lieutenant Governor in the Absence of the Governor, of the Eastern Coast of New South Wales, and the Islands adjacent thereto, to convene, from Time to Time, as Occasion may require, a Court of Judicature, for the Trial and Punishment of all such Outrages and Misbehaviours, as if committed within this Realm would be deemed and taken, according to the Laws of this Realm, to be Treason, or Misprision thereof, Felony, or Misdemeanor, which said Court shall proceed to try such Offenders after the Manner therein mentioned: And whereas from the increased Number of Persons in Norfolk Island, being One of the said Islands adjacent to the said Eastern Coast of New South Wales, and from the Delay and Difficulty attending the Conveyance of Prisoners from the said Norfolk Island to His Majesty's Settlement on the said Eastern Coast of New South Wales, the due Execution of the said Act hath been greatly retarded and impeded: For Remedy thereof, and to the End that the Benefits of the said Act may be more effectually extended to His Majesty's Settlement on Norfolk Island; be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That His Majesty may, by His Commission under the Great Seal, authorize the Lieutenant Governor, or Person for the Time being administering the Government of His Majesty's Settlement in Norfolk Island, to convene, from Time to Time, as Occasion may require, a Court of Judicature for the Trial and Punishment of all such Outrages and Misbehaviours, as if committed within this Realm would be deemed and taken, according to the Laws of this Realm, to be Treason, or Misprision thereof, Felony, or Misdemeanor; which Court shall consist of the Judge Advocate, to be appointed in and for His Majesty's Settlement in Norfolk Island, together with Four Officers of His Majesty's Forces by Sea or Land, and shall proceed to try all Persons who shall offend in any of the Premises, by calling such Offenders respectively before them, by causing the Charge against him, her, or them respectively, to be read over, which Charge shall always be reduced into Writing, and shall be exhibited to the said Court by the Judge Advocate, and by examining Witnesses upon Oath, to be administered by such Court, as well for as against such Offenders respectively, and afterwards judging by the Opinion of the major Part of the Persons composing such Court, that the Party accused is or is
26 HISTORICAL RECORDS OF AUSTRALIA.

1794.
9 May.

Statute authorising criminal court at Norfolk Island.

not (as the Case shall appear to them) guilty of the Charge, and by pronouncing Judgement therein (as upon a Conviction by Verdict) of Death, if the Offence be Capital, or of such corporal Punishment, not extending to capital Punishment, as to the said Court shall seem meet.

II. And be it further enacted, That the Provost Marshall or other Officer to be for that Purpose appointed by such Lieutenant Governor, or Person for the Time being administering the Government of His Majesty's Settlement in Norfolk Island as aforesaid, shall cause due Execution of such Judgement to be had and made, under and according to the Warrant of such Lieutenant Governor, or Person for the Time being administering the Government of His Majesty's Settlement in Norfolk Island as aforesaid, under his Hand and Seal and not otherwise: Provided always, That Execution shall not be had or done on any capital Convict or Convicts, unless Four Persons present in such Court shall concur in adjudging him, her, or them, so accused and tried as aforesaid, to be respectively guilty, until the Proceedings shall have been transmitted to His Majesty, and by Him approved.

III. And be it further enacted by the Authority aforesaid, That the said Court shall be a Court of Record; and shall have all such Powers as, by the Laws of England, are incident and belonging to a Court of Record.

INSTRUCTIONS TO GOVERNOR HUNTER.

23 June, 1794.

[A copy of these instructions will be found on page 520 et seq., volume I, series I.]

COMMISSION FOR DEPUTY JUDGE-ADVOCATE AT NORFOLK ISLAND.

GEORGE R.

GEORGE THE THIRD etc. to Our Trusty and Well beloved Thomas Hibbins, Esqr., Greeting: We do by these Presents Constitute and appoint you to be Deputy Judge Advocate in Norfolk Island, part of Our Settlement of New South Wales. You are therefore carefully and diligently to discharge the Duty of Deputy Judge Advocate by doing and performing all and all manner of things thereunto belonging, And you are to observe and follow such Orders and Directions from Time to Time, as you shall receive from Our Governor of our said Settlement, or the Lieutenant Governor of our said Island called Norfolk Island for the time being, or any other Your Superior Officer, according to the
WARRANT FOR COURTS-MARTIAL.

Rules and Discipline of War. Given at Our Court at St. James's the 12th day of July, 1794, In the Thirty fourth year of Our Reign.

By His Majesty's Command,

PORTLAND.

T. Hibbins, Esqr., Deputy Judge Advocate, Norfolk Island.

CHARTER FOR COURT OF CRIMINAL JUDICATURE* AT NORFOLK ISLAND.

5th June, 1795.

[A copy of this charter will be found on page 3 et seq., volume II, series I.]

GOVERNOR HUNTER TO THE DUKE OF PORTLAND.

12th November, 1796.

[Copies of two despatches bearing this date will be found on pages 666 et seq., and 674 et seq., volume I, series I. The first reported the opposition of the military to the civil power, and the second transmitted general orders and proclamations, September, 1795—November, 1796.]

GOVERNOR HUNTER'S WARRANT FOR COURTS-MARTIAL.

GEORGE R.

WHEREAS an Act has been made and passed in this present Session of Parliament, entitled "An Act for punishing Mutiny and Desertion, and for the better payment of the Army, and their Quarters." And whereas We have this day been pleased to establish Articles of War for the better government of all Our Forces, which Act of Parliament and Articles of War are hereunto annexed, We for the more effectually carrying the purposes of the said Act and Articles of War into Execution, within the limits of Your Command, have thought fit to direct, and We do hereby authorize and empower you from time to time, as occasion may require, to convene or cause to be assembled General Courts Martial for the Trial and punishment of Mutiny and Desertion, or any other offence committed against the Rules of Military Discipline, by any Officers or Soldiers of Our Forces under your Command, And We do hereby further empower you to direct your Warrant to any Officer, not under the degree of a Field Officer, having the Command of a Body of Our said Forces, authorizing him to convene Courts Martial for the Trial of Offences committed by any Officer or Soldier under his command, every of which Court Martial shall consist of a President, and of a competent number of other Officers who can be conveniently

* Note 21.  † Note 22.
1797.
25 March.

Warrant for J. Hunter to convene courts-martial.

summoned to attend the same, regard being always had, as well in the appointment of such President, as in the Rank and Quality of the other Officers composing such Courts Martial to the Rules prescribed by the said Act of Parliament and Articles of War. And We do hereby authorize and empower such Courts Martial to hear and examine all such Matters and Informations as shall be brought before them, touching the Misbehaviour of any Commissioned Officer, non-commissioned Officer, or Soldier, by Mutiny, Desertion, or otherwise, as aforesaid, and to proceed in the trial of such charges, and in giving sentence and awarding Punishment according to the Powers and Directions contained in the said Act of Parliament and Articles of War. And We Do hereby authorize and empower you when and as often as any sentence shall be given and passed by a General Court Martial, legally constituted as aforesaid, to cause such sentence to be put in execution, or to suspend, mitigate, or remit the same, as in your discretion you shall see cause. And as there may not in any case be a failure of justice, from the want of a proper person authorized to act as Judge Advocate, We do hereby further empower you, in default of a person appointed by Us, or deputed by the Judge Advocate General of Our Forces, or during the Illness or occasional absence of the Person so appointed or deputed, to nominate and appoint a fit person, from time to time, for executing the office of Judge Advocate at any such Court Martial for the more orderly proceedings of the same. And for enforcing the adjudication or sentence of every such Court Martial, We do also give you authority to appoint a Provost Martial, to use and exercise that Office as it is usually practised in the Law Martial. And for executing the Several Powers, Matters and Things herein expressed, these shall be, as well to you, as to the said Courts Martial, and all others whom it may concern, a sufficient Warrant. Given at Our Court at St. James’s this 25th day of March, 1797, In the Thirty seventh year of Our Reign.

By His Majesty’s Command,

PORTLAND.

To Our Trusty and Well beloved John Hunter Esq. General and Governor in Chief, in and over Our Territory of New South Wales, or to the Commander in Chief of Our Forces there for the time being.

(A similar warrant was given, probably owing to the mutiny on board the vessel by which the first was sent.)

At Our Court etc. this 25th day of March 1798 in the Thirty eighth year of Our Reign.

By, &c.,

PORTLAND.
COMMISSION FOR JUDGE IN VICE-ADMIRALTY.

Governor Hunter to Under Secretary King. 1st June, 1797.

[A copy of this despatch, reporting the abolition of the civil power* by lieut.-governor Grose and captain Paterson, will be found on page 9 et seq., volume II, series I.]

Governor Hunter to the Duke of Portland. 6th July, 1797.

[The continuation of the general orders† and proclamations from November, 1796, to July, 1797, were transmitted with this despatch; see page 68 et seq., volume II, series I.]

Commission of Deputy Judge-Advocate Dore.‡

9th September, 1797.

[This commission was similar to that granted to David Collins; see page 1.]

Dormant Commission of Commander P. G. King.

1st May, 1798.

[A copy of this commission§ as successor to Governor Hunter will be found on page 605, volume II, series I.]

Revd. R. Johnson to Governor Hunter.

5th July, 1798.

Surgeon Arndell to Governor Hunter.

25th July, 1798.

Revd. S. Marsden to Governor Hunter.

11th August, 1798.

[Copies of these three letters, detailing the abolition of civil power* by lieut.-governor Grose and captain Paterson, will be found on page 178 et seq., volume II, series I.]

Commission for Major Foveaux as Judge in Vice-Admiralty.

By His Excellency John Hunter, Esquire, Captain-General and Governor-in-chief in and over his Majesty’s Territory called New South Wales and its dependencies, etc., etc.

The exigency of the public service requiring that a Court of Vice-Admiralty should be held on Monday, the Twentieth day of this instant August, at Sydney, in the County aforesaid, to take

* Note 23. † Note 22. ‡ Note 24. § Note 17.
cognizance of and proceed in all matters within the Maritime Jurisdiction of the Vice-Admiralty Court of New South Wales, in the absence of Lieutenant-Colonel Grose, the Lieutenant-Governor of this Territory, who is appointed the Judge or President of the said Court of Vice-Admiralty, in and for this Settlement, it becomes expedient that a competent person should be appointed to sit or preside as Judge or President of such Court, I, John Hunter, Esq., Governor and Captain-General in and over his Majesty's Territory called New South Wales, by virtue of the powers and authorities delegated and vested in me as Vice-Admiral, Commissary, and Deputy of the said Court of Vice-Admiralty to depute or surrogate in my place one or more Deputy or Deputies as often as I shall think fit, and also to name, appoint, make, and constitute whatsoever other fit and convenient Officers and Ministers under me for the said Office and execution thereof in New South Wales aforesaid, do by these presents nominate, appoint, ordain, make, and constitute you, Major Joseph Foveaux, of the New South Wales Corps, to be Judge and President of the said Court of Vice-Admiralty, which shall be holden at Sydney aforesaid: And you, the said Major Joseph Foveaux, are hereby required to officiate in the said Court in all the duties appertaining to the said Office of Judge and President.

For this shall be your sufficient Warrant and Authority.

Given under my Hand and Seal, at Government House, Sydney, this tenth day of August, in the year of our Lord One thousand Seven hundred and Ninety-eight.

JNO. HUNTER.

GOVERNOR HUNTER TO THE DUKE OF PORTLAND.

20th August, 1798.

[The continuation of the general orders* and proclamations from July, 1797, to August, 1798, were transmitted with this despatch; see page 199 et seq., volume II, series I.]

DEPUTY JUDGE-ADVOCATE DORE TO UNDER SECRETARY KING.

Sydney. New South Wales.

12th September, 1798.

Sir,

I have the honor to inform you of my safe arrival in this Territory on the eighteenth day of May last, when I entered upon my office as Judge Advocate, an appointment which I find every day grows more and more weighty in its duties and embraces a variety of important concerns. One great source of inconvenience is the scarcity of Paper, Stationery, etc., in this Colony; and I understand that there is no more than Twenty

* Note 22.
pounds a year allowed here for this article, which is widely dis-
proportionate to the consumption. In the various Courts of
Jurisdiction occasionally held here, such as Vice Admiralty,
Civil and Criminal, a considerable quantity of Paper is used,
and I should scarcely conceive that Twenty pounds a year
would furnish the Governor for his own occasions, independt.
of the usual business of the Colony; I can speak with greater con­
dience on this subject having been appointed by the Governor,
His Excellency’s secretary: Indeed so scarce has paper been of
late, that the Comissary has actually purchased some of a very
inferior quality at upwards of One hundred P. Cent. advance.
I will request of you to represent this to His Grace of Portland
who, I have no doubt, will direct a supply for my Office; it is
also necessary for me to be furnished with parchment for con­
victions, Records, Writs, Recognizances, etc., etc., Books of vari­
ous sizes for entering Proceedings in, together with every Article
of Stationary. Some practical Law Books will also be necessary
for my Information in general matters of Business, particularly
such as relate to the Official duties of a Proctor, Attorney, Notary
Public, etc., Civil Magistracy, and a general system of Profes­
sional Instructions, in which the practical points are more my
object than any theoretical Essays, and a continuation of the
Statutes at large down to the latest period.

With the greatest Respect, &c.,
RICH. DORE.

P.S.—When Mrs. Dore takes her departure for this Territory
with her little Family, I hope and trust you will have the good­
ness to take care that they have every accomodation and com­
fort that can be afforded them. For myself I am free to confess
that I wish for nothing so much as the Society of my Family,
and I shall ever think myself particularly obliged by any atten­
tion you may shew them on the occasion.

GOVERNOR HUNTER TO THE DUKE OF PORTLAND.
21st February, 1799.

[Two despatches, bearing this date, reported the misconduct
and the interpretation of the charter of justice* by judge-advocate
Dore; see pages 243 et seq. and 278 et seq., volume II, series I.]

UNDER SECRETARY KING TO SECRETARY NEPEAN.

Sir, Whitehall, 20th March, 1799.

I beg leave to refer You to the within Copy of a letter
from me to you of the 2d March, 1797, And as it does not appear
whether the Lords Commissioners of the Admiralty were pleased

* Note 25.
to accede to the appointment therein recommended by The Duke of Portland, or whether, as His Grace conceives to be the case, the Original Warrant appointing Major Paterson (now Lieut. Colonel of the New South Wales Corps) to the Office of Judge of the Admiralty at the Settlement of New South Wales, was sent out and lost in the Lady Shore Transport; I have now The Duke of Portland's directions to desire that You will move Their Lordships to be pleased to cause an other Warrant to be made out with as little delay as possible in order that Lieutenant Colonel Paterson, who is on the eve of his departure for New South Wales, may be enabled to take upon himself the duties of the Office of Judge of the Admiralty upon his arrival at that Settlement, when occasion may require it.  

I am, &c.,  

J. KING.

GOVERNOR HUNTER TO THE DUKE OF PORTLAND.  

30th April, 1799.  

[This despatch reported opposition to the exercise of the prerogative of pardon; see page 342 et seq., volume II, series I.]

WARRANT OF APPOINTMENT FOR THOMAS SMYTH.  

By His Excellency John Hunter, Esquire, Captain General and Governor in Chief in and over CUMBERLAND to wit. 

His Majesty's Territory called New South Wales and its dependencies, etc., etc., etc.

By Virtue of such Powers and authorities given granted and vested in me for that purpose I do hereby nominate constitute and appoint you Thomas Smyth of Sydney in the county and Territory aforesaid to be Marshal to a Court of Vice Admiralty which is to be holden and assembled in Sydney aforesaid on Wednesday the first day of May next ensuing for the determination of all such matters as may then and there come before them. And you the said Thomas Smyth are hereby authorized and empowered to act as Marshal to the said Court.

For which this shall be your sufficient Warrant, Given under my Hand and Seal this 30th day of April, 1799.  

JNO. HUNTER.

GOVERNOR HUNTER TO THE DUKE OF PORTLAND.  

1st May, 1799.  

[The continuation of the general orders* and proclamations from August, 1798, to May, 1799, were transmitted with this despatch; see page 356 et seq., volume II, series I.]

* Note 22.
COMMISSION OF LIEUT.-GOVERNOR PATERSON.

GEORGE R.

George the Third, etc., Greeting:—

We, reposing especial trust and confidence in your loyalty, courage, and experience in military affairs, do, by these presents, constitute and appoint you to be Lieutenant-Governor of the Settlement within our Territory called New South Wales, in the room of Colonel Francis Grose. You are, therefore, as Lieutenant-Governor, to take the said Settlement into your care and charge, and carefully and diligently to discharge the Duty of Lieutenant-Governor thereof, by doing and performing all and all manner of things thereunto belonging; And We do hereby strictly charge and require all our Officers and Soldiers who shall be in our said Territory, and all others whom it may concern, to obey you as our Lieutenant-Governor thereof; And you are to
observe and follow such Orders and Instructions, from time to
time, as you shall receive from Us, our Governor of our said
Territory for the time being, or any other your superior Officers,
according to the Rules and Discipline of War, in pursuance of
the trust we hereby repose in you.

Given, etc., 9th June, 1801.

By His Majesty’s Command.

PORTLAND.

COMMISSION OF JOSEPH FOVEAUX AS LIEUT.-GOVERNOR OF
NORFOLK ISLAND.

[This was a repetition of the commission granted to P. G.
King; see page 23.]

ACTING JUDGE-ADVOCATE ATKINS TO ACTING GOVERNOR KING.

[This opinion on the powers and duties of the deputy judge-
advocate will be found on page 262, volume III, series I.]

ACTING GOVERNOR KING TO THE DUKE OF PORTLAND.

[This despatch transmitted the proceedings at the trial of
lieutenant Marshall, who claimed the right to challenge members
of the court; see page 187 et seq., volume III, series I.]

ACTING GOVERNOR KING TO UNDER SECRETARY KING.

[In this despatch, the necessity for reforms in the criminal
jurisdiction was discussed; see pages 245-6, and a continuation of
the general orders* and proclamations from March to August, 1801,
were transmitted; see page 248 et seq., volume III, series I.]

COMMISSION AND INSTRUCTIONS FOR GOVERNOR KING.

[Copies of these documents† will be found on page 384 et seq.,
volume III, series I.]

GOVERNOR KING TO THE DUKE OF PORTLAND.

[The continuation of the general orders* and proclamations
from August, 1801, to February, 1802, were transmitted with this
despatch; see page 462 et seq., volume III, series I.]

* Note 22. † Note 20.
Surgeon Balmain to Sir Joseph Banks.

No. 1 Manchester Buildings,
Westminster, 24th May, 1802.

Sir,

The inclosed is the paper which I took the liberty of laying before you on the subject of our Courts of Justice in New South Wales.

The flattering reception it has met with from you confers on me the highest honor, for having witnessed every movement in the colony from its first formation, and been personally engaged in many of its public transactions,* it will not seem strange that I feel warmly interested in its prosperity.

I have to regret my being unable to wait upon you last evening. On another occasion I will have the honor to take advantage of your kind invitation.

I am, &c.,

W. Balmain.

[Enclosure.]

Courts of Justice.

When the colony of New South Wales was first planted the Civil and Criminal Courts of Judicature were capable of performing all that was required of them. The officers, who were occasionally summoned as members, were, in general, steady men, and, as the number of European inhabitants were few, crimes were not frequent among them, and law-suits scarcely known. In this early stage, therefore, where difficulties seldom occurred on any of the trials, neither the Judge-Advocate or members were required to possess any intricate knowledge of the British laws; nothing was yet agitated in the colony that could tend to perplex their minds or warp their judgements. The people were satisfied, and the ends of justice were fully answered.

In process of time population increased and crimes multiplied; property was acquired, and litigation kept pace with it; every scheme, that the art and cunning of thorough-paced rogues could devise, was sedulously employed to perplex the Courts of law, and to obstruct the course of justice; and at present seldom a day passes without the commission of a crime or the commencement of a law-suit. Cases of real or artificial difficulty occur at every trial, which, from the incompetence of the judges, frequently produce unpleasant divisions of opinion among them, insomuch that references without end are made from their decisions to the higher powers in England, and justice is left to sleep untill answers are returned on the subject.

From this, in part, proceeds that want of respect for our Courts of Judicature which at present manifests itself throughout

* Note 26.
the colony. The inhabitants begin to assume some little consequence, and think their rights rather in danger under the present forms of law.

They complain that the Courts are on too small a scale to be free from corruption; that several of the officers are low-bred, ignorant men; that others are young and inexperienced, and unequal to draw a just conclusion in cases of importance—in short, they are desirous that a form of jurisdiction should be established in the colony which may afford them greater security than they at present enjoy, and shall approach more nearly to the established forms in England; nor can there exist a doubt that such a change has become absolutely necessary.

The Criminal Court, in place of six, should consist of twelve members, taken indifferently from the officers—civil, military, and naval—together with such of the respectable inhabitants as shall be found sufficiently qualified to be impannelled on such an occasion; and it is most essential that the Judge-Advocate, being the principal law officer, should be a man of the strictest honor and integrity, possessing a thorough knowledge of the laws of his country, and capable of conducting the duties of his office with an independant spirit.

This form of trial would command reverence and respect from the public, and the prisoner, whatever might be the issue of his cause, would derive security from the number of his judges, and rely with confidence on their decision.

In like manner the Civil Court should consist of twelve members, in place of the Judge-Advocate and two discreet housekeepers who are directed by the Patent to compose it under the present form, and no appeal to lay from its decision where the matter in dispute is less than the sum of £200; for the spirit of strife has arisen to such a wonderful height among the inhabitants that matters of weighty concern are frequently agitated before this Bench of Justice, which commands so little respect from its feeble structure, that they are seldom brought to a happy conclusion. The vanquished party cannot, or will not, persuade himself that his plea has met with due consideration, and he instantly arraigns the judgement of the Court and appeals to the Gov'r to reverse its verdict. Thus are our Courts of law involved in perpetual perplexity, and have become the sources of great dissatisfaction and unhappiness among the inhabitants.

In cases of emergency, when offenders could not be sent to head-quarters for trial with sufficient dispatch and without injury to the service, it might be prudent to direct the Colonial residents to summon to their assistance as many officers and other respectable persons as could be found in their district, and with
them proceed to try, pass sentence, and order execution of criminals, the magnitude of whose offence was of such a nature as to threaten the settlement with manifest danger unless suppressed by prompt and exemplary punishment.

The residents might also be authorised to hold occasional meetings of respectable persons for the adjustment of civil differences in order to check, as much as possible, that roving disposition and love of novelty which their frequent visits to headquarters never fail to excite, and which, in most cases, exhausts all their relish for domestick comfort and enjoyment.

I will not presume to give an opinion as to the number of votes that should preponderate in the decisions of the Courts of Judicature, nor in what manner they may be allowed to vary in particular cases. This being the province of men experienced in professional knowledge, I leave it for them to determine.

GOVERNOR KING TO LORD HOBART.

9th November, 1802.

[The continuation of the general orders* and proclamations from March to September, 1802, were transmitted with this despatch; see page 617 et seq., volume III, series I.]

LEGAL OPINION ON TRIAL OF LIEUTENANT MARSHALL.

13th January, 1803.

[A copy of this opinion will be found on page 43, volume IV, series I.]

COMMISSION OF LIEUT.-GOVERNOR COLLINS.

COMMISSION OF DEPUTY JUDGE-ADVOCATE BARBAULD.

14th January, 1803.

[Copies of these commissions† for the settlement at Port Phillip will be found on pages 4 and 5, volume I, series III.]

INSTRUCTIONS TO LIEUT.-GOVERNOR COLLINS.

7th February, 1803.

[A copy of these instructions will be found on page 10 et seq., volume IV, series I.]

COMMISSION AND INSTRUCTIONS TO LIEUTENANT BOWEN AS COMMANDANT AT RISDON COVE.

28th March, 1803.

[Copies of these papers‡ will be found on page 189, volume I, series III, and page 152, volume IV, series I.]

* Note 22. † Note 27. ‡ Note 28.
Opinion of Crown Counsel on Vice-Admiralty Court.

My Lord,

Linc. Inn Fields, 27th June, 1803.

In pursuance of the Directions of Yr. Lordship's letter of the 17th ult., referring us to a letter from Govr. King to Yr. Lordship, and to the proceedings of the Vice Admiralty Court in New South Wales, on the trial* of Luckyn Betts for Murder, we have taken the same into our consideration, and without troubling Yr. Lordship with any opinion respecting the propriety of the Sentence pronounced by that Court, we beg leave to submit to Yr. Lordship that in our judgment the proceedings have been had in this case before a Court not having a competent jurisdiction to try the Offence upon which it has adjudicated; for we apprehend that the Stat. of the 27th of His Majesty c. 2, by virtue of which this Court was assembled, cannot possibly be held to give Jurisdiction to a Municipal Court in New South Wales over offences committed on the High Seas, and which are cognizable only by the High Court of Admiralty; we therefore submit to Yr. Lordship that the sentence of this Court ought not to be confirmed and carried into execution.

We have, &c.,

J. Nicholl.

Sp. Perceval.

Thos. Manners Sutton.

Lord Hobart to Crown Counsel.

Gentlemen,

Downing Street, 29th June, 1803.

I have received your letter of the 27th Inst. returning the Proceedings of the Vice Admiralty Court in New South Wales, on the Trial of Luckyn Betts for Murder, and observing that the Sentence of the Court ought not to be confirmed or carried into execution, the Court not having competent Jurisdiction to try the Offence; I am therefore to request that, under these circumstances, You will be pleased to favor me with your opinion, for His Majesty's Information and Consideration, whether it would be proper to take any, and what, measures against the said Luckyn Betts in the High Court of Admiralty.

I have, &c.,

Hobart.

Legal Opinion on Murder Case.

My Lord,

4 July, 1803.

We have had the Honour of receiving your Lordship's Letter of the 29th of June Ult. requiring us to report to Your Lordship for His Majesty's Information, and Commands,

* Note 29.
whether under the circumstances that have arisen in the case, it would be proper to take any, and what measures, against Luckyn Betts, in the High Court of Admiralty. We therefore beg leave to submit to your Lordship that conceiving as we do, that the Offence charged against Luckyn Betts is cognizable only at an Admiralty Sessions held under 28 H. 8, and that all the proceedings of the Court of New South Wales against him are void, and it appearing from the evidence upon the Trial that there were circumstances of cruelty in the case, we are of opinion that, if the witnesses, who proved the charge of Homocide against the Prisoner, are forthcoming, their examination ought to be taken and the Prisoner committed for Trial at the Admiralty Sessions; but, if those witnesses or any of them are not in this Kingdom, or expected within a reasonable time, we apprehend that there are no legal grounds to justify his Detention.

We have, &c.,

J. Nicholl.
Sp. Perceval.
Th. Manners Sutton.

Governor King to Lord Hobart.

7th August, 1803.

[A continuation of the general orders* and proclamations from October, 1802, to August, 1803, were transmitted with this despatch; see page 320 et seq., volume IV, series I.]

Warrant appointing Lieutenant Bowen to be Commandant of Tasmania.

13th October, 1803.

[A copy of this warrant† will be found on page 201, volume I, series III.]

Commission of Deputy Judge-Advocate Bate‡ at Port Phillip.

15th January, 1804.

[A copy of this commission will be found on page 122, volume I, series III.]

* Note 22.
† Note 28.
‡ Note 30.
1804.
13 March.

Memorial of
R. Atkins
soliciting
allowances for
increased
duties.

HISTORICAL RECORDS OF AUSTRALIA.

MEMORIAL OF DEPUTY JUDGE-ADVOCATE ATKINS.

New South Wales, 13th March, 1804.

To the Right Honorable Lord Hobart, His Majesty's Principal
Secretary of State for the Colonies, etc., etc., etc.

The Memorial of Richard Atkins, Esquire, Judge Advocate of
His Majesty's Territory of New South Wales.

Respectfully Sheweth,

That your Lordship's Memorialist officiated as acting
Judge Advocate to this Territory on the departure of David
Collins, Esquire, in 1796, and continued in that Situation until
the Arrival of Richard Dore, Esquire, the late Judge Advocate
in 1798.

That, on the Demise of the last mentioned Gentleman, which
took place in December, 1800, Your Lordship's Memorialist was
appointed by His Excellency Governor King to succeed him in
that Office, until His Majesty's Pleasure was known.

That His Majesty was pleased to confirm to Your Memorialist
the Appointment of Governor King, and he received his Com­
mission accordingly.

That your Memorialist has continued to Exercise the Duties
of his Office, which on Account of the extended State of the
Colony are become far more arduous than heretofore, and neces­
sarily engage the whole of your Memorialist's time and
Attention.

That by a late Arrangement His Excellency the Governor
was pleased to discontinue the Priviledge of the four Convict
Servants,* whose labor had hitherto been assigned your Me­
memorialist, on the plea of an Indulgence granted only to those
Magistrates appointed by His Excellency the Governor and not
to the Judge Advocate, who is one by virtue of his Office.

Your Memorialist represents that all the Magistrates (save
only Your Memorialist) have four Men assign'd them, some of
the Magistrates having pay equal to that of your Memorialist.

And by reason that your Memorialist not only performs the
Duty of Judge Advocate to this Colony, which embraces a great
variety of Concerns in the Civil and Criminal Courts of Judica­
ture, but is moreover hourly called upon in the less important
Concerns of the Colony as a Magistrate.

Your Memorialist humbly presumes to Submit to Your Lord­
ship's Consideration how far these various and complicated
Duties of Judge Advocate and Magistrate entitle him to the
labor of the four Convict Servants (valued at £156 Per Annum

* Note 30.
nearly equal to the Augmented Pay), which have until lately been assigned him, and which Memorialist trusts from this his Representation will be ordered to be allowed him.

And your Memorialist will ever Pray,

RICH. ATKINS, J.A.

WARRANT* APPOINTING WILLIAM SLADDEN AS JUSTICE OF THE PEACE IN TASMANIA. 26th March, 1804.

[A copy of this warrant will be found on page 491, volume I, series III.]

INSTRUCTIONS TO LIEUT.-COLONEL PATERSON AS LIEUT.-GOVERNOR AT PORT DALRYMPLE. 1st June, 1804.

[A copy of these instructions will be found on page 588 et seq., volume I, series III.]

Governor King to Lord Hobart. 14th August, 1804.

[A continuation of the general orders† and proclamations from August, 1803, to August, 1804, were transmitted with this despatch; see page 65 et seq., volume V, series I.]

Commission and Instructions for Lieut.-Colonel Paterson as Lieut.-Governor at Port Dalrymple. 1st October, 1804.

[Copies of these documents‡ will be found on page 599 et seq., volume I, series III.]


[Copies of these papers will be found on pages 729-730, volume I, series III.]

Governor King to Lord Hobart. 13th January, 1805.

[A continuation of the general orders† and proclamations from August, 1804, to January, 1805, were transmitted with this despatch; see page 269 et seq., volume V, series I.]

Commission and Instructions for Governor Bligh. 24th and 25th May, 1805.

[Copies of these documents§ will be found on page 1 et seq., volume VI, series I.]

* Note 31. † Note 22. ‡ Note 32. § Note 20.

8th July, 1805.

[A copy of this opinion* will be found on page 502 et seq., volume V, series I.]

Mr. F. Moore to Under Secretary Cooke.

Sir,

I have the Honor to transmit to you for the consideration of Lord Castlereagh, the enclosed Papers relative to Richard Atkins, Esqr., who claims an allowance for having officiated as Deputy Judge Advocate at two general Courts Martial, held at Sydney in New South Wales for the Trials of John Carr, Wm. Burke and Wm. Page, Privates in the New South Wales Corps on the 24th Decr., 1804, and for the Trial of Lieutt. Wm. Moore of the Said Corps on the 31st Decr., 1804, and as the Judge Advocate General in this Country cannot form such an Estimate from the Proceedings of the Courts Martial of the Extent of the Duty performed by that Gentleman as will enable him to fix the amount of the Allowance to be made, The Secretary at War Suggests the expediency of Govr. King being directed to make such allowances to Mr. Atkins as may appear to the Govr. reasonable, the amount thereof to be charged in his contingent acc., etc.

I have, &c.,

F. Moore.

[Enclosure.]

Mr. C. Pearce to Mr. F. Moore.

Sir,

I have the honor to transmit to you two certificates which I have received from Richd. Atkins, Esqr., the Deputy Judge Advocate at New South Wales, of his attendance upon two Courts Martial held there for the trials of John Carr, William Burke, and William Page, Privates in the New South Wales Corps, dated 24th Decr., 1804, and for the trial of Lieutt. William Moore of the said Corps, dated the 31st Decr., 1804, and to request the favor of you to lay the said Certificates before the Secy. at War, in order that the necessary directions may be given for the payment to Mr. Atkins of such Sums as may be judged adequate to his services for the said attendance.

I have, &c.,

Chas. Pearce,
Agent to Richd. Atkins.

* Note 33.
MEMO. RE LEGALITY OF ORDERS.

[Sub-enclosures.]

CERTIFICATES OF SERVICE.

These are to certify that Richard Atkins, Esqr., officiated as Deputy Judge Advocate at a General Court Martial, held at Sydney in this Territory by my Warrant, dated the first day of September, 1804, for the Trial of John Carr, William Burke and William Page, Privates in the New South Wales Corps for Mutiny, and that he was employed Twelve days in making preparations for the said Court Martial and copying and transmitting the Minutes of the Proceedings.

Given under my Hand, this 24th Day of December, 1804, at Government House, Sydney, New South Wales.

PHILIP GIDLEY KING.

(The second certificate, dated 13th Decr., 1804, referred to twelve days on the trial of Lieutt. Moore "for ungentlemanly behaviour and neglect of Duty.")

COMMISSION FOR W. GORE AS PROVOST-MARSHAL.

GEORGE R.

George the Third by Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, etc., To Our Trusty and Well beloved William Gore, Gent., Greeting—We, reposing especial Trust in Your Loyalty, Integrity and Ability, do by these Presents constitute and appoint you to be Our Provost Marshal to Our Settlements in New South Wales. You are therefore carefully and diligently to discharge the Duty of Provost Marshal to the said Settlements, by doing and performing all and all manner of Things thereunto belonging. And you are to observe and follow such Orders and Directions from time to time as you shall receive from Us, Our Governor of New South Wales, or any other Your Superior Officer according to the Rules and Discipline of War. Given at Our Court of Saint James's, the First Day of August, 1805, in the Forty fifth year of Our Reign.

By His Majesty's Command,

CASTLEREAGH.

MEMORANDUM BY GOVERNOR KING ON THE LEGALITY* OF GOVERNMENT AND GENERAL ORDERS.

In a conversation between Mr. McArthur and myself respecting the free introduction and sale of spirits, which he defended the legality of, and which from experience and a thorough knowledge

* Note 34.
of the baneful effects of a small quantity being allowed to be landed while its influence lasted, I objected to in the most decided manner. He introduced the subject of some counsel’s opinion of the illegality of all local Regulations, and that no Order or Regulation given by a Governor could be binding or legal unless sanctioned by an Act of Parliament. This subject was brought about on his urging the propriety of the distilling peaches into a spirit for the use of the inhabitants, and my testifying a wish to coincide, but that I felt a repugnance to doing it as the Judge-Advocate had said that he considered the introduction of the excise laws as a stretch of authority, and without adopting some of them I did not consider it possible to allow of that or any other distilling.

As Mr. McArthur was not possessed of that authority, or chose to mention the name of the counsel who gave the opinion, I could only observe that this was the first time I ever heard of such an objection, as all the local Regulations were regularly sent* the Minister for the Colonies, who had never made any exception, but had, in some instances, testified his approbation of the general part; a proof of which was my Lord Hobart’s directing Lieut.-Gov’r Collins to comply with those Orders, with most part of which he was furnished with copies for his guidance. And as most of the Orders, I have given, have been as near as possible conformable to the existing laws of England, allowances being made for the descriptions of persons they were to govern, and rendered necessary by the local state of the colony and the precedents of former Governors, I most certainly have considered myself warranted in framing these Regulations, without which no human being could have preserved any degree of regularity or order.

If it is urged that the laws of England are sufficient for the government of this colony, experience has fully shown the fallacy of such reasoning. Were the generality of the inhabitants of that mixed description that composes society in an English town and county, such reasoning might be allowed; but when it is considered that three-fourths of the inhabitants have been spared from an ignominious death by the humanity of the laws of England, and that the greater part of that number are so rooted in wickedness and vice, which can never be changed by any time or place (at least as far as respects the present generation), joined to the very little amendment that is seen in those who have either expiated their crimes, either by having served their terms or become emancipated—the necessity of these restrictive local Regulations must be visible to everyone who is, or ever has been, acquainted with the depravity of those which they govern

* Note 35.
in, and of the established law of England, which is lost sight of
on no occasion whatever, and in those instances when a devia-
tion is necessary for the security of persons and property, they
are invariably adhered to as much as circumstances admits of it;
nor in many cases does these deviations exist beyond the term
that any exigency renders them absolutely necessary.

DEPUTY JUDGE-ADVOCATE ATKINS TO GOVERNOR KING.

I RECEIVED Your Excellency's Letter respecting Your Authority
for convening General Courts Martial for the trial of such
Officers and Privates of the Royal Marines as it might be found
necessary to bring before such Court in this Colony.

In the Conversation I had with Your Excellency on that
Subject, I was clearly of Opinion that Your Excellency, not
possessing any Authority from the Lords of the Admiralty, you
could not with safety issue your Warrant for that purpose. I
am confirmed in that opinion from a Circumstance that occurred
during the American War, when it was found indispensably
necessary to obtain an Act of Parliament to subject the Marines
to a General Court Martial whose Members were composed off
Officers of the Line in conjunction with Officers of their own
Corps.

Another strong Case in point occurred in this Colony where
Major Ross, who commanded the Marines, wished to bring two of
his own Officers to a General Court Martial, but the then Gov­
ernor not having Authority from the Lords of the Admiralty to
issue His Warrant for that purpose, it was laid aside, and one of
those Officers was under an Arrest for nigh three Years, and was
afterwards tried in England.

These, Sir, are my reasons for thinking that no Officer or
Private of the Royal Marines can be tried here (in which opinion
Major Johnston coincides) unless a Power is vested in the
Governor from the Lords of the Admiralty authorizing him to
convene such a Court for that purpose.

I have, &c.,

Sydney, 29th Jany., 1806.

Rd. Atkins, J.A.

GOVERNOR BLIGH TO THE RIGHT HON. WILLIAM WINDHAM.

31st October, 1807.

[In this despatch, Governor Bligh reported the necessity for
reforms in the law courts; see pages 151, 156 and 157, volume VI,
series I.]
THE TRIAL OF JOHN MACARTHUR.

25th January, 1808.

[The proceedings in this trial, in which the prisoner protested against the dep. judge-advocate as a member of the court, will be found on page 221 et seq., volume VI, series I.]

GENERAL ORDERS* AND PROCLAMATIONS.

[Copies of those issued by major George Johnston, January-April, 1808, will be found on page 271 et seq., volume VI, series I.]

COMMISSION† FOR DEPUTY JUDGE-ADVOCATE BENT.

GEORGE R.

GEORGE THE THIRD, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, To Our Trusty and Wellbeloved Ellis Bent, Esqre., Greeting. We, reposing especial Trust in your Loyalty, Integrity and Ability, Do by these Presents Constitute and Appoint you to be Deputy Judge Advocate in Our Settlements in New South Wales. You are therefore carefully and diligently to discharge the Duty of Deputy Judge Advocate in the said Settlements by doing and performing all and all manner of Things thereunto belonging. And you are to observe and follow such Orders and Directions from Time to Time as you shall receive from Our Governor of Our said Settlements or any other your Superior Officer. Given at Our Court at Saint James’s, the First day of January, 1809, In the Forty ninth Year of our Reign.

By His Majesty’s Command,

CASTLEREAGH.

MR. T. W. PLUMMER TO COLONEL MACQUARIE.

4th May, 1809.

[A copy of this letter on administrative reforms‡ required in the colony will be found on page 197 et seq., volume VII, series I.]

COMMISSION AND INSTRUCTIONS OF GOVERNOR MACQUARIE.

8th and 9th May, 1809.

[Copies of these documents§ will be found on page 183 et seq., volume VII, series I.]

* Note 22. † Note 36. ‡ Note 37. § Note 20.
COUNSEL’S OPINION ON GOVERNOR BLIGH’S ARREST.

My Lord, Linc. Inn, 17th November, 1809.

We had the honour to receive Your Lordship’s Letter dated 23rd October, 1809, inclosing to Us, by the King’s Commands, a Correspondence which had been received from New South Wales (according to a Schedule thereto annexed) relating to the Arrest and Imprisonment of Captain Bligh, His Majesty’s Governor there, and the assumption of the Government by Major Johnson and afterwards by Lieutenant-Col’l Foveaux.

You also enclosed to us an Abstract of the Case made under Lord Castlereagh’s direction by Mr. Counsellor Harris, and you likewise inform us that the said Major Johnson and Mr. McArthur, who appeared to have taken a very active part in the transactions above mentioned, were daily expected to arrive in England.

And you desire that we will take the said Papers into our consideration, and report to your Lordship, for His Majesty’s information, our opinion as to the Steps which may be proper to be taken by His Majesty’s Government therein.

We have accordingly taken the same into our consideration, and have the honor to report to your Lordship that we think Major Johnson, Mr. McArthur, and the Persons concerned with them, were guilty of a Conspiracy and high misdemeanor in the arrest and imprisonment of Governor Bligh, and in the Assumption of the Government of the Colony of New South Wales on themselves.

That, as there might be a doubt raised whether Major Johnson was a person within the meaning of the Statute 42 G. 3rd, cap. 85, if proceeded against by information in the Court of King’s Bench; and as he certainly may be tried for Mutiny by Court-Martial under the Mutiny Act, We think the proper steps, as to him, would be to bring him to a Court-Martial.

That Lieut.-Col’l Foveaux is also liable to be tried by a Court-Martial on a similar charge of Mutiny in continuing the Arrest and Imprisonment of Governor Bligh on his taking the Command in the Settlement.

That, as these Offences were committed out of the Kingdom, there is no jurisdiction here to try Mr. McArthur and the Civil Persons concerned with him; and, therefore, he should be sent back to New South Wales, and a Prosecution should be instituted in the Criminal Court there against him, and such other persons, for a misdemeanor, as was done in the year 1779 in the case of Stratton Brooke and others, for the arrest and imprisonment of Lord Pigot, and the assumption of the Government at Madras.
That the Evidence, to be collected from the Correspondence, principally affects John McArthur, Nicholas Bayly, Doctor Townson, John Blaxland, Garnham Blaxcell, and Thomas Jamieson, as having previously concerted together with Major Johnson the Arrest and Imprisonment of Governor Bligh, and having afterwards borne a part in the assumed Government.

We have, &c.,
V. GIBBS.
THOS. PLUMMER.

INSTRUCTIONS TO MAJOR GORDON AS COMMANDANT AT PORT DALRYMPLE.

26th January, 1810.

[ A copy of these instructions will be found on page 707 et seq., volume I, series III.]

DEPUTY JUDGE-ADVOCATE BENT TO UNDER SECRETARY COOKE.

Sir,

Sydney, New South Wales, 7th May, 1810.

In obedience to your wishes, I avail myself of this opportunity of communicating to you such information as I possess in regard to the state of the Judicial Department of this Colony, and am only sorry that the unfortunate state of my health for the last six months has prevented me from bestowing as much attention upon it as the importance of the subject demands and my own wishes suggest.

I must beg leave to observe in general that I found on my arrival the greatest possible confusion and disorder in the Office of the Deputy Judge-Advocate,* and that the mode which has been usually adopted of doing business here has subjected me to the greatest difficulties.

In order to remedy this evil, I have endeavoured, as far as lay in my power, to introduce a regular System, and it has been my object to render that System as conformable to the practise of the Courts of Law in England as local circumstances and the different natures of the two Jurisdictions would permit.

But I am grieved to say that a very great deal yet remains to be done.

The first subject to which I should wish to call your attention, and one to which, I believe, His Majesty's Ministers have attached the greatest importance, is the Criminal Jurisdiction of the Colony. This is, undoubtedly, imperfect in every point of view; but the greatest defect, and the one which seems to make the strongest impressions upon the minds of the Publick, is the variety of duties which are by the Patent imposed upon the Judge-Advocate, which seem to be incompatible with the due

* Note 38.
BENT TO COOKE.

performance of his duties as a Judge. In the first instance, he is obliged to prepare and examine into the Evidence for the Prosecution. He is, in fact, the Prosecutor. He has then to draw up the Indictment, of the legality of which he is afterwards to judge, and it is by him to be exhibited to the Court, and is in the nature of an information exhibited by His Majesty's Attorney-General.

The execution of these previous duties is apt to bias the mind and to render a proper attention to the subsequent and most important part of his Office more difficult, or, at least, more open to suspicion.

By the Patent, the Judge-Advocate is constituted the President of the Criminal Court, and it is reasonable to suppose that, where he is a professional man, the rest of the Members of the Court will be greatly influenced by his opinion, which, therefore, should be as little exposed as possible to the danger of previous suspicion.

Another defect which I should wish to point out to you, sir, upon this subject is the very great similarity the Court, as it is at present constituted, bears to a Court-Martial. This similarity, and the nature and form of its proceedings—its Meeting at ten o'clock, and adjournment regularly at three, and other circumstances, also have made many of the Publick suppose that it was, in fact, a Court-Martial; and many of those Officers who have often sat as Members of the Court have always considered it as a Court-Martial. Another circumstance which has much tended to confirm this idea has been that of the Judge-Advocate's first administering the Oath to the Members, and then receiving it in his turn from them. It was this circumstance that caused a great deal of difficulty on the Trial of Mr. McArthur* at the commencement of the late disturbances in this Colony, and it appears to me, Sir, that it will be found equally effectual and more consistent with the character of a President of a Court of Justice to require the Judge-Advocate to take a general Oath for the due performance of his Duty before the Governor of the Colony upon his first entering into Office.

Since my arrival in this Colony, Sir, I have made every enquiry in order to form a correct judgment upon the practicability of establishing the Trial by Jury in this Colony as far as it regards Criminal matters. From all that I can learn, I think there are a sufficient number of respectable persons from whom a Petty Jury might be formed; though I do not think it practicable, in the present state of the Colony, to assemble a Grand Jury. If it were thought necessary, the Petty Jury might consist of twelve persons, as in England; and I should certainly advise the constitution of the Jury upon the principles of the English law.
As I have been made acquainted by you, Sir, with the wishes of His Majesty’s Ministers to remedy the inconveniences and defects of the present mode of administering the Criminal Law of this Colony, and as it may probably be expected that I should suggest such alterations regarding it as may be in furtherance of such honourable wishes, I feel it my duty to point out to you, Sir, such measures as I conceive will be calculated to remove in a great degree the defects in the Criminal Court of Judicature above mentioned.

For this purpose I think it would be adviseable that there should be a professional person in the Colony, uniting in himself the characters of Attorney-General and King’s Advocate, whose duty it might be to prepare all prosecutions in Criminal Cases, to advise upon the steps necessary to pursue, to draw and file on the records of the Court all Criminal Information, in the same manner and for the same purposes as is now done by the Judge-Advocate.

I should also advise that, in order to remove any resemblance to a Court-Martial, the name of Judge-Advocate should be changed to that of Judge, and that the Court should consist of the Judge and a Jury of twelve persons to be chosen from persons who came out free and from those who had obtained their pardon for a considerable time, or whose sentences were expired, and were respectable in their conduct and situation.

If the selection of Jurymen were confined to that class of persons which has come out free, many would be excluded who are now among the most useful and opulent Members* of the Society here.

The duty of the Judge would then be, as in England, to explain the Law to the Jury, and make such observations on the facts as might better enable them to give a conscientious verdict of Guilty or Not Guilty.

As in a great variety of cases a specifick punishment is awarded by the Law to particular Crimes, the duty of the Judge would in this respect be rendered very simple, and by the present Constitution of the Colony no sentence of Death can be carried into execution without a warrant under the hand and seal of the Governor.

It would also be adviseable that the Judge’s clerk should act as clerk of the Court, and in that capacity record the Verdicts and have the custody of the Records of the Court.

I submit it, Sir, with great deference to the opinion of His Majesty’s Ministers, that a Court constituted as above might produce very beneficial effects to the inhabitants of this colony.

* Note 40.
A Bench of Magistrates* is held in Sydney every Saturday at which the Judge-Advocate always presides. The cases brought before them consist of Breaches of the Peace, Larcenies of a petty nature, Prisoners brought up for neglect of work, and complaints of a trivial nature. In these cases the Magistrates act in a very summary manner, and proceed without the form of Indictment or Information. The minutes of these proceedings are, however, always taken down in writing, and the Sentences taken down in a book for that purpose, which is usually transmitted at the adjournment of the Court to the Governor for his inspection.

While I am upon the subject of the Criminal Judicature of the Colony, I may take this opportunity of observing that the number of the crimes committed is owing to the want of proper punishment, and I have been extremely embarrassed as to the degree or the mode of punishment to be inflicted upon offenders.

It frequently happens that Prisoners are brought forward charged with and eventually convicted of Felony; and when the Bench are about to sentence the Offender to confinement in the gaol for a certain space of time, it is perhaps objected that the prisoner is in the employ of Government, and that by his confinement his labour will be lost. This objection, which when admitted leaves the Bench no other alternative but that of Corporal Punishment, appears to me to be attended with very injurious consequences, for it has the effect of enabling Offenders to elude punishment altogether; and it has frequently happened that felons have been let out of Gaol on the application of individuals to be allowed to employ them as their labouring servants before their sentences are expired.

By these means the distinctions between the good and the bad are confounded—no warning is given to the vicious, no example is afforded to the publick; and I cannot but imagine that, if guilt were always attended with its proportionate Punishment, much of the Vice unfortunately too prevalent here would be repressed.

This impolitick laxity of proceeding towards persons charged with, and convicted of, the most heinous offences will be more properly illustrated, perhaps, by the following instance:—

One was some time since sent up from Van Diemen's Land, charged with maliciously and unlawfully shooting at and wounding one of his fellow labourers. The Offence is of the most heinous nature, and by the Law of England is punished by Death; but on his arrival here, as it was found that he was an useful workman, he was employed in Government work till the day of his trial, on which he was convicted, and Sentence of Death was passed upon him. On account of his previous character he was recommended to mercy, which His Excellency the Governor was

* Note 41.
1810.
7 May.

Causes of increase in crime.

pleased to extend to him on certain conditions. He has in consequence been since set at liberty and employed in Government labour, but has again, I am informed, been committing an act of felony.

On this case I would observe, first, that there appears a degree of indecency and indecorum in allowing persons charged with heinous Crimes in being at liberty and mixing without distinction with the sober and well-behaved till the very day of their being called upon to answer with their lives for the crimes committed against the laws; and next, that we have here an instance of a person convicted of a most horrid Crime having evaded every kind of punishment that could serve either as a warning to himself or as an example to deter others from the Commission of like Offences.

Upon the whole, I beg leave, Sir, to express my opinion that the species of Punishment most calculated to produce the reforma­tion of Offenders in this Colony is that of solitary confinement in a degree proportionate to the offence; and that the benefit that would result to Government, and to the publick, by a proper and steady infliction of this Punishment, would eventually much more than compensate Government for the loss of labour sustained by the confinement of such offenders.

I have mentioned these circumstances merely to show the nature of the punishments which have hitherto prevailed in this Colony, and have no doubt that in future every means will be adopted to repress crimes by the judicious punishment of the Offenders. The present Gaol does not appear to be sufficiently large or secure, or to afford sufficient conveniencies for the separate confinement of offenders, and I conceive a new Gaol, constructed upon a judicious plan, would be highly beneficial.

I am fearful, Sir, that I have already taken up too much of your time; yet my anxiety to represent to you, as far as I am able, the true state of the Judicial Department of the Colony, induces me to trespass a little longer upon it, in order to give you some idea of the mode of doing business in the Court of Civil Judicature, and of the inherent defects of its constitution.

This Court, Sir, was very well calculated to answer the purposes for which it was created in the infant state of the colony; but as the population has very much increased since its first establishment, and with that the Trade of the Colony, it has now become very deficient in many respects. It is a Court that is well adapted for the purpose of investigating questions of simple debt or breach of Contract; but the very summary mode of its proceedings are but ill-suited to the deciding of questions of a
complicated nature, when the interests of third parties are concerned; yet questions of this nature are frequently brought before it.

There are some cases indeed in which I have thought myself obliged to depart from the strict letter of the Patent in order to do Justice.

The Patent directs “that upon complaint to be made in writing to the said Court by any person against any other person residing, etc., of any cause of suit, the said Court shall or may issue a Warrant in writing under the hand and seal of the said Judge-Advocate” against the party complained of. It appears from hence that these Warrants are issuable strictly only during the sitting of the Civil Court. But the number of writs applied for is so great, and the residences of the persons upon whom they are to be served are frequently so distant, and, in cases when Defendants are about to leave the Colony, the necessity of issuing writs immediately is so pressing, that I have taken upon myself to sign and issue writs at all times, even when a Court of Civil Jurisdiction is not sitting, making them returnable before the next Court. This mode has the good effects of preventing Defendants from defrauding their just Creditors, and at the same time of giving them an opportunity of preparing their defence to the action, and also of saving the time of the Court which would otherwise be completely occupied in the issuing of writs, and, on the other hand, no injustice is done to either party.

Between the 1st day of January last and the 19th day of March, when the Civil Court met, between 350 and 400 writs were issued, one of which was for the sum of £20,000, upon which £10,000 was paid in part, and the action stayed upon security being given for the rest; another for £30,000 in an action of false imprisonment, and a third for £10,000 in a similar action. Besides these, there were actions brought which were referred to Arbitrators by order of the Court on consent of parties, which involved property to the alleged amount of £30,000. Previous to the Meeting of the Court I ordered all actions meant to be tried to be entered with my Clerk, and tried them in the order entered. The actions entered amounted to 251, of which 240 were actually tried. The amount of the Verdicts given by the Court, exclusive of costs, was £4,585 17s. 6d. Except Saturdays and Sundays, the Court sat every day for three weeks.

The Meetings of the Courts are uncertain; but it would be greatly to the advantage of the publick were they to meet four times a year at certain fixed times, for the writs issued could then be made returnable at a day certain, which now cannot always be the case.
It is a great hardship upon the poorer Suitors of the Court, and those who reside at a great distance, that there are no proper Agents or Attorneys whom they can employ to manage such actions as they are obliged to bring for the recovery of the Debts due to them. This want of proper Attorneys falls also very heavily upon the Judge-Advocate, as very much of his time is taken up by attending to complaints which are perfectly frivolous; and in those which appear to rest on good grounds he is often obliged to give his advice, altho' it is a subsequent part of his duty to determine upon them.

This is peculiarly unpleasant to a person sitting as a Judge, whose wish and duty it is to come into Court perfectly unbiassed.

If a few—three or, at most, four—Attorneys were to come out here, whose characters were respectable, Complainants would naturally have recourse to them to be informed of the legal mode of obtaining redress, and the expense necessarily incurred by them in adopting this step would be the means of preventing any frivolous Litigation.

With a trifling encouragement afforded them by Government, three or four Attorneys, by being allowed to practice here, under control of the Civil Court, might at the least obtain a very comfortable livelihood.

If this should ever be the case a certain distinct mode of pleading would be introduced, which would oblige the parties to take issue upon one or two distinct points, and the Court would more easily and more satisfactorily form their opinions as to the Verdict.

In the present Constitution of the Court, it is a great difficulty to find two fit persons* to sit with the Judge-Advocate; for the sittings of the Court are long, and the persons who are usually appointed as Members have extensive concerns to manage, and all endeavour to avoid as far as they can the performance of a duty which requires the sacrifice of so much time.

I own it would give me a very great pleasure to see the Trial by Jury introduced also in this Court; but I am not so clear that it would be equally advisable. And I conceive that a Court, consisting of one, two, or three permanent Judges, having also the powers of a Court of Equity, and also a regular Registrar or Clerk to record the Orders, Decrees, and Rules of the Court, would be the most eligible, and most adapted to the circumstances of this Colony.

The Judges should, I think, be permanent, for in the present circumstances of the Court, when the Members appointed to assist the Judge-Advocate are changed every sitting, they have not the

* Note 42.
time to obtain that knowledge which might render them useful; and relying, as they generally do, on the Judge-Advocate, the whole of the responsibility rests upon him.

Before I conclude this long Letter, Sir, I beg leave to add a word or two upon the necessity of having a proper and commodious Court of Justice erected as soon as possible.

The only place appointed for the meeting of the Civil and Criminal Courts, for the Bench of Magistrates, and for the Judge-Advocate's office, is a small low room about fifteen feet in length and of proportionate breadth, which does not possess one single accommodation for the purposes of Justice.

There are no places whatsoever for the custody* of the Records of the Court, nor any desk or box where a paper can be deposited with safety.

It may therefore be readily imagined, Sir, that the records of the proceedings of both the Courts are extremely imperfect.

Thus, Sir, I have endeavoured to give you as accurate an account as my present state of health will enable me to do of the state of the judicial department of this colony, and I must not omit to add that His Excellency the Governor has most readily and zealously offered to adopt any improvement I was able to suggest.

Since my arrival in the colony Commodore Bligh has had frequent occasion of taking my opinion on the measures to be pursued in respect of persons engaged in the late tumultuous proceedings in this Colony. These cases, with the opinions I had the honor of giving, will, doubtless, be laid before you; and I beg you will assure His Majesty's Ministers that I have endeavoured to the best of my judgment, to advise upon all these occasions such measures as I conceived to be best calculated to promote the honor of the Crown and to preserve the harmony of the Colony.

I have, &c.,

ELLIS BENT.

INSTRUCTIONS TO CAPTAIN JOHN MURRAY AS COMMANDANT AT HOBART TOWN.

16th June, 1810.

[These instructions will be found on page 443 et seq., volume I, series III.]

COMMISSION† OF THOMAS DAVEY AS LIEUT.-GOVERNOR OF TASMANIA.

1st September, 1811.

[A copy of this commission will be found on page 694, volume VII, series I.]
APPOINTMENT OF JUSTICE OF THE PEACE AT TAHITI.*

NEW SOUTH WALES.

By his Excellency Lachlan Maquarie, Esquire, Captain General and Governor in chief in and over His Majesty’s Territory, Called New South Wales and its Dependencies, etc., etc.

By virtue of the powers vested in me, I have assigned you, William Henry now of Sydney in this Territory, Missionary, my Justice to keep his Majesty’s peace in and over the Island of Taheite, otherwise called Otaheite, and the Islands adjacent, and for the preservation thereof and the quiet rule and Government of his Majesty’s people within the said Islands.

Given under my hand and Seal at Government house, Sydney, this Eighteenth day of September, 1811.

L. MACQUARIE.

Oath.

I, William Henry of Sydney in this Territory, Missionary, do swear that, as a Justice of the peace in the said Islands, in all articles as a Justice of the peace, I will do equal right to the poor and the Rich after my cunning, wit and power, and after the laws and Customs of the Realm and statutes thereof made. And I will not be of Council of any Quarrell, hanging before me; and that I hold sessions after the form of the statutes hereof made, and the Issues, Fines and Ameirciaments, that shall happen to be made, and all Forfeitures, which shall fall before me, I will Cause to be entered without any Concealment or embezzling, and truly send them to the King’s Exchequer in this Territory. I will not let for gift or other cause, but well and truly do my Office of Justice of the peace in that behalf; and that I will take nothing for my Office of Justice of the peace to be done, but of the King and fees accustomed and costs limited by Statute; and I will not direct or cause to be directed any Warrant (to be made) to the parties, but direct them to the Provost Marshal of this Territory, or other the King’s Officers or Ministers, or other indifferent persons to do execution thereof.

So Help me God.

WM. HENRY.

Sworn before me His Majesty’s Judge Advocate in and for the Territory of New South Wales, this eighteenth day of September, 1811.

ELLIS BENT, Judge Advocate.

* Note 45.
Declaration.

I, William Henry, do declare that I believe there is not any transubstantiation in the Sacrament of the Lord's Supper, or in the elements of Bread and Wine, at or after the consecration thereof by any person whatever.

WM. HENRY.

These are to Certify that Mr. William Henry, Missionary of Sydney, made and subscribed the foregoing declaration against transubstantiation previous to his being sworn in a Justice of the peace, at which time he also took the Oaths of Allegiance, Supremacy and Abjuration.

Dated this 18th day of September, 1811.

ELLIS BENT, J.A.

GOVERNOR MACQUARIE TO THE EARL OF LIVERPOOL.

18th October, 1811.

[In this despatch, Governor Macquarie reported the necessity for legal reforms; see page 393 et seq., volume VII, series I.]

DEPUTY JUDGE-ADVOCATE BENT TO THE EARL OF LIVERPOOL.

Sydney, New South Wales,

My Lord,

1. A few days previous to my departure from England to fill the Situation of Judge Advocate of this Territory, I was informed by Mr. Cooke, that it was the wish of Viscount Castle-reagh, (then at the head of the department over which Your Lordship now presides) that I should communicate to him for the information of His Majesty's Ministers, my sentiments, upon the means hitherto adopted for the Administration of Justice in New South Wales; and that I should more particularly enquire whether the Trial by Jury in Criminal cases could be easily and advantageously introduced into this Territory.

2. In obedience to that wish, a few months after my arrival here, I availed myself of the return to Europe of the Hindostan, Captain Pasco, to address a Letter to Mr. Cooke, under date I believe of the 9th May, 1810, in which I endeavoured to explain my sentiments upon those topics: but the very reduced state of my health at that period prevented me from writing in so satisfactory a manner as the importance of the subject demanded.

3. Conceiving, however, that your Lordship will be equally anxious to obtain correct information relative to points so essential to the well being of this part of His Majesty's dominions; urged too by a strong sense of duty, and by the earnest wishes
of His Excellency the Governor, I now venture with much sub-
mission, to transmit to Your Lordship some more detailed 
observations upon the Constitution of the Courts of Justice in 
this Colony, wherein I shall humbly endeavour to point out to 
your Lordship their present inaptitude to the purposes of their 
formation: and also with the entire concurrence of His Excel-
lency the Governor, to direct the attention of your Lordship to 
a plan for the more effectual Administration of Justice: the 
Adoption of which will be attended with little additional expence, 
but, I sincerely trust, with much benefit to every individual of 
this Community.

4. Your Lordship is no doubt aware that His Majesty's Patent,*
by virtue of which the Courts of Civil and Criminal Judicature 
are held in this Colony, has received no alteration since its first 
promulgation. A cursory review of the provision of that Instru-
ment will satisfy your Lordship, that it could be intended only 
for a very small community, where the mutual dealings between 
Man and Man are of the most simple nature, and the disputes 
which arise may be very easily and satisfactorily decided in a 
Summary manner.

5. But that state of society is now passed—the free and 
respectable population is much more numerous—the Commercial 
dealings between this Colony and other parts of the World, par-
ticularly India, are of very considerable extent, cases of great 
legal difficulty are daily arising, and complex questions of 
account involving large masses of property form the frequent 
subjects of deliberation of the Court of Civil Judicature.

6. In the course in which I now propose to myself to la;
before your Lordship the observations I am about to make, I 
will first beg leave to call your Lordship's attention to the Con-
stitution of the Court of Criminal Judicature.

7. That Court consists of the Judge Advocate and Six Officers 
belonging to His Majesty's Forces by Sea or land, appointed 
by the Governor or other Officer in Command.

8. The Judge Advocate is the President of the Court; and it 
is his duty to examine the depositions taken (perhaps by himself) 
upon the committal of Offenders, to prepare the Informations 
upon which they are to be tried, to cause the necessary Witnesses 
to be summoned, to exhibit those Informations to the Court, to 
conduct and make minutes of the Trial, to take down the evi-
dence, to make such observations thereon to the other Members 
of the Court, as he may deem expedient, to pronounce the Judg-
ment of the Court, to make up the Record of the Conviction or 
acquittal of the Prisoners, and to take charge of all the Records 
of the Court.

* Note 46.
9. Your Lordship will observe that this duty is both laborious and complicated. The Judge Advocate is thus at once, the Committing Magistrate, Public Prosecutor, and Judge; and he is called upon to decide upon the legality of the Informations, drawn up and exhibited by himself.

10. It may also be observed that from being so intimately concerned in the preliminary steps of every prosecution, it is hardly possible for the Judge Advocate to free his mind from some degree of bias against the Innocence of the Prisoners, and I need hardly add that his opinion must necessarily have great weight with the other Members of the Court.

11. Another observation which I should wish to suggest to your Lordship relative to the Court of Criminal Judicature, is, that in its Constitution it bears to strong analogy to that of a Court Martial. The title of Judge Advocate, with the circumstance of so large a Majority of the Court, being composed of Officers, either Military or Naval, gives the Court so strong a Military cast that, I may say, all the Officers and most of the Inhabitants of the Colony, look upon the Court in no other light than as a Court Martial.

12. On this Account the Court of Criminal Judicature does not command that veneration, awe, or respect which ought ever to attend upon a Court of Justice, and the numerous, free, respectable, and affluent Inhabitants of the Colony are rendered amenable to a Jurisdiction originally intended for the Summary Investigation of the Crimes of Prisoners, and established too at a time, when there were no other but Military or Naval Officers proper to be appointed to act as Members of a Court of Justice.

13. But whatever defects are attached to the Constitution and practice of the Court of Criminal Jurisdiction, they are much exceeded by the Inconveniences which result from the course of Civil Procedure established in this Colony, as the objects of the latter Jurisdiction are infinitely more varied, embrace every possible degree of complexity, and are more or less felt by a vast proportion of the Individuals composing this Community. But this subject is so extensive, that I am sure I should weary your Lordship, were I to attempt to develope all the Inconveniences resulting from the limited means of this Court, and the great mass of business which comes before it. I will therefore intreat permission to select a very few of the leading defects of this department of our Judicial System, and very shortly to submit them to your Lordship's consideration.

14. By His Majesty's Patent, to which I beg leave to refer your Lordship, the Court of Civil Jurisdiction is ordered to consist of His Majesty's Judge Advocate, and any two respectable
Inhabitants of the Colony, to be appointed by virtue of a Precept from His Excellency the Governor: and I would particularly call the attention of your Lordship to one circumstance, that this Court is directed by the Patent to decide all causes whatsoever which may come before it, in a Summary manner.

15. The first inconvenience to which I would wish to direct your Lordship's attention, is the total want of a regular judicial body, and of proper Officers of the Court. The consequences of this defect are two-fold; for it throws an intolerable burden upon the Judge Advocate, and causes great delay and grievance to the Suitors of the Court.

16. In consequence of the want of regular Council and Solicitors to afford legal advice to those who have occasion to apply for it, The Judge Advocate is constantly called upon to give his Advice upon all occasions, where an action is about to be brought or defended. It is his duty to state in writing the cause of Action, to issue all processes, to prepare the evidence in many cases, to preside at the Trial, to take down the evidence, and keep correct minutes of the proceedings. It is also his Business to make out all Orders and decrees of the Court whatsoever. Having so much to do, it can be done but imperfectly, for I do assure your Lordship, that the labor it imposes, to be executed properly, is beyond the power of one man.

17. From this Motive, and also from a wish to avoid the embarrassment which might perhaps result from it in my decisions, I have lately, in most Cases, declined giving my opinion out of Court; but the consequence of this has been, that I am frequently called upon to try actions of great importance without the smallest previous knowledge of the nature of the facts at issue between the parties.

18. Another unpleasant consequence arising from the want of regular Advocates and Solicitors is that as, in most cases, the parties themselves appear in person to prosecute or defend the Actions in which they are concerned, they bring into Court with them all the passions and enmities towards each other by the effect of which Justice is much obstructed, order subverted, solemnity and decorum set at defiance, and an inconceivable degree of discredit thrown upon the proceedings and Authority of the Court.

19. The want of proper rules and forms pointing out the due practice of the Court in all cases, is another defect, which I should wish to mention to your Lordship: and it is one which, on the present System, is almost irremediable. For though it were an easy matter, it would be of but little use to establish forms and rules, when there are no persons whose immediate
duty and Interest it is to make themselves acquainted with them; and where the only persons whose business it is to take notice of them, are those whose hours are occupied by other avocations, and whose education and pursuits through life never afforded opportunities of attending to, or understanding them.

20. But though these evils, My Lord, may be considered as sufficiently palpable and mischievous, they are not the only ones incidental to our present Judicial System: for there is one, and it is the last to which I shall beg your Lordship's attention, the consequences of which are of a most alarming nature to the Interests of the Colony. I mean the right which is given to all persons who feel themselves aggrieved by the decrees of the Colonial Court, in cases where the debt or demand is of greater value than the sum of £300, to appeal from those decrees to His Majesty in Council. The consequences of this right are rapidly undermining, and must soon accomplish, the ruin of the Credit of this Colony. All debts above the sum of £300 are now looked upon as debts of honor, and, by the acquisition of this right, the fraudulent debtor obtains such a manifest advantage over his Creditor, that he can force him to the acceptance of any terms, however unjust. I am very sorry to be obliged to add that but too many of the traders of this Colony are in general so devoid of principle, that they in all cases make use of this advantage. The consequence is that a private Bill of Exchange, drawn here for a larger amount than the sum of £300, is not negociable upon any terms: And the Merchants, more especially the foreign Merchants, will not take in payment any other bills than those drawn on the behalf of Government, or by the Paymaster of the Regiment stationed in the Colony.

21. Upon the whole view of the Judicial System of the Colony, I would humbly submit to your Lordship that its general faults are, that it does not now meet the wants of its increased and ameliorated population and Commerce: that the Officers attached to it are too few either for the convenient or orderly dispatch of business; and that its proceedings are of a nature too summary, not sufficiently final, and too much wanting in Solemnity to command the respect and deference which ought ever to be paid to Courts of Justice.

22. I trust Your Lordship will excuse me, in now offering a few observations on the situation which I have the honor to hold. I am inclined to believe from what I have already stated, that your Lordship will think the duties of the Judge Advocate are too multifarious, and too heavy to be discharged satisfactorily by one person. Many of those duties appear to be inconsistent with the character of a Judge, and to belong rather to
that of an Advocate. I will also venture to add, that his situation is too dependent, as he is bound by the very tenor of his Commission* to obey any orders he may receive from His Excellency the Governor or Lieutenant Governor, or other his superior Officer. This circumstance must certainly diminish the confidence of the Public in his character and expose him to the suspicion of being liable to undue influence; and therefore prevent him from commanding that respect which is the just title of all who fill a Judicial situation of importance. Considering this want of independence, in a personal point of view, I can assure your Lordship, that the comfort and happiness of any Judge Advocate, nay even the proper discharge of his duty, must depend entirely upon the personal character of the person in whose hands the Executive power of the Colony happens to be vested. Permit me here to add, My Lord, that this observation is very far from being meant to apply to my situation at present; for the Courte: y and Conduct of Colonel Macquarie bespeak so strongly his uniform wish to promote the happiness of all that I cannot but feel it a pleasure to serve under him.

23. In order to afford Your Lordship every means in my power of forming a correct Judgment of the weight that may be due to the opinions I have ventured to lay before your Lordship on this important subject, and of the great benefits that would be derived by this Colony from the establishment of a new and more enlarged Judicial System, I beg to refer your Lordship to the accompanying Report of the Number of Causes which have actually come before me for Trial, during the eighteen months which have elapsed, since my arrival in this Colony; in which are stated the amount of the Sums sued for, and of the Sums recovered, and that of the whole costs incurred in the recovery of the same. This Report has been made out, under my own immediate inspection, and I can confidently add that your Lordship may depend upon its accuracy. From this your Lordship will be able to obtain a tolerably correct idea of the extent of the legal business, dealings and Commerce of this Country. Many of these Causes are still undecided; and there are now applications for actions involving a mass of property not less than £60,000 due from different Merchants in this Settlement to Mercantile houses of the first respectability in the City of London.

24. I have now, My Lord, to request your Lordship's attention to a plan for the remodelling of the Judicial System of this Colony, which I have very maturely considered, and have now the Honor of laying before your Lordship with the entire Con­currence and by the immediate desire of His Excellency the

* Note 47.
Governor. But I have already trespassed so long upon your Lordship's attention that I will not venture to do more than sketch out the Outline of the plan, without entering into any detail upon the minute parts of it.

25. I should propose to your Lordship that a Supreme Court of Judicature be established at Sydney for the Territory of New South Wales, consisting of One Judge (being a Barrister of not less than five years' standing) and two persons to be chosen by rotation from the Magistrates of the Territory. That in this Court should be vested full power to exercise all Civil, Criminal and Ecclesiastical Jurisdiction, to form such rules of practice, and rules for the Process of the Court, as might be found necessary to the due Administration of Justice. That this Court should be a Court of Record, and also a Court of Oyer and Terminer and Gaol delivery for the Territory of New South Wales; and that the Judge of this Court, should in the exercise of his Functions be perfectly independant of the Executive Power of the Colony, and removeable only at the pleasure of His Majesty expressed through his Ministers.

26. I should further propose to your Lordship that this Court should be guided in its decisions by the common and statute law of Great Britain, except in cases where that law is altered by the bye laws of this Territory, or is inapplicable to the local circumstances of the Country. I think it would be adviseable that all the bye laws of the Territory should be drawn up by one of the Officers of the Law and registered in the Supreme Court. These bye laws are at present extremely vague and contradictory and are only to be found among the general Orders* of the different Governors of the Territory. If my leisure and my health permit, I propose collecting and arranging them, and, under the Authority of the Governor, from the present undigested mass, to endeavour to select a consistent and Judicious body of Regulations, applicable to the circumstances and wants of the Colony. Amongst these Alterations of the law of England, I should earnestly recommend it to your Lordship, as a measure highly calculated to promote the ends of Justice, that real Estates, lands, houses, etc., in this Colony or its dependencies be rendered liable to all just debts and demands, and to be seized and sold by virtue of the Process of the Supreme Court, in the same manner as personal chattels. Such a measure was adopted in regard to the British plantations in America, by virtue of a Statute† passed in the 5 Geo. 2, Chap. 7, sect. 4.

27. In considering the extent of Jurisdiction to be allowed to this Court, it will be necessary for your Lordship to advert to the situation of His Majesty's Settlement in Van Dieman's
1811.
19 Oct.
Problems of justice in Tasmania.

Encouragement of barristers and attorneys.

Appointments proposed for lawyers.

Proposed clerk of the peace and prothonotary.

Proposal for trial by jury in criminal jurisdiction.

Land, which your Lordship knows was once thought to be a part of the Continent of New South Wales, and is now one of the dependencies of this Government. The distance of either of those Settlements,* from this part of the Territory, and their Insular situation, would perhaps form an objection to the Processes of this Court issuing there, And as I am very imperfectly acquainted with their state and condition, I feel at a loss to give an opinion in regard to the mode best adapted for the due Administration of Justice therein.

28. To obviate many of those inconveniences which I have already enumerated, I should earnestly recommend that two Barristers, and two Attornies be induced to come out to practise their profession in this Colony. I have no doubt that it might be practised here with much benefit to themselves, and the community. Considering the extent of the profession of the law, and the different Advantages which might be held out to them by the Moderate grants of Land and Cattle, I entertain a very confident hope that the number of young Men, I have mentioned could be selected from the profession who would readily embrace any reasonable proposition of this nature, which might be made to them.

29. Of the Barristers, one might come out with a Salary, in the situation of King's Advocate, the other might perhaps with much advantage be placed at the head of the Police, and have a general Cognizance of the Crimes, committed by Convicts. Of the Attornies, one might also have a Salary, and fill the situation of King's Proctor, and the other could be appointed Coroner of the Territory, with a power to take certain fees or with a moderate Salary, both of which might be charged on the Police Fund.

30. I should also recommend to your Lordship that a professional person be sent out as Clerk of the Peace, whose duty it would be to draw up all Indictments and Informations, to manage the formal parts of all prosecutions, to draw up all the Orders of the Court, to make up and have the custody and charge of all its records. The same person might also hold the situation of Registrar or Prothonotary in the Civil department of the Court and act as a Notary Public.

31. After a very mature consideration of the state and condition of the Colony, I feel myself justified in recommending to your Lordship that all offences, crimes and misdemeanors to be enquired of by the Supreme Court, be tried by a Jury of Twelve free British Subjects, resident in the Territory; and that no Indictment should be enquired of by such Jury, until it had previously been laid before a Grand Jury consisting of Twenty

* Note 50.
three Free British subjects, also resident and having lands or houses in the Territory. I have no doubt that Grand and Petty Juries, so constituted, of great respectability, may be impanelled in this Colony with much facility, and that such an establishment would be considered as a blessing to the country and received with the most perfect satisfaction.

32. In the consideration of this plan it will be a question well worthy of your Lordship's attention whether the benefits of such a Trial by Jury should be confined to the free residents of this Colony, or whether they should be extended to the numerous Convicts in the Colony, in any cases except those which affect the life of the accused. If I might be allowed to offer an Opinion to your Lordship upon this point, I should deem it adviseable, that except in cases of a capital nature or of great enormity they should remain under the immediate Control of the Police, and that the Offences committed by them should be entirely under the Cognizance of the Superintendent of that Department. By this means they might be kept more orderly, and induced by sobriety and regularity of conduct to merit a re-admission to those privileges once forfeited by their Crimes.

33. With regard to the trial of pleas and suits of a personal nature, I beg leave to submit it as my opinion to your Lordship that in those cases, where the points in dispute can be reduced to one or more plain issues of fact, the Trial by Jury might also be introduced with great benefit to the Public. But as many questions may arise of too complicated a nature to be advantageously submitted to the consideration of a Jury, it would be also necessary that the Court should be enabled to act as a Court of Equity, so that its whole constitution would be somewhat on the model of the Court of Exchequer in England, which is at once a Court of both Law and Equity.

34. In the event of your Lordship deeming it adviseable to recommend to his Majesty the adoption of such a Judicial System, as that which I have had the honour to lay before your Lordship, I conceive that the right of appeal as it now stands might admit of a very considerable and beneficial limitation. For as such a system seems to me to justify a well grounded confidence, that the rights of Individuals would be both ably discussed and impartially determined, I think that the right of appeal to His Excellency the Governor might be altogether dispensed with; and that no Appeals whatsoever should be allowed to be interposed from the decrees of the Court to His Majesty in Council except in cases where the debt or demand in dispute exceeded the value of £6,000.
35. This is the whole of the plan which I have to lay before your Lordship. I have indulged a strong hope that much benefit might be derived from its establishment, and am happy in being able to assure your Lordship that the whole of it might be carried into effect with the additional expense of £2,000 per annum.

36. I have now only to express my fear, that I have trespassed too much upon the attention of your Lordship and yet failed in the due illustration of the topics I have ventured to discuss. I will not therefore detain your Lordship longer than merely to add, that in the observations, I have taken the liberty to make upon the Judicial System of this Colony, and in the plan I have humbly suggested to your Lordship for its improvement, I intreat your Lordship to believe that I have not been actuated by any selfish consideration of future personal advantage, but solely by a regard to the welfare of this remote and little known part of his Majesty's dominions and from a conviction that the present charter of the Colony does not sufficiently provide for the due administration of Justice in such manner as the state and condition of the Settlement require.

37. Lieutenant Ovens of His Majesty's Seventy third Regiment, who is proceeding to England (via China) in the Ship Providence, is the Bearer of this Public Letter to your Lordship, and from the situation he has held in the Colony will be able to answer such questions relative to the state of this Settlement as your Lordship may be pleased to ask.

I have, &c.,

ELLIS BENT.

[Enclosure.]

LIST of causes tried, Amount of Money sued for, and amount of Verdicts recovered in the Court of Civil Judicature held at Sydney in the Territory of New South Wales.

<table>
<thead>
<tr>
<th>No. of Court</th>
<th>When assembled</th>
<th>when adjourned</th>
<th>No. of Causes tried</th>
<th>Amount of money sued for</th>
<th>Amt. of Verdicts recovered</th>
<th>Amount of Costs</th>
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<td>No. 1</td>
<td>March 19th, 1810</td>
<td>April 6th, 1810</td>
<td>187</td>
<td>£64,221 15 3</td>
<td>5,686 10 8</td>
<td>£374</td>
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<td>&quot;  2</td>
<td>August 13th, 1810</td>
<td>October 11, 1810</td>
<td>313</td>
<td>37,529 12 2</td>
<td>7,451 1 10 9</td>
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<td>&quot;  3</td>
<td>January 7th, 1811</td>
<td>February 8th, 1811</td>
<td>182</td>
<td>12,239 13 8</td>
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<td>&quot;  4</td>
<td>April 1st, 1811</td>
<td>April 30, 1811</td>
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<td>£184,570 19 2</td>
<td>£50,197 13 10</td>
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Judge Advocate's Office,
Sydney, 19th Octr., 1811.

ELLIS BENT, J.A.
Sydney, New South Wales, 30th November, 1811.

In conformity with the wishes of His Excellency the Governor, I had the honor of addressing a Letter to your Lordship, dated the 19th October ulto., which I entrusted to the charge of Lieutt. Ovens of His Majesty’s 73rd Regiment, who was proceeding to England, by the way of China, in the Ship Providence, in which I endeavoured to draw your Lordship’s Attention to the situation of the Judicial department of this Colony, and to a plan drawn up, in concurrence with the Governor, for its amelioration. I now beg leave to forward to Your Lordship a duplicate of that letter by the Ship Friends, which is proceeding to England direct, and which is likely on that account to arrive before the original letter. In the event of your Lordship’s deeming it expedient to recommend to His Majesty the adoption of some such plan, as I have had the honor to point out in that letter, I trust your Lordship will not think that I presume too much, if I humbly express my hope that I shall not be found unfit to fill the then more dignified and important station of the principal Law Officer of this Colony. My anxiety on this head will I hope excuse my observing that the expectation (which I expressed in a letter to Mr. Cooke previous to my departure from England), that I should not be overlooked in any subsequent alteration of the Judicial system of this Colony, in some measure induced me to take upon myself the Office of Judge Advocate of this Territory. That your Lordship may be the better able to judge whether I am deserving or not of the honor of such an appointment, I intreat permission to mention to your Lordship that, in the earlier and more fortunate part of my life, I was a Fellow Commoner of St. Peters College, Cambridge, that after the usual residence and examination I was admitted to the degree of Bachelor of Arts, and since that time I have taken the degree of, and am at this moment a Master of Arts in that University. Upon leaving College, I commenced the Study of the Law, and was admitted as a Fellow of the Society of Lincoln’s Inn, by which I was called to the Bar in 1805, so that I am now a Barrister of nearly seven years standing. Until I had the honour of being appointed by Lord Castlereagh to the situation I now hold, I regularly practised the profession of the law, went the Northern Circuit and was one of the Senior Barristers at the Cumberland Sessions. The testimonials, I was at that time required to present at your Lordship’s Office, will, I feel confident, be deemed perfectly
satisfactory to your Lordship. In my conduct since my arrival
in this Territory, it has been my most anxious endeavour to
restore confidence and introduce regularity; to prevent all extor-
tion and unnecessary delay; to hear patiently, and to determine
consistently and justly. In Ireland, I am well known to Vis-
count Northland, the Bishop of Derry, Sir Harry Bruce and
others. In England to the different Members of my own pro-
fession, to the Judge Advocate General, to Lord G. H. Cavendish,
and my being in my present situation has been occasioned by
family misfortunes of the severest nature. The Salary, which
it has pleased His Majesty’s Ministers to affix to the Office I
hold, is £800 which by the income tax and other necessary reduc-
tions is reduced to £680 Per Annum. On account of the heavy
expence which I was obliged to incur in coming out, and the long
suspence, in which I had been kept, by which I was prevented
from going one Circuit, Lord Castlereagh was pleased to direct
that my Commission should bear date from the 1st of January,
1809, and that three quarters amount of Salary should be
advanced to me, which was accordingly done. I arrived here in
a most wretched state of health on the 1st January, 1810, since
which I have been obliged to incur heavy expences, and have
till this moment been in a situation, which requires constant
Medical attendance; under these circumstances, My Lord, I have
been much concerned to be informed that £180 of arrears of
Salary actually due to me, on the credit of which I have unfor-
tunately drawn Bills upon my Agent in London, is retained by
Mr. Chinnery of the Treasury for half pay due to Mr. Atkins.
on account of his doing the duties of the situation in the year
1809. I hope your Lordship will feel the hardship of subtracting
from my Salary whatever may be due to Mr. Atkins for his
services, and taking away from me what has once been given.
I presume to observe to your Lordship, that I came out in an
entirely different character from that of Mr. Atkins—on an in-
creased Salary.—on peculiar terms,—and that the money, which
was ordered to be paid to me, was paid for a particular purpose,
which I have already mentioned to your Lordship. I can assure
Your Lordship that, upon an application which I made to Vis-
count Castlereagh for a remuneration on account of the heavy
expenses I must necessarily incur in my Voyage, I received a
verbal answer from Mr. Cooke, that there was no precedent in
the Office of making a direct remuneration on that account;
but that, as his Lordship conceived it was proper I should be
remunerated in some shape, his Lordship had pleased to direct
that my Commission should be dated as above, and three
quarters Salary paid me in advance. Under these circumstances,
I beg leave to put myself under your Lordship's protection. In the public letter, which I have had the honor of addressing to your Lordship, I have taken the liberty to mention the very numerous and heavy duties imposed upon the Judge Advocate, my Whole time is occupied, and a heavy responsibility is thrown upon me. In addition to these duties, I have also those of the Judge of the Admiralty to which commission no Salary is annexed, and as no table of fees has yet come out, I have deemed it my duty to refuse taking any fee whatsoever on account of the exercise of those duties. While I mention these circumstances, I beg leave to suggest to your Lordship, that every Article and necessary of life bears here a most enormous price, and obliges me to live at an expense beyond my Salary. I hope I shall therefore be excused, if on these accounts I humbly request your Lordship to take into your consideration the propriety of increasing the Salary at present attached to the situation I have the honor to hold; in doing which I am sure, I need not suggest to your Lordship, that I have given up for some years at least my Country, my friends, and for ever the practice of my profession. I rely with the most perfect confidence on the liberality of His Majesty's Ministers and will not further trouble your Lordship on this topic. I sincerely hope that your Lordship will not think the details I have felt myself obliged to enter into, either tedious or impertinent, they are such as your Lordship must be conscious are of the highest importance to me. If your Lordship would also take into your consideration the very dependent situation in which a Judge Advocate is placed by the very tenor of his Commission, I can assure your Lordship, it would be attended with the greatest advantage to the public and enable me to go through the arduous duties of my Office, with much more satisfaction to my feelings and my conscience.

I have, &c.,
Ellis Bent.

Instructions to Major Geils as Commandant at Hobart Town.
8th February, 1812.

[A copy of these instructions will be found on page 467 et seq., Instructions to A. Geils.]

Government and General Orders.
25th May, 1812.

[These orders* announcing the union of the settlements in Tasmania will be found on pages 623 and 624, volume VII, series I.]

* Note 51.
INSTRUCTIONS TO CAPTAIN RITCHIE AS COMMANDANT AT PORT DALRYMPLE.

22nd June, 1812.

[A copy of these instructions will be found on page 723 et seq., volume I, series III.]

GOVERNOR MACQUARIE TO THE EARL OF LIVERPOOL.

17th November, 1812.

[In this despatch, Governor Macquarie reported the necessity of law courts* in Tasmania and the duties* of the lieut.-governor of N.S.W.; see pages 584 and 610, volume VII, series I.]

EARL BATHURST TO GOVERNOR MACQUARIE.

23rd November, 1812.

[In this despatch, Earl Bathurst detailed proposed legal reforms; see page 672 et seq., volume VII, series I.]

INSTRUCTIONS TO THOMAS DAVEY AS LIEUT.-GOVERNOR OF TASMANIA.

30th January, 1813.

[A copy of these instructions† will be found on page 730 et seq., volume VII, series I.]

COMMISSION OF LIEUT.-GOVERNOR MOLLE.

20th June, 1813.

[A copy of this commission‡ will be found on page 71, volume VIII, series I.]

GOVERNOR MACQUARIE TO EARL BATHURST.

28th June, 1813.

[In this despatch, Governor Macquarie submitted suggestions for legal reforms; see page 774 et seq., volume VII, series I.]

PROCLAMATION OF A COINAGE FOR THE COLONY.

1st July, 1813.

[A copy of this proclamation§ will be found on page 750 et seq., volume VII, series I.]

ADMIRALTY COMMISSIONERS TO JUDGE OF VICE-ADMIRALTY COURT.

By the Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, etc.

WHEREAS we think fit to revoke the power and authority given to you to take cognizance of and judicially to Proceed|| upon all and all manner of Captures, Seizures, Prizes and Reprizals of all

* Note 52. † Note 53. ‡ Note 54. § Note 55. || Note 56.
Ships, Vessels, and Goods, seized and taken, or which should be seized and taken within the limits of the Vice Admiralty Court of the Settlement of New South Wales, and to hear and determine the same, and according to the course of Admiralty and Law of Nations to adjudge and condemn all such Ships, Vessels, and Goods, save and except in regard to such Ships, Vessels, and Goods concerning which Proceedings shall have been actually commenced before the receipt of this Order; You are therefore hereby required and directed to return to our Secretary the Warrants, in order to their being cancelled; and you are to consider the Power and Authority abovementioned as being revoked accordingly.

Given under Our hands and the Seal of the Office of Admiralty the 31st July, 1813.

W. DARRETT.
G. WARENDER.
H. PAULET.

By Command of their Lordships.

JNO. BARROW.

EARS BATHURST TO THE ATTORNEY-GENERAL AND SOLICITOR-GENERAL.

Gentlemen,

Downing Street, 4th Octr., 1813.

I have the honor of submitting to you for your consideration the draft of a New Patent of Justice* for the Colony of New South Wales. I also inclose a Copy of the former Patent,* granted to that Colony, and an extract of a Dispatch* addressed by me to the Governor, detailing the alterations, which I conceived it necessary to make. It being of the utmost importance that these alterations in the Judicial Establishments of the Colony should take place at an early period, I have to request that you would report to me, with as little delay as possible for the information of His Royal Highness The Prince Regent, how far you consider the inclosed Draft calculated to answer the objects, which the Dispatch has in view, and that you would make such alterations as you may consider necessary for giving to them complete effect.

I am, &c.,

BATHURST.

MESSRS. GARROW AND DALLAS TO EARL BATHURST.

My Lord,

Lincoln's Inn, 9th October, 1813.

We have the honour of Your Lordship's Letter of the 4th Inst. enclosing for our consideration the Draft* of a new Patent of Justice for the Colony of New South Wales, also a Copy of

* Note 57.
the former Patent* granted to that Colony, and an Extract* of a
dispatch addressed by Your Lordship to the Governor, detailing
the alterations, which you conceived it necessary to make, and
stating that it being of the utmost importance that these altera-
tions in the Judicial Establishments of the Colony should take
place at an early period, Your Lordship has been pleased to
request that we would report to you, with as little delay as pos-
sible for the information of His Royal Highness The Prince
Regent, how far we consider the Draft calculated to answer the
objects which the Dispatch has in view and that we would make
such alterations as we may consider necessary for giving to them
complete effect.

We have accordingly proceeded to consider the Draft of the
new Patent with reference to the objects, which it has in view,
to which consideration and to suggesting, should they appear
to us to be necessary, any alterations in the frame of the Patent
so as to give effect to its intention, we understand our duty, on
the present occasion to be confined.

We collect from the representation† of Mr. Bent that one
leading evil complained of is, the former Charter having directed
the present Court to proceed in a summary way and what he
proposes with respect to the new Court is, that "it shall be
guided in its decisions by the Common and Statute Law of this
Country, except in Cases where that Law is altered by any bye-
Laws of the particular Territory, or is inapplicable to the local
circumstance of the Country"; and we observe from Your
Lordship's Dispatch to Governor Macquarie, dated the 23d No-
vemr., 1812, that the Decisions being of such a sort is one of the
evils enumerated as belonging to the present Establishment.
The Draft, however, of the intended Patent certainly continues
instead of abolishing this evil, for it expressly provides, that
both Courts shall proceed in a summary way, omitting altogether
the mode of proceeding suggested by Mr. Bent; But, on this
point, it is not for us to decide, having only to compare the
Draft of the Patent with the objects it has in view, and no
where perceiving that it is the present intention to adopt, in this
respect, the suggestion thrown out by the Judge Advocate. We
should not, therefore, have noticed the circumstance except
that a marginal observation calls our attention to it, pointing
out for consideration, how far directing such summary mode of
proceeding is proper or consistent with your Lordship's dispatch?
And to this we answer that it does not appear to us to be alto-
gether consistent, tho' whether this inconsistency should be
obviated by directing, in the place of a summary proceeding,
the course of proceeding suggested by way of change, is that

* Note 57. † Note 58.
upon which we are not called upon to advise, and, indeed, as a point of local policy, if called upon, should not have felt ourselves competent to determine. If any alteration should, however, be made in this respect, it must be a change in substance, a fundamental alteration, changing altogether the ground on which the proposed judicial establishment is to stand. Your Lordship will permit us further to remark that we incline to think some provision should be inserted in the Patent, empowering the appointment of proper Officers for the several Courts, and to assign due Salaries, and to provide for the payment of the same, by which we mean to direct in what manner they shall be paid. We do not however observe that this is suggested by the Judge Advocate, and we submit it therefore merely for consideration.

It also appears to us that it may be necessary to introduce some Clause, in the nature of a saving Clause for the Proceedings now depending, as far as they are intended to be saved, and which would, otherwise, become abated by the abrogation of the former Charter; and, beyond this, it does not occur to us to make any further Observations on the Draft of the intended Patent, and the Papers which accompanied it, and the whole of which we now return to your Lordship. We have, &c.,

W. Garrow.
R. Dallas.

Earl Bathurst to the Attorney-General and Solicitor-General.

Gentlemen, Downing Street, 15th Nov., 1813.

I have the honor to inclose for your consideration the Draft of a Patent of Justice for the Colony of New South Wales, in which several alterations have been made agreeably to the Suggestions contain'd in your Letter of the 9th Ultimo.

The object, which I have had in view in the formation of this Patent, has been to confer upon the Governor's Court a summary Jurisdiction similar to that exercised by the Court, which now exists in the Colony, but to restrict its jurisdiction to Causes in which the Cause of Action does not exceed fifty pounds. To remedy the evils of which Mr. Bent complains, I have considered it expedient to form another Court called the Supreme Court, the Jurisdiction of which should not be summary, and which should take cognizance of all Suits in which the Cause of Action exceeds fifty pounds.

Having thus briefly submitted to you the objects which I have had in view in forming the Draft of this Patent, I have to
request that you would take the same into your consideration and report to me for the Information of His Royal Highness The Prince Regent how far it is calculated to answer the Ends which I have in view; and in the Event of your considering the Authority conferred upon the Supreme Court insufficient to suggest such Alterations as may be required.

I have, &c.,

Bathurst.

MESSRS. Garrow and Shepherd to Earl Bathurst.

My Lord,

Lincoln's Inn, 6th Decemr., 1813.

We have received the draft of the Patent of Justice for the Colony of New South Wales, accompanying your Lordship's letter of the 15th Novemr. last, in which several alterations have been made agreeably to the suggestions, which the Attorney General had the honor to communicate to your Lordship in concurrence with Sir Robert Dallas His Majesty's late Solicitor General.

We observe that the object, which your Lordship has had in view in the formation of this Patent, has been to confer upon the Governor's Court a summary jurisdiction similar to that exercised by the Court which now exists in the Colony, but to restrict its jurisdiction to causes in which the cause of action does not exceed fifty pounds.

To remedy the evils of which Mr. Bent complains, your Lordship has considered it expedient to form another Court called the Supreme Court, the jurisdiction of which should not be summary, and which should take cognizance of all suits in which the cause of Action exceeds fifty pounds; and Your Lordship has done us the honor to submit the same for our consideration, and to request that we would report to you, for the information of His Royal Highness The Prince Regent, how far it is calculated to answer the ends which your Lordship has in view; and, in the event of our considering the authority conferred upon the Supreme Court insufficient, to suggest such alterations as may be required.

We have accordingly proceeded to consider the same, and beg leave to state to your Lordship that, with respect to the Governor's Court, it appears to us that the intention of the Crown is to give Jurisdiction to that Court not only to decide Causes relating to matters of debt and contract, but also Titles to land and the Interest therein, and therefore, if that be so, we think the present draft of the Charter should in page 5 be altered in the passage* "where the sum in dispute shall not exceed £50

* Note 59.
Sterling," for this expression can relate only to suits to recover
debts or to matters of personal property, and that for this reason
there should be added "or where the value of the lands, ten-
ements or Hereditaments, or the Interest therein, or the subject
matter of the suit does not exceed the value of £50."

Again with respect to this case, as the process to be issued to
bring in the Defendant to answer the Complaint is to be a bai-
able process, if the demand be above the value of £10, we appre-
hend that this bailable process is only to issue in Cases of de-
mands for debts or detention of goods or Chattels, and not in
Suits relating to the recovery of land or Trespasses, and if so
the Charter should in page 6 be altered by saying,* "where the
value of the demand shall be £10 or upwards, if the same arises
from or by virtue of any debt or detention of any goods or
Chattels."

Again with respect to the powers of executing the Judgment
of the Governor's Court by imprisonment of the person, or levy-
ing the sum recovered and the costs by execution against the
goods, the present draft appears to us to be sufficient where the
Judgment is for the recovery of a debt or damages; but, if the
Judgment is for the recovery of the land itself, then there is
no provision for any means of enforcing the Judgment by seiz-
ing the land, and putting the Plaintiff, to whom it is awarded
or adjudged, in possession of the land; and therefore, if that be
intended, it should authorize the issuing a warrant by the Judge
Advocate to some officer to enter upon the land or tenement
awarded by the Judgment to the Plaintiff, and to cause the same
to be possessed by such Plaintiff, or the possession thereof to be
delivered to the Plaintiff, or in other words a warrant in the
nature of the English Writ of habere facias possessionem, which
is the writ that follows the Judgment in the English Action of
Ejectment.

There is another observation, which it occurs to us to make,
relative to this Court, which is equally applicable to the Supreme
Court as to its process to compel appearance, and the proceeding
where the party does not appear. If the Officer, who is to serve
the process or make the arrest, returns that the party is not
found, the Court are to proceed ex parte. The consequence may
be that a person contracting a debt or other demand may have
left the Colony before any proceeding is instituted against him,
or, what sometimes happens, a fraudulent person may invent a
demand against an absentee; the Officer may very truly return
that the party is not found, and then he is certain of having an
irrevocable Judgment against him in a matter that he could have
no opportunity of answering, and the execution might be

* Note 59.
executed upon his property either in his absence or upon his return without a possibility of redress, or would be the foundation of an action against him in this Country if he returned here; and tho', in the latter case, the Judgment of the Court in New South Wales would only be prima facie evidence of the demand, yet he would probably be unable to rebut the presumption arising from such evidence. We therefore beg to suggest that, in cases of return of not found by the officer, before the Court proceed ex parte, it should be verified to them upon Oath that the Defendant, at the time of the Complaint instituted, was abiding some where within the Colony.

With respect to the Supreme Court, your Lordship will permit us to submit that, if the party summoned do not appear at the time and place of the Summons, that, before a warrant is issued for the arrest of the person, oath should be made of the amount of the debt or demand and that this should be confined to cases of debt, or demand for some specific goods or Chattels detained, and that the arrest should not take place where the object of the Suit is to recover possession of lands or tenements, unless it is intended by your Lordship that, in pleas for the recovery of lands or tenements, the Deft. should be arrested or holden to bail. The observations made upon the carrying the Sentence of the Governor's Court into effect, where the suit shall be one to recover possession of lands, tenements or any Interests therein, applies to this Court in page 15, namely that power should be given to issue process or a warrant commanding the Officer to cause the Plaintiff to be put into possession, and to deliver possession to him of the lands or tenements recovered by the Judgment.

In carrying the object intended into effect, all that relates to the forms of their proceeding in appointing days or periodical times of hearing, and in giving due notice between the parties, must necessarily be left to the Judges of the Court, when their general jurisdiction is by the Charter established, and general outline of their duty pointed out. With the few formal alterations therefore that have been suggested we think the Charter is calculated to answer the ends in view.

We have, &c.,

W. GARROW.
SAML. SHEPHERD.

1814.
17 Jan.

Salary for solicitors.

MR. JUSTICE BENT TO UNDER SECRETARY GOULBURN.

MR. BENT* takes the liberty of requesting Mr. Goulburn to inform him, what is the amount of Salary intended to be given to the Solicitors to be sent out to New South Wales, and also

* Note 60.
to the Depy. Judge Advocate of V. Diemen's Land, as it is almost the first Question asked by the Persons to whom He has mentioned the Situation; Mr. Bent had not yet mentioned the latter, as gentlemen at the Bar are at present attending Sessions. 11 Jany., 1814.

LETTERS PATENT TO ESTABLISH COURTS OF CIVIL JUDICATURE IN NEW SOUTH WALES.

In the Name, etc.

GEORGE P.R.

GEORGE, etc.—To all to whom these Presents shall come, Greeting. Whereas by our Letters Patent* under our Great Seal of Great Britain, bearing date at Westminster, the 2d Day of April in the 27th Year of our Reign, Reciting that, by Virtue of an Act of Parliament passed in the 24th Year of our Reign, We judged fit by and with the advice of our Privy Council by two several Orders, bearing date respectively on the 6th day of Decr., 1786, to declare and appoint the place to which certain offenders should be transported for the time or terms in their several Sentences mentioned to be the Eastern Coast of New So. Wales, or some one or other of the Islands adjacent; And that, Whereas We had found it necessary that a Colony and Civil Government should be established in the place to which such Convicts should be transported, and that a sufficient Provision should be made for the Recovery of Debts and determining of Private Causes between Party and Party in the Place aforesaid, We, taking the same into our Royal Consideration and being desirous that Justice should be administered to all our Subjects, did, of our especial Grace, certain Knowledge and mere Motion, think fit to grant ordain direct and appoint and by the said Letters Patent did for Us, our Heirs and Successors, will, grant, ordain, direct and appoint that there should be within the Place aforesaid a Court to be called The Court of Civil Jurisdiction, and that such Court should consist of the Judge Advocate for the time being, together with two fit and proper Persons inhabiting the said Place, to be appointed from time to time by our Governor, or in Case of his Death or Absence by our Lt. Governor for the time being, or of any two of them (whereof the Judge Advocate to be one), to which Court We did thereby give 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 Contracts,

* Note 61.
1814.
4 Feb.

Letters patent for courts of civil judicature.
Recitation of former letters patent.

Trespasses and all manner of other Personal Pleas whatsoever. And We did further Will, ordain and grant to the said Court full Power and Authority to grant Probates of Wills and Administration of the Personal Estates of Intestates dying within the Place or Settlement aforesaid. And our further Will and Pleasure was, And We did by the said Letters Patent for Us, our Heirs and Successors, direct, ordain and appoint that, upon Complaint to be made in Writing to the said Court by any Person or Persons against any other Person or Persons residing or being within the said Place, of any cause of Suit, the said Court should or might issue a Warrant in Writing under the hand and seal of the said Judge Advocate for the time being to be directed to the Provost Marshal, or such other officer as should be appointed by our Governor, to execute the Process thereof, which Warrant should contain shortly the Substance of the Complaint, and should either command such officer to summon the Defendant or Defendants to appear, or, in Case the Value of the Demand be £10 or upwards (of which Oath should first be made), command him to bring his, her or their Body or Bodies to take Bail for his or their Appearance before the said Court at a certain time or place, therein to be named, to answer to the said Complaint and to find sufficient Security for his, her or their performance of such Judgment, Sentence or Decree, as should be pronounced thereupon, or finally given upon an Appeal; and upon Appearance, Arrest or Non Appearance, or Return by the officer that the Defendant or Defendants could not be found, We did thereby for Us, our Heirs and Successors, ordain, direct and authorize the said Court to proceed to the Examination of the Matter and Cause of such Complaint, and, upon due proof made thereof either upon the Oath or Oaths of any Witness or Witnesses in Writing to be by him, her or them subscribed (for which purpose We did by the said Letters Patent empower and require the said Court to administer an Oath to such Witnesses as should be produced by either Party, Plaintiff or Defendant, or by the voluntary Confession of such Defendant or Defendants) to give Judgment and Sentence according to Justice and Right, and to award and issue out a Warrant or Warrants of Execution under the hand and Seal of the said Judge Advocate for the time being for levying the duty, adjudged or decreed to the Party or Parties Complainant, together with Costs of Suit, upon the Goods and Chattels of such Defendant or Defendants, and to cause Sale to be made of the said Goods and Chattels, rendering to the Party the overplus (if any be); and, for Want of sufficient Distress, We did thereby for Us, our Heirs and Successors, give full Power and authority
to the said Court to imprison the Defendant or Defendants, until Satisfaction be made by him her or them to the Plaintiff or Plaintiffs of the Duty decreed together with the Costs; and, in Case Judgement should be given for the Defendant or Defendants, We did thereby likewise give full Power and Authority to the said Court to award Costs to such Defendant or Defendants, and to issue the like Process of Execution for the same, as in Cases where Costs are awarded to any Plaintiff or Plaintiffs; and, if either Party should find him or themselves aggrieved by any Judgment or Decree to be given or pronounced by the said Court, Our Will and Pleasure was that He, She or They should and might appeal to the Governor of the Eastern Coast of New So. Wales and the parts adjacent, or, in Case of his Death or absence, to the Lieut. Governor for the time being, whom We did thereby empower and authorize to hear and determine the same and to issue Process of Summons to answer to such Appeal and the like Process of Execution, as the said Court was thereby directed and empowered to issue, and if either Party should find him her or themselves aggrieved by the Judgement or Determination of the said Governor in any Case, where the Debt or Thing in Demand should exceed the Value of £300 and not otherwise, our Will and Pleasure also was that such Party so aggrieved might appeal to Us or our Heirs and Successors in Council. And We did further Will and Ordain that no Appeal should be admitted from the Judgement of the said Court, unless the same should be interposed within 8 days after the said Judgement, nor from the Judgement of the Superior Court unless the same should be interposed within 14 days after the Judgement of such Superior Court; and further that the said Court might proceed in a summary way by foreign Attachment of Goods, Debts and Effects of Debtors in the Hands or Possession of other Persons, residing in the Place aforesaid. And We did further will and ordain that all Complainants, at whose Suit any Persons should be imprisoned, should make an Allowance to each of such Defendants after such Rate for every day, so long as such Defendants should be Kept in prison, as the said Court should direct, and, in default of payment thereof for one week, such Person should be discharged out of Prison, and such Discharge out of Prison should be a Discharge of the Debt unless the Complainant should, before any new Proceeding against such Defendants, pay or tender to them all the arrears of such Allowance from the time of the last payment to the time of such new proceeding. Provided always that such Defendants did make Oath before the Judge Advocate to his Satisfaction that he had not any Estate or Effects sufficient to
maintain himself with Necessaries in the Prison, otherwise that such Allowance be not made to him. And our said Letters Patent further Reciting that, Whereas it was necessary that a Court of Criminal Jurisdiction should also be established, within the Colony or Settlement aforesaid, with Authority to proceed in a more summary way than was used within this Realm according to the Known and established Laws thereof; And that, by an Act of Parliament passed in the 27th year of our Reign, It was enacted that His Majesty might, by his Commission under the Great Seal, authorize the Person to be appointed Governor, or the Lt. Governor in the absence of the Governor of such place as aforesaid, to convene from time to time, as occasion might require, a Court of Judicature for the Trial and Punishment of all such Outrages and Mis Behaviours, as, if committed within this Realm, would be deemed and taken according to the Laws of this Realm to be Treason or Misprision thereof, Felony or Misdemeanor; which Court should consist of the Judge Advocate to be appointed in and for such Place together with six officers of H. M.'s forces by Sea or Land, which Court should proceed to try such offenders by calling such offenders respectively before that Court, and causing the Charge against him her or them respectively to be read over, which Charge should always be reduced into Writing and should be exhibited to the said Court by the Judge Advocate, and by examining Witnesses upon Oath to be administered by such Court, as well for as against such offenders respectively; and afterwards adjudging by the opinion of the Major part of the Persons composing such Court that the Party accused was or was not (as the Case should appear to them) Guilty of the Charge and by pronouncing Judgment therein (as upon a Conviction by Verdict) of Death if the Offence be Capital or of such Corporal Punishment not extending to Capital Punishment, as to the said Court should seem meet; and in Cases not Capital by pronouncing Judgement of such Corporal Punishment not extending to Life or Limb, as to the said Court should seem meet; and that the Provost Marshall or other officer to be for that purpose appointed by such Governor or Lt. Governor should cause due Execution of such Judgement to be had and made under and according to the Warrant of such Governor or Lt. Governor in the Absence of the Governor under his hand and seal and not otherwise. Provided always that Execution should not be had or done on a Capital Convict or Convicts, unless five Persons, present in such Court, should concur in adjudging him, her or them, so accused and tried as aforesaid, to be respectively Guilty, until the Proceedings should have been transmitted to His Majesty and
CHARTER OF JUSTICE.

by him approved; and that the said Court should be a Court of
Record and should have all such Powers, as by the Laws of
England are incident and belonging to a Court of Record. We,
upon full Consideration of the Premises and of our especial
Grace, certain knowledge and mere Motion, thought fit to grant,
direct and appoint and by the said Letters Patent did accord-
ingly for Us, our Heirs and Successors, grant, direct ordain
and appoint that there should be within the Settlement and
Colony aforesaid a Court, which should be called The Court of
Criminal Jurisdiction. And We did thereby create, direct and
constitute the said Court of Criminal Jurisdiction to be a
Court of Record and that our said Court of Criminal Jurisdi-
cion should have all such Powers as are incident to a Court of
Record by the Laws of that Part of our Kingdom of Great
Britain called England. And We did further will, ordain and
appoint that the said Court of Criminal Jurisdiction should
consist of our Judge Advocate for the time being, together with
such Six officers of our Sea and Land Service as our Governor,
or in Case of his Death or absence our Lt. Governor, should by
Precept, issued under his hand and seal, convene from time to
time for that purpose; and that the said Court of Criminal
Jurisdiction should have power to enquire of, hear determine and
punish all Treason or Misprisions thereof, Murders, Felonies,
Forgeries, Perjuries, Trespasses and other Crimes whatsoever
committed in the place or places aforesaid, such Punishment so
to be inflicted being according to the Laws of that part of our
Kingdom of Great Britain called England, as nearly as might be,
considering and allowing for the Circumstance and Situation of
the Place and Settlement aforesaid and the Inhabitants thereof.
And It was Our further Will and Pleasure that our said Court
of Criminal Jurisdiction should proceed to try all offenders, by
calling them respectively before such Court and causing the
Charge or Charges against him, her or them respectively, when
reduced into Writing and exhibited by our Judge Advocate, to
be read over to such Offender or Offenders respectively, and by
examining Witnesses upon Oath to be administered by the said
Court of Criminal Jurisdiction, as well for as against such
offenders respectively; and that the said Court should adjudge by
the Opinion of the Major part of the Persons composing the same
as aforesaid that the Party accused was Guilty or Not Guilty of
the Charge so exhibited as aforesaid, and, if adjudged Guilty, that
the Court should proceed to pronounce Judgement of Death, if the
Offence be Capital, in like manner as if the Prisoner had been
found Guilty by Verdict of a Jury in that part of Our Kingdom of
Great Britain called England, or by pronouncing Judgement of
such Corporal Punishment, not extending to Capital Punishment, as to the said Court or the Major part of the Persons composing the same should seem meet; And in Cases not Capital by the Laws aforesaid by pronouncing Judgement of such Corporal Punishment, not extending to Life or Limb, as to the said Court or the Major Part of the Persons composing the same should seem meet. And It was Our further Will and Pleasure, And We did thereby ordain, direct and appoint that our Provost Marshal, or such other officer as should be appointed for that purpose by our Governor, or in Case of his Death or Absence by our Lt. Governor for the time being, should cause due Execution to be had and made of such Judgements as aforesaid according to the Warrant of our Governor, or in his absence of our Lt. Governor for the time being, under their hands and seals respectively and not otherwise. And We did by the said Letters Patent ordain and direct that Execution of any Judgement of Death should not be had or done on any Offender or Offenders, unless five Persons present sitting in Judgement in Our said Court of Criminal Jurisdiction should concur in adjudging such Offender or Offenders so accused and tried as aforesaid to be respectively Guilty, until the Proceedings in the Trial of such Offender or Offenders should have been transmitted to Us, our Heirs or Successors, and our or Their Pleasure should have been signified thereupon. And that Execution be not done in any Capital Case whatever without the Consent of our Governor or in Case of his Death or absence of our Lt. Governor. And in Case Execution should be suspended that the said Governor or Lt. Governor should apply to Us, our Heirs and Successors, for our or Their Direction therein. And our further Will and Pleasure was that all and every the Members of our said Court of Civil Jurisdiction respectively should, before they proceeded to sit in Judgement, severally make Oath well and truly to try the several Issues brought before them, and to give a true Judgment according to the Evidence, and that all and every the Members of our said Court of Criminal Jurisdiction should in like manner make Oath to make true Deliverance between Us, our Heirs and Successors, and the several Prisoners, who should by them be tried, and to give a true Judgment according to the Evidence. And We did thereby give full Power and Authority to Our Judge Advocate for the time being to administer such Oaths to the respective Members of our said several Courts. And further We, for preserving the Peace of Our said Settlements and the Islands thereunto adjacent, of Our special Grace, certain Knowledge and mere Motion, granted, ordained, directed and appointed, and, by the said Letters Patent did grant, ordain, direct and appoint
that our present and all our future Governors and Lt. Gov-
ers and our Judge Advocate for the time being should be
Justices of the Peace within the said Place or Settlement, and
that all and every such Justice and 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 with respect to the Inhabitants resid-
ing or being in the Place and Settlement aforesaid, as Justices
of the Peace had within that part of Great Britain called Eng-
land within their respective Jurisdictions. And Whereas, by
Virtue of the said Recited Letters Patent, the Court of Civil
Jurisdiction, thereby established within our said Territory of
New So. Wales and it’s Dependencies, was fully constituted and
appointed and has since continued to exercise and now does
exercise, within our said Territory and it’s Dependencies, the
various Jurisdictions and Authorities, offices and Functions,
granted to and vested in it by the said Letters Patent. And
Whereas, in consequence of the increased Population of the
said Territory and it’s Dependencies, the said Court of Civil
Jurisdiction has been found insufficient for the purpose of
administering Civil Justice to our Subjects, residing within the
said Territory and It’s Dependencies, or for determining private
Causes between Party and Party within the same, We have
thought fit to revoke, and We do by these Presents revoke so
much of the said Letters Patent herein before recited, as relates
to the Appointment of the Court of Civil Jurisdiction, and
every matter Clause and Thing relating thereto therein con-
tained; And Our Will and Pleasure is that as far relates to the
said Court of Civil Jurisdiction should henceforth determine,
and be null and void. And Now Know Ye that, in order to
provide for the better Administration of Civil Justice within
our said Colony of New So. Wales and it’s Dependencies, We
have, of our especial Grace, certain Knowledge and mere Motion,
thought fit to grant, ordain, direct and appoint, and by these
Presents do for Us, our Heirs and Successors, will, grant, or-
dain, direct and appoint that there be within the said Territory
and it’s Dependencies Three Courts of Civil Judicature to
respectively called “The Governor’s Court,” “The Supreme
Court,” and “The Lt. Governor’s Court.” And It is our Will
and Pleasure that the Governor’s Court shall consist of The
Judge Advocate for the time being, together with two fit and
proper Persons inhabiting the said Territory of New So. Wales
to be appointed from time to time by our Governor (or in Case
of his Death or Absence by our Lt. Governor for the time being),
or of any two of them (whereof The Judge Advocate to be one).
1814.
4 Feb.

Letters patent for courts of civil judicature. Constitution of supreme court; and of lieut.-governor's court.

And it is our further Will and Pleasure that the Supreme Court shall consist of a Judge to be appointed by Commission under our Royal Sign Manual together with any such two Magistrates of our said Territory and it's Dependencies as our Governor, or in Case of his Death or absence our Lt. Governor for the time being, shall by Precept under his hand from time to time appoint, or any two of them (whereof the Judge to be one). And It is our further Will and Pleasure that the Lt. Governor's Court shall consist of the Dy. Judge Advocate of Van Dieman's Land for the time being, together with two fit and proper Persons inhabiting our Island of Van Dieman's Land to be appointed from time to time by the Lt. Governor of Van Dieman's Land for the time being, or in Case of his Death or absence by the Officer Administering the Government of the said Island for the time being, or of any two of them (whereof the Dy. Judge Advocate to be one). And It is our Will and Pleasure that the said Governor's Court, constituted as aforesaid, shall have full Power and Authority to hold Plea of and to hear and determine in a summary way all Pleas concerning Lands, Tenements, Hereditaments and all manner of interests therein, and all Pleas of Debt, Account or other Contracts. Trespasses and all manner of other personal Pleas whatsoever, where the Sum in dispute shall not exceed £50 Sterling, or where the Value of the Lands, Tenements, Hereditaments or the Interest therein, or the Subject Matter of the Suit shall not exceed the said Value of £50 Sterling, excepting only such as shall arise between Party and Party resident in our Island of Van Dieman's Land, which shall be determined as hereinafter provided. And our further Will and Pleasure is, And We by these Presents for Us, our Heirs and Successors, direct, ordain and appoint that, upon Complaint to be made in Writing to the said Governor's Court by any Person or Persons residing or being within any part of our said Territory of New South Wales, save and except always our Island of Van Dieman's Land, of any Cause of Suit, the said Court shall or may issue a Warrant in Writing under the hand and seal of the said Judge Advocate to the Provost Marshal, or such other officer as shall be appointed by our Governor, to execute the Process thereof, which Warrant shall contain shortly the Substance of the Complaint, and shall either command such Officer to summon the Defendant or Defendants to appear, or, in Case the Value of the Demand be £10 or upwards, if the same arises from or by Virtue of any Debt or Detention of any Goods or Chattels (of which Oath shall first be made) command him to bring his, her or their Body or Bodies to take Bail for his, her or their appearance before the said Court at a certain time.
and place, therein to be named, to answer to the said Complaint, and to find sufficient Security for his, her or their performance of such Judgement, Sentence or Decree, as shall be pronounced thereupon, or finally given; and, upon appearance, arrest, or Non appearance and Return by the officer that the Defendant or Defendants cannot be found, in which Case of Non appearance and Return that the Defendant or Defendants cannot be found, it shall be previously verified upon Oath before the said Court that the Defendant or Defendants, at the time of the Complaint instituted, was or were abiding somewhere within the said Territory of New So. Wales, We do hereby for Us, our Heirs and Successors, ordain, direct and authorize the said Court to proceed to the Examination of the Matter and Cause of such Complaint, and, upon due Proof made thereof either upon the Oath or Oaths of any Witness or Witnesses (for which purpose We do hereby by these Presents empower and require the said Court to administer an oath to such Witnesses as shall be produced by either Party, Plaintiff or Defendant), or by voluntary Confession of such Defendant or Defendants to give Judgement and Sentence, according to Justice and Right, which Judgement and Sentence shall be final; and the said Governor’s Court shall and may award and issue out a Warrant or Warrants of Execution under the hand and Seal of the said Judge Advocate for the time being for levying the duty, adjudged or decreed to the Party or Parties complainant, together with Costs of Suit upon the Goods and Chattels of such Defendant or Defendants, and to cause Sale to be made of the said Goods and Chattels, rendering the Surplus (if any be) to the Defendant or Defendants; and, for Want of sufficient Distress, We do hereby for Us, our Heirs and Successors, give full Power and Authority to the said Governor’s Court to imprison the Defendant or Defendants until Satisfaction be made by him, her or them to the Plaintiff or Plaintiffs of the duty decreed, together with the Costs; and, in Case Judgement shall be given for the Defendant or Defendants, We do hereby likewise give full Power and Authority to the said Court to award Costs to such Defendant or Defendants, and to issue the like Process of Execution for the same, as in Cases where Costs are awarded to any Plaintiff or Plaintiffs. And It is our Will and Pleasure that the said Governor’s Court may proceed in a summary way by Foreign Attachment of Goods, Debts and Effects of Debtors in the hands or Possession of other Persons residing within our said Territory of New So. Wales. And It is our further Will and Pleasure that the said Supreme Court constituted as aforesaid shall be, and is hereby Constituted a Court of Record, and is hereby
authorized to hold plea of and to hear and determine all Pleas concerning Lands, Tenements, 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, except where the Cause of Action shall not exceed £50 Sterling. And We do by these Presents for Us, our Heirs and Successors, direct, ordain and appoint that, upon Complaint to be made in Writing to the said Court, by or on the Behalf of any Person or Persons against any other Persons whomsoever, then residing or being, or who at the time, when such Cause of Action did or shall accrue, did or shall reside within our Territories in New So. Wales or it's Dependencies, or in our Island of Van Dieman's Land, of any of the Causes of Suit aforesaid, unless the Cause of Suit shall not exceed the Value of £50 Sterling, the said Court shall and may issue a Summons in Writing under the Hand and Seal of the Judge, to be directed to the Provost Marshal, requiring the Party or Parties, Defendant or Defendants, to appear before the Court at a certain time and place therein to be appointed in the said Summons to answer the said Complaint; and, in Default of appearance, upon return of the said Summons at such time and place, the said Court shall and may, upon Oath being first Made of the Amount of the Debt or Demand, issue forth a Warrant under the hand and seal of the said Judge for the time being to take the Body or Bodies of such Defendant or Defendants and bring him, her or them before the said Court, at a certain time and place therein to be appointed, to answer to the said Complaint; and, in Case of Appearance or Arrest of the Body or Bodies of such Defendant or Defendants, to let such Defendant or Defendants to Bail upon giving sufficient Security (which We do hereby empower the Court to take) to abide and perform the final order of the said Court, or such final order and Judgement as shall be given upon any appeal to be brought in the said Cause, or to surrender him, her or themselves to the said Court, to be charged in Execution 'till the said Judgement shall be satisfied; or, in Default of finding Bail or giving such Security as aforesaid to detain the said Defendant or Defendants in Custody, until he she or they shall have found such Bail or have given such Security as aforesaid, or shall have Judgement or Sentence given for him, her or them upon such Complaint; and, after such Bail Bond or Security given as aforesaid or in Case such Defendant or Defendants shall be detained in Custody for Want of Bail or Security, We do hereby for Us, our Heirs and Successors, ordain direct and authorize the said Court to proceed to the Examination of the Matter and Cause of Complaint, upon
the Oath or Oaths of any Witness or Witnesses (which Oath or Oaths We do by these Presents empower and require the said Court to administer to such Witness or Witnesses, as shall be produced on behalf of either Party, Plaintiff or Defendant), or by the Confession or admission of such Defendant or Defendants in his her or their answer upon the like Oath or Oaths; and thereupon it shall be lawful for the said Court to give Judgement and Sentence according to Law and Equity, and to award and issue a Warrant or Warrants of Execution under the hand and seal of the Judge of the said Court to be directed to the Provost Marshal for the time being for levying the Debt Duty or Dammage, adjudged or decreed, to the Party or Parties, Complainant or Complainants, together with Costs of Suit, upon the Goods and Chattels of such Defendant or Defendants, or to cause Sale to be made of his, her or their Goods and Chattels, tendering to the Party the overplus (if any be); and, for the Want of sufficient Distress, We do hereby for Us, our Heirs and Successors, give full Power and Authority to the said Court to imprison the Defendant or Defendants, until Satisfaction be made by him, her or them to the Plaintiff or Plaintiffs, of the Debt, Duty or Dammage decreed or adjudged, together with the Costs of Suit; and, in Case Judgement shall be given for the Defendant or Defendants, We do hereby for Us, Our Heirs and Successors, likewise give full Power and Authority to the said Court to award Costs to such Defendant or Defendants, and to issue the like Process and Execution for the same, as in Cases where Costs are awarded to any Plaintiff or Plaintiffs. And It is our further Will and Pleasure that the said Supreme Court may proceed, by way of foreign Attachment of Goods, Debts and Effects of Debtors, in the Hands or Possession of other Persons, residing within our said Territories. And, if either Party shall find him, her or themselves aggrieved by any Judgement or Decree, to be given or pronounced by our said Supreme Court, in any Case whatever where the Judge of the said Court shall have differed in opinion with the Magistrates acting with him, and shall have protested against the Judgement or Decree of the said Court (such Protest being duly recorded), or in any other Case where the Debt or Thing in Demand shall exceed the Value of £300 Sterling, our Will and Pleasure is that He, She or They shall and may appeal to our said Governor, or in Case of his Death or Absence to the Lt. Governor for the time being, which Governor or Lt. Governor, as the Case may be, shall be assisted by the Judge Advocate.* And We do hereby authorize and empower him, with the Assistance of the Judge Advocate, to hear and determine the same and to issue Process of Summons.
1814.
4 Feb.

Letters patent for courts of civil judicature.

Appeals to privy council.

Procedure in cases of appeal.

Jurisdiction of lieut.-governor's court.

Procedure in lieut.-governor's court.

to answer such appeal, and the like Process of Execution as the said Supreme Court is hereby directed and empowered to issue, which Decision shall be final in every Case where the Debt or Thing in Demand shall not amount to the Sum of £3,000 Sterling. And if any Party shall find him, her or themselves aggrieved by the Judgement or Determination of the said Governor in any Case, where the Debt or Thing in Demand shall amount to or exceed the Value of £3,000 Sterling and not otherwise, Our Will and Pleasure further is that such Party so aggrieved may appeal to Us or to our Heirs and Successors in Council; and We do further will and ordain that no Appeal shall be admitted from the Judgement of the said Supreme Court to the Governor, assisted by the Judge Advocate, in any Case unless the same shall be interposed within 8 days after the said Judgements, nor from the Judgement of the Governor to us or to our Heirs and Successors in Council, unless the same shall be interposed within 14 days after such Judgement, nor unless the Party appealing shall give good Security to be duly approved of by our Governor or Lt. Governor as aforesaid for his her or their Performance of such Judgement, Sentence or Decree, as shall be finally given or pronounced thereupon, in at least Double the Amount of the Debt or Thing in Demand, or double the Value of the Lands, Tenements or Hereditaments, or other Estate in question. And It is our further Will and Pleasure that the said Lieut. Governor's Court, constituted as aforesaid for our Island of Van Dieman's Land, shall have full Power and authority to hold Plea of, and to hear and determine in a summary way all Pleas concerning Lands, Tenements, Hereditaments, and all manner of Interests therein, and all Pleas of Debt, Account or other Contracts, Trespasses and all manner of other personal Pleas whatsoever within our said Island of Van Dieman's Land, where the Sum in dispute shall not exceed £50 Sterling, or where the Value of the Lands, Tenements or Hereditaments, or the Interest therein, or the Subject Matter of the Suit, does not exceed the said Value of £50. And our further Will and Pleasure is, And We do by these Presents, for us, our Heirs and Successors, direct, ordain and appoint that, upon Complaint to be made in Writing to the said Lt. Governor's Court, by any Person or Persons against any Person or Persons residing or being within our said Island of Van Dieman's Land, of any Cause of Suit, the said Court shall and may issue a Warrant in Writing, under the Hand and Seal of the said Dy. Judge Advocate to the Provost Marshal, or such other officer as shall be appointed by our Governor or Lt. Governor, to execute the Process thereof, which Warrant shall contain shortly the
Substance of the Complaint, and shall either command such officer to summon the Defendant or Defendants to appear, or in Case the Value of the Demand be £10 or upwards, if the same arises from or by Virtue of any Debt or Detention of any Goods or Chattels (of which oath shall be first made) command him to bring his, her or their Body or Bodies, or to take Bail for his, her or their Appearance before the said Court at a certain time and place therein to be named to answer to the said Complaint, and to find sufficient Security for his, her or their performance of such Judgement, Sentence or Decree, as shall be pronounced thereupon, or finally given; and, upon appearance, arrest or Non Appearance and Return by the officer that the Defendant or Defendants cannot be found; in which Case of Non appearance and Return that the Defendant or Defendants cannot be found, it shall be previously verified upon Oath before the said Court that the Defendant or Defendants at the time of the Complaint instituted was or were abiding some where within the said Island, We do hereby for Us, our Heirs and Successors, ordain, direct and authorize the said Court to proceed to the Examination of the Matter and Cause of such Complaint; and, upon due proof made thereof, either upon the oath or Oaths of any Witness or Witnesses (for which purpose We do hereby by these Presents empower and require the said Court to administer an Oath to such Witnesses as shall be produced by either Party Plaintiff or Defendant) or by voluntary Confession of such Defendant or Defendants, to give Judgement and Sentence according to Justice and Right, which Judgement and Sentence shall be final; and the said Lt. Governor’s Court may and shall award and issue out a Warrant or Warrants of Execution under the Hand and Seal of the said Dy. Judge Advocate for the time being for levying the duty adjudged or decreed to the Party or Parties Complainant, together with Costs of Suit upon the Goods and Chattels of such Defendant or Defendants, and to cause Sale to be made of the said Goods and Chattels, rendering the Surplus (if any be) to the Defendant or Defendants; and, for Want of sufficient Distress, We do hereby for us, our Heirs and Successors, give full Power and Authority to the said Lt. Governor’s Court to imprison the Defendant or Defendants, until Satisfaction be made by him, her or them to the Plaintiff or Plaintiffs of the duty decreed, together with the Costs; and, in Case Judgement shall be given for the Defendant or Defendants, We do hereby likewise give full Power and Authority to the said Court to award Costs to such Defendant or Defendants, and to issue the like Process of Execution for the same, as in Cases where Costs are awarded to any Plaintiff.
or Plaintiffs. And It is our Will and Pleasure that the said Lt. Governor's Court may proceed in a summary way by foreign Attachment of Goods, Debts and Effects of Debtors in the hands or possession of other Persons resident within our said Island of Van Dieman's Land; and It is our further Will and Pleasure that, in all Cases in which Judgement shall be given by any of the said Courts in any Suit, which shall be brought to recover possession of Lands, Tenements or any Interests therein, the said Governor's Court, Supreme Court, and Lt. Governor's Court respectively may and shall issue a Warrant under the hand and Seal of the said Judge Advocate, Judge or Deputy Judge Advocate for the time being respectively, as the Case may be, addressed to the Provost Marshal or such other Officer as may be appointed by our Governor or Lt. Governor, to execute the same, to enter upon the Lands and Tenements adjudged or decreed to the Party or Parties Complainant, and to cause possession thereof to be delivered to the said Party or Parties Complainant; and the said Governor's Court, Supreme Court and Lt. Governor's Court respectively shall have full Power to award such Costs, and to issue the like Process of Execution for the same, as is hereinbefore directed in Cases where the Suit shall arise from or by Virtue of any Debt or Detention of Goods and Chattels. And Whereas it may frequently happen that the Estate and Effects of Persons, dying in our said Colony of New So. Wales and it's Dependencies, are wasted and embezzled, and their Debts contracted there remain unpaid, for Want of a proper Authority vested in some proper Person or Persons residing therein to take Care of the same, for the preventing of which Mischief We do hereby for Us, our Heirs and Successors, give and grant unto the said Supreme Court, and Do by these Presents ordain, establish and appoint that, when any Person or Persons within the said Colony and it's Dependencies, shall by his Will appoint any Person or Persons within the said Colony or it's Dependencies to be his, her or their Executor or Executors, then and in such Case the said Supreme Court upon proof made of the due Execution of the said Will is hereby authorized and required to grant Probate of the said Will under the Seal of the Court aforesaid whereby the Person or Persons so named Executor or Executors shall have full Power and ample Authority to act as such, as touching the Debts and Estate of his, her or their Testator; and, when any Person shall die within the Colony or it's Dependencies aforesaid intestate or not having appointed some Person or Persons to be Executor or Executors residing within the said Colony or it's Dependencies, that, in either of these Cases, the said Supreme Court shall and the same is empowered
to grant Probates of Wills or Letters of administration with an
Authentic Copy of the Will annexed (determinable upon any
Executor named in such Will appearing in Court and praying
Probate thereof) as touching the Debts and Estate of the
Person dying intestate, or not naming such Executor as afore-
said, that shall be or arise within the Limits aforesaid to such
Person or Persons then residing within the Jurisdiction of the
said Court, as shall be next of Kin to the Person so dying, or
his Residuary Legatee; and, in Case there shall be no such
Person within the said Jurisdiction, then to the Principal
Creditor of the Person so dying; and, for Want of any Creditor
appearing, then to such other Person or Persons as shall be
thought proper by the said Court; every such Person or Persons
to whom Administration shall be granted first giving Security
by Bond (respect being had to the Value of the Estate) to the
Judge of the said Court 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. And
It is Will and Pleasure that such Person or Persons, to whom
Administration shall be so granted, shall and may act in all
Respects as Administrator or Administrators touching the Debts,
Effects, and Estates of such Person or Persons, to whom he, she
or they shall take out Administration as aforesaid, which shall
be or arise within the said Colony. And It is our further Will
and Pleasure, and We do hereby for Us, our Heirs and Suc-
cessors, grant, ordain and establish that the said Supreme Court
shall also be a Court of Equity and have Equitable Jurisdiction
over the Person and Persons hereinbefore described and specified,
or limited for its ordinary Civil Jurisdiction as aforesaid, and
shall and may have full Power and Authority to administer Jus-
tice in a summary manner 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 Pænas and other Process
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 De-
crees and orders of the said Court of Equity in such manner and
form and to such Effect as our High Chancellor of Great Britain,
or as near the same as Circumstances will admit. And We do
hereby authorize the said Supreme Court to administer Oaths
and to frame such Rules of Practice, and nominate and appoint
such Clerks and officers, and to do all such other Things as shall
be found necessary for the Administration of Justice and the
due Execution of all or any of the Powers, granted to them by
these Presents, subject to the Approbation of our said Governor. And our further Will and Pleasure is, And We do hereby require and command that a Table of the Fees to be allowed to such Clerks and Officers shall be settled by the said Supreme Court with the Consent and Approbation of our said Governor, and shall be written out fair and constantly fixed up in some visible and open part of the Room or Place, where the said Court shall be held; and that it shall be lawful for the said Court, with the Approbation of the said Governor, to vary and alter such Table of Fees in such manner as they shall think fit. And We further will and ordain that all Complainants, at whose Suit any Defendant or Defendants shall be imprisoned by the Process either of the Governor’s Court or of the Supreme Court, or of the Lt. Governor’s Court respectively, shall make an Allowance to each of such Defendants after such rate for every day as such Defendants shall be Kept in Prison, as the said Courts shall respectively direct; and, in Default of Payment for one week, such Person shall be discharged out of Prison, and such Discharge out of Prison shall be a Discharge of the Debt, unless the Complainant shall before any new Proceedings against such Defendant or Defendants pay or tender to him, her or them all the arrears of such Allowance from the time of the last payment to the time of such new proceeding. Provided always that such Defendant do make oath before the Judge Advocate or the Judge of our Supreme Court or the Deputy Judge Advocate respectively, as the Case may be, to their Satisfaction that He or She hath not any Estate or Effects sufficient to maintain himself or herself with Necessaries in the Prison, otherwise that such Allowance be not made to him or her. And We do further will and ordain that the Persons so appointed by Us into the offices of Judge Advocate, Judge and Dy. Judge Advocate as aforesaid shall previously to their taking their Seats in the said Courts respectively take an oath duly to execute their respective offices together with the oath of Allegiance, which Oaths our said Governor or Lt. Governor for the time being is hereby empowered to administer accordingly, and that all and every other Member of the Governor’s Court, The Supreme Court and The Lt. Governor’s Court respectively, shall, before they proceed to sit in Judgement, severally make Oath well and truly to try the several Issues brought before them, and to give Judgement according to the Evidence. And We do hereby give full Power and Authority to our Judge Advocate, Judge and Dy. Judge Advocate respectively for the time being to administer such Oaths to the Members of our said Courts respectively. And We do hereby further
CHARTER OF JUSTICE.

will, ordain and direct that no Action, Cause, Suit or Proceeding, now depending in the Court of Civil Jurisdiction established by our said Letters Patent before recited, shall be avoided, abated, discontinued or annulled by the Cessation of the Authority and Functions of the said Court. But that the same shall remain in as full force and virtue as if the said Court of Civil Jurisdiction still possessed the Powers and Authorities, conferred upon it by the said recited Letters Patent, and shall be respectively transferred in their present Condition to, and subsist and depend respectively, and be prosecuted, tried and determined respectively in the said Courts, hereby constituted, according to the Amount of the Sum or Thing in Dispute, to all Intents and Purposes as if they had been first respectively commenced, had, brought and prosecuted in the said last mentioned Courts respectively; for which purpose We do further will, direct and appoint that all the Records Muniments and Proceedings whatever of and belonging to the said Causes, Actions or Suits respectively, shall be delivered over to and deposited and preserved either in the said Governor’s Court, or in the said Supreme Court, or in the said Lt. Governor’s Court, as the Case may happen to be. And further know ye that We, for preserving the Peace of our said Settlement, and the Islands thereunto adjacent, of our especial Grace, certain Knowledge and mere Motion, have granted, ordained, directed and appointed, and by these Presents do grant, ordain, direct and appoint that our present and all our future Governors, Lt. Governors and our Judge Advocate, Judge and Deputy Judge Advocate for the time being shall be Justices of the Peace within the said Territory and it’s Dependencies and all Places or Settlements therein, and that all and every such Justice and Justices of the Peace shall 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 with respect to the Inhabitants residing or being in the Places and Settlement aforesaid, as Justices of the Peace have within that part of Great Britain called England within their respective Jurisdictions. And these our Letters Patent or the Enrollment or Exemplification thereof shall be as well unto the said Courts respectively as unto all and every other Person or Persons whomsoever a sufficient Warrant and Discharge from time to time for all and whatever they shall do or execute in pursuance of our Royal Will and Pleasure hereinbefore declared. And Lastly our Will and Pleasure is, And We do hereby declare, that this our Charter shall be and remain in force only, until We shall be pleased to revoke and determine or alter the same. In Witness whereof We have
caused these our Letters to be made Patent Witness Ourself at Westminster the 4th day of February in the Fifty fourth year of our Reign. By Writ of Privy Seal,
BATHURST AND BATHURST.

COMMISSION* FOR JEFFERY HART BENT.

In the Name and on the Behalf of His Majesty

GEORGE P.R.

GEORGE THE THIRD, etc., To our Trusty and Well beloved Jeffery Hart Bent, Esqre., Greeting. We reposing especial Trust and Confidence in the Loyalty, Integrity and ability of you, the said Jeffery Hart Bent, do by these Presents constitute and appoint you to be our Judge of our Supreme Court of Civil Judicature in our Territory of N. S. Wales and its Dependencies, to have, hold, exercise and enjoy the said Office during our Pleasure and your Residence within the said Territory and its Dependencies, with full Power and Authority to hold the said Supreme Court, as established by our Letters Patent, bearing date the 4th Day of February, 1814; Given at our Court at Carlton House, the 7th Day of February, 1814, In the Fifty fourth year of our Reign.

By Command of H.R.H. The Prince Regent, In the Name, &c.,
BATHURST.

MR. JUSTICE BENT TO UNDER SECRETARY GOULBURN.

Sir, 6 Gray's Inn Square, 7 Feby.

Allow me to call your attention to the necessity of erecting a proper Court House in N. S. Wales. I find from my letter that the only place for that purpose was a Room 20 feet square, and which was also used as an Office for the clerks employed in the dispatch of the business of the Courts, and as a Repository for the Records of both Civil and Criminal Courts; being at the same time destitute of every convenience for any one of the Purposes, to which the Room was applied.

I have also to mention to you the name of Mr. Wm. Moore, of No. 3 Woodstock Street, Oxford Street, as a proper person to go out to New South Wales as one of the Attornies intended to be sent. His father was Under Sheriff of London and Middlesex to Mr. Alderman Heygate, and, dying in that Office, the duty was carried on through the year by his son. He served his Clerkship to his father, has been admitted an Attorney about 4

*N. Note 63.
years, is known to several Solicitors of Respectability, and also to Mr. Richards, the Chief Justice of Chester, and Mr. Hart, King’s Counsel at the Chancery Bar.

I venture to enquire after the progress of the Patent, and to hope that all obstacles are removed to the affixing the Great Seal.

I have, &c,

JEFFERY HART BENT.

COMMISSION FOR DEPUTY JUDGE-ADVOCATE ABBOTT IN TASMANIA.

8th February, 1814.

[A copy of this commission* will be found on page 267, volume VIII, series I.]

EARL BATHURST TO GOVERNOR MACQUARIE.

13th February, 1814.

[A copy of this despatch, which announced the appointment of solicitors, will be found on page 139, volume VIII, series I.]

MR. JUSTICE BENT TO UNDER SECRETARY GOULBURN.

Sir, 15th Feby., 1814.

I have to forward to you the name of Mr. Garling, of No. 13, New North Street, Red Lion Square, as being well qualified to go out as one of the Attornies to New South Wales. He has been some years admitted an Attorney in the Court of King’s Bench, and a Solicitor in the Court of Chancery; and has been acting as Managing Clerk in the Office of Mr. Winter, the Solicitor to the Bank. If he should be approved of, I should recommend him to be named as the first of the two Solicitors; He is a married Man and I consider him as likely to be of considerable use in the colony.

I have, &c,

JEFFERY HART BENT.

MR. JUSTICE BENT TO EARL BATHURST.

My Lord, Broxbornebury at Sea, 21 Feby., 1814.

I take the liberty of addressing your Lordship, in order to express the hope I had entertained of having had the honour of being presented to His Royal Highness the Prince Regent, and receiving the Honour usually conferred upon Professional Gentlemen filling similar Offices to the one I now hold.

I trust your Lordship will not think me a Man of so little a mind, as to do nothing without parade, and will give me credit when I add that my only inducement, when I ventured to make the request of your Lordship, was to raise a little the character of the Colony in the eyes of the World, and to do my duty

* Note 63.
towards those who might hereafter follow me in the Office. The Honour has been conferred upon Persons going to India as Advocate General to the Company, and I can scarcely suppose would be refused to one holding a Commission of Importance under the Prince Regent though in a minor Settlement.

I have the honour to announce that I received the Patent and Commission in time, and reached Portmouth some hours previous to the ship’s sailing.

Your Lordship may rely upon my doing everything in my Power for the advantage of the Colony and the satisfaction of your Lordship and I have the honour, &c.,

JEFFERY HART BENT

MR. JUSTICE BENT TO UNDER SECRETARY GOULBURN.

Dear Sir,

Corunna, 7th March, 1814.

I take the liberty of enclosing my letters to you, as a similar Indulgence had been given to my Brother and have to inform you also, of the Broxbornebury Transport, on board of which I am embarked, having been obliged to put into this Port, through stress of weather; we had contrary winds down Channel, but succeeded in beating out, and were going on tolerably well when last Tuesday we were assailed by a violent gale from the S.W. and N.W., which till Thursday, we were in great danger, and when day broke on Thursday found ourselves close upon Cape Turiano, a little to the Eastward of Cape Finisterre. We had great difficulty in getting off as we were within two miles of the coast, and also considerable danger in weathering the Island of Leserga, and getting into this port. The Convicts suffered greatly, everything they had, Bedding, etc., being washed from side to side by water we shipped. We have, by the assistance of the Transport Agent here, and the Officers of His Majesty’s Navy, succeeded in getting refitted, and we proceed on our Voyage tomorrow, But with considerable Risk, as we have lost our convoy, and there is none to be obtained here. In the hurry of Departure, I forgot to mention that, since the Statutes had been sent me, the 53d of the King has been published; I have to the 52d only. Will you have the goodness to direct that the Statutes for the 53d year of the King be sent the next ship. I have also had no copy of the Statutes* passed last Session for the better recovery of Debts in N. S. Wales sent to me; I suppose copies have been sent to the Governor, but for fear of omission presume to call the same to your recollection.

May I take the liberty, at the same time, of stating to you in confidence, that I felt a little hurt at being obliged to quit

* Note 64.
the country without an opportunity of paying my respects to the Prince Regent, or having those honours conferred which are generally given to Legal Situations of Importance. I felt it not upon my own account personally, but because it appeared to me necessary to raise the character of the Colony and add as much respectability as possible to the situation I am going to hold; certainly I was anxious for it on no other account; as I was deprived of the opportunity, owing to the short period before my departure, on which I received my Commission, perhaps, if not incompatible with established Rules, I may presume to hope for them.

I have, &c.,

JEFFERY HART BENT.

MR. F. GARLING TO UNDER SECRETARY GOULBURN.

13 New North Street, Red Lion Square,

Sir,

Encouraged by the flattering manner in which His Majesty's Government has been pleased to sanction Mr. Bent's recommendation in my behalf to the appointment of first Solicitor under the new Law Establishment in the Colony of New South Wales, I take the liberty respectfully of offering to you a few suggestions on the subject, and trust the liberality of my Lord Bathurst and yourself will excuse me on account of the necessity which is personally applicable to myself, as well as the Interest of His Majesty's Government, with reference to the character I shall have to sustain and the Duties to perform in the Colony.

Conceiving it will be my first duty, as I beg to assure you it will be my sincere Inclination, to watch anxiously over and defend the Interests of the Crown, I request you will allow me to point out the necessity of my frequently referring to the public Statutes and other Law Authorities; and, under these circumstances, hope I shall be excused in respectfully requesting to be furnished by the King's Printer with a Copy of the Statutes at Large and the Common Law and Chancery Reports; and I am the more induced to make this request as I believe those Works (so advantageous to professional Men in discharge of public duties) are not unusually granted to persons going abroad with legal appointments similar to my own.

I do not presume to doubt for a moment the Justice or Liberality of Governor Macquarie, of whom indeed I entertain a very different Impression, nor is it my wish to interfere in the smallest degree with any arrangement which may belong to himself; but, as my particular appointment is perfectly new in
that Colony, it has occurred to me as possible that His Excellency the Governor may be uncertain as to the extent of the Privileges to be attached to my Office without some previous Instructions from His Majesty's Government at Home; I beg therefore most respectfully to intimate that I am not only abandoning all my Professional Prospects here and with my whole Family quitting possibly for ever all those connections and Associations which must naturally have been most dear to me, and finally, in the arrangements necessarily incurring considerable Expence, while all pecuniary Emoluments, with the Exception of the Government Salary, is contingent and uncertain. Under these circumstances, I request you will have the goodness to lay before my Lord Bathurst my hope that His Lordship will be pleased to instruct Governor Macquarie to grant me those advantages, which, although of great Importance to myself, trench but little on the public resources of the Colony, and are, I understand, invariably extended to all the regular Officers of the Crown, vizt.:

A Residence with an allowance of Convict Servants and Rations from the Government Stores.

A Grant of Land with a moderate quantity of Stock from the Government Flocks and Herds, and a suitable number of Convict Servants as cultivators under the usual restrictions. I would further most respectfully point out the unprotected situation, in which my wife and Family would be left, should I happen to die at an early period after my arrival in the Colony, and without having realized a moderate competency by professional Industry. I trust therefore His Majesty's Government will not think me unreasonable or intrusive in hoping that, upon such an event, a portion of my Government salary (as is usually granted in similar cases) would be allowed to devolve to my widow and children.

I trust, Sir, that, neither in the nature or form of the requests I have made, I shall be deemed wanting in respect to His Majesty's Government and hope I shall be honor'd with a reply on the subject as early as it has had an opportunity of consideration on your part.

I have, &c.,

FREDERICK GARLING.

UNDER SECRETARY GOULBURN TO MR. F. GARLING.

Sir,

Downing Street, 2d June, 1814.

I have not failed to bring under Lord Bathurst's consideration at the earliest moment, which the variety of other Business rendered practicable, the various points to which your
Letter of the 19th Ultimo referred. I am directed to acquaint you that his Lordship will not fail to make known to Governor Macquarie the nature of the situation to which you have been appointed, and will give him such Instructions as may secure to you all those advantages which are conferred upon the most respectable Settlers upon their first arrival in the Colony.

But his Lordship is under the necessity of declining to accede to those requests, which relate to particular advantages, not given to other Official Servants; and he trusts that you will admit the impossibility of a compliance with them without giving rise to similar demands on the part of all other Colonial Officers, which it would be altogether out of his power to satisfy. For these reasons it is impossible to hold out to your Family any expectation of a Provision in case of your death at an early period, nor can his Lordship grant you the other less important indulgence, which you have solicited, of a collection of Statutes and legal Reports. His Lordship, however, trusts that the Colony will not suffer any inconvenience from the want of them, as a Set of the Statutes have been lately sent from this Country for the use of the Settlement.

I am, &c.,
HENRY GOULBURN.

EARL BATHURST TO GOVERNOR MACQUARIE.

5th July, 1814.

[In this despatch, Earl Bathurst notified the appointment of solicitors; see page 268, volume VIII, series I.]

SURVEYOR-GENERAL OXLEY TO GOVERNOR MACQUARIE.

Sir, Sydney, 10th Augt., 1814.

I take the liberty most respectfully to submit to the Consideration of Your Excellency the expediency of establishing a distinct Registry for the purpose of entering all Transfers, Sales and Leases of Lands, at the period such Transfer or Sale is made. I believe it to be at present Customary to make such Registry in the Office of the Judge Advocate, but, so blended with other papers of a different description, that the useful Object intended is very Inadequately obtained.

I would therefore respectfully suggest, that, in future, All Deeds, in any manner relating to the Sale of Grants or Leases, be separately Registered in a Book kept solely for that purpose; and that, as far as it is at present practicable, such Deeds, as appear now to be Registered, be extracted and re-entered in the

* Note 66.
above manner, by which means a complete and Uniform Register will be obtained, and great additional security given to all persons interested in the sale or Purchase of Landed Property.

I beg leave to subscribe myself, &c.,

J. OXLEY, Surveyor Genl.

GOVERNOR MACQUARIE TO EARL BATHURST.

7th October, 1814.

[ A copy of this despatch, relating to the control of the church, will be found on page 336, volume VIII, series I. ]

DEPUTY JUDGE-ADVOCATE BENT TO EARL BATHURST.
Sydney, New South Wales, 14th October, 1814.

My Lord,

1. I take the liberty of availing myself of the departure of the Ship Seringapatam for England, to inform your Lordship that, since I had last the honor of addressing myself to your Lordship, the Charter of Justice recently granted by His Majesty to this Colony has arrived; and that it was duly promulgated to the inhabitants of the Territory on the anniversary of the Birth of His Royal Highness the Prince Regent.

2. On this occasion, I hasten to request your Lordship will accept my sincerest thanks for the appointment conferred on my Brother* in the new arrangement of the Courts of Justice here; your Lordship's Kindness in this instance has been highly grateful to my feelings; and I beg to assure your Lordship that I shall ever retain a due sense of it.

3. In former letters, which I have had the honor of addressing to your Lordship on the subject of the administration of justice in this Colony, I ventured to recommend some alterations in the plan recently adopted which I thought deserving your Lordship's attention; and, had my letters on this subject reached your Lordship before the final arrangement of the present system, I think the suggestions they contained would have materially influenced your Lordship's determination; and, as essential variations are yet to be made in the criminal department, I hope I shall be excused if I still press those suggestions on your Lordship's notice, and point out some inconveniences in the present arrangement, which would be wholly removed by the adoption of those suggestions.

4. The establishment of two Courts of Civil Judicature not of concurrent jurisdiction, is, I humbly conceive, unnecessary, as the object of Dispatch may be as fully attained by the appointment of one Supreme Court of Judicature, consisting of a Chief

* Note 67.
Justice and an Assistant Judge, both Barristers, having full civil, criminal, equity, ecclesiastical and admiralty jurisdiction, if that Court were but assisted by proper subordinate Officers for the management of the details of business, such as the care and custody of the Records, the drawing up all processes and orders, and other business of that nature.

5. The existence of two Distinct Courts of Civil Jurisdiction, the Governor's Court, and the Supreme Court, is attended with some material inconveniences. Unless their Sessions are held at different times (which will be so harrassing to the suitors, the Officers of the Court, and the Colony in general, that I consider it almost impracticable), two rooms will be required for these Courts which will occasion an additional expence.

6. The constitution of these two courts will require every Session the attendance of four of the most respectable inhabitants of the Colony as Members. There cannot well be less than four Sessions in the year, each of which will be of from twenty to thirty days' duration. I have already, in former communications to your Lordship on this subject, explained how little the attendance of such members either forwards the business of the Court or assists the Judge, and that local circumstance renders it a grievous burden to the inhabitants, and I think it a point well worthy your Lordship's consideration.

7. Your Lordship will recollect that the jurisdiction of the Governor's Court is confined to cases where the subject matter in dispute does not exceed £50 in value, and that the jurisdiction of the Supreme Court is confined in terms to all matters exceeding the value of £50; that therefore these Courts are not of concurrent jurisdiction. This circumstance, I am very fearful, will give rise to much perplexity and confusion; for, in all cases of tort, all actions where the damages are of an uncertain nature, in many where there have been mutual accounts of long duration, and in many others founded quantum meruit or a quantum valebat, it is impossible for the parties to ascertain beforehand the precise amount of their damages or debt; so that after much litigation and expence, a plaintiff may find, that, from his demand, contrary to expectation, being reduced below, or raised above fifty pounds, he has brought his action corum non judice before a Court having no power to relieve him, and that he must therefore have recourse to another jurisdiction and incur fresh expence and trouble. Your Lordship will therefore observe that this mode of defining the several jurisdictions of these Courts is of an uncertain nature, and that the object would have been more readily obtained by considering the nature of the relief sought for, and founding on that the principle of
the division of their jurisdiction: for instance, by giving to the
one Court a jurisdiction according to the ordinary course of
law, and to the other an equity and ecclesiastical jurisdiction.

8. I now request your Lordship's indulgence towards a few
observations I am about to make on the Office of the Judge
Advocate of New South Wales. This Office of Judge Advocate,
and the duties annexed to it, have always been considered as
exclusively of a military nature, and the commission* under
which those duties are exercised (to which circumstance I entreat
your Lordship's most serious attention) is in form a Military
Commission. But in this colony the military duties of the
Office are so few that I have had occasion to sit only three times
on a General Court Martial, during a period of nearly five years;
while on the other hand the civil functions of the Office have
been extremely burdensome, important, and of great responsi-
bility, embracing more than the usual duties of a Judge, and
requiring a greater knowledge both of the theory and practice
of the law than it would become me even to think that I possess.
A consideration of these circumstances, and of my being a Bar-
rister of long standing, had induced me to hope that it would
have been thought proper to relieve me from the military duties
of Judge Advocate, and to have continued to me the exercise of
my other judicial functions under the title of and with the Com-
mission usually granted to a Judge. I sincerely hope that your
Lordship will indulge me in the gratification of this wish, and
that my conduct in this Colony will not be thought undeserving
of this mark of favor, which would be pleasing to my feelings, as
it would be consonant to my professional views, would con-
tribute much to my comfort, would gain me additional respect,
and promote the conscientious and independent discharge of my
duty. I trust I am not going too far, if I add that it is very
hazardous to those comforts and painful to my feelings to per-
form all the duties of a Civil Judge under the military title and
commission of Judge Advocate.

9. The division of business between the two Courts will cer-
tainly afford some relief to the Judge Advocate, but not so much
as your Lordship may perhaps suppose, as I have no doubt the
appeals will be more numerous in the decision of which your
Lordship will recollect that the Judge Advocate will hence-
forward be called upon to assist; and I could have wished much
that the New Charter had specifically pointed out the extent
of that assistance and the mode in which it is to be rendered.

10. I beg leave to observe to your Lordship that by the New
Charter the Supreme Court cannot issue Warrants of Arrest
against a Debtor in any case until a summons be first issued
and returned, and the defendant makes default by not appearing, and to express my fears that this provision will afford a great advantage to the fraudulent; and, in cases where the defendant is a resident of Van Diemen's Land, will enable him very much to harrass his, if not altogether to defeat his claim; and must necessarily protract the Suit very considerably.

11. In the observations, which I have just presumed to offer to Your Lordship on the Subject of the New Charter, I sincerely hope that your Lordship will do me the justice to believe that I am not actuated by any other motive, than the most earnest and purest wish by every effort and suggestion in my power to assist His Majesty's Ministers in rendering to this Colony that most invaluable blessing, a pure, judicious, independant and effective administration of Justice; the want of which has occasioned much confusion and many evils, the effects of which are still visible; if, in my attempts to accomplish this wish, I have occupied more of your Lordship's time than the subject required, I rely on your Lordship's goodness to excuse the error of a perhaps superabundant Zeal.

12. Strongly impressed by this wish, and after much and serious consideration, I would earnestly recommend to your Lordship the establishment of One Court of Justice in this Colony, to be called the Supreme Court of Judicature, to consist of a Chief Justice and one Assistant or Puisne Judge, both being barristers of five years standing, and invested with the several powers and authorities I have suggested in my various communications to your Lordship on this subject; in specifying which, I would humbly advise your Lordship to be guided by the Charter and Act of Parliament* on which the Jurisdiction of the Supreme Court at Calcutta is founded, so far as accords in your Lordship's opinion with the local circumstances of this Colony. I am of opinion that the unity and simplicity of this arrangement will prevent much trouble and confusion, that it will occasion a less rather than a greater expence to the Government, and will be an incalculable relief and protection to the inhabitants of this territory.

13. I should recommend that all appeals from the decrees of a Court thus constituted should be direct to His Majesty in Council, subject to such limitations and provisions as may be thought most expedient.

14. I feel it my duty to mention to your Lordship that some instances have lately occurred of very enormous offences perpetrated on the High Seas within the limits of this Government which have escaped punishment or investigation for want of a

* Note 69.
1814.
14 Oct.

104

HISTORICAL RECORDS OF AUSTRALIA.

Jurisdiction in this territory, to take cognizance of offences committed under such circumstances; and that, to meet such cases in future (which from the considerable intercourse subsisting between these Settlements and the Islands of the South Seas will probably be not infrequent), it would be advisable either to issue a commission for the trial of such offences pursuant to the Statute of the 46th of the King, Chapter 54, or otherwise, should it be thought proper to establish a Supreme Court of Judicature, as I have recommended, to invest that Court with a power to take cognizance of such offences.

15. In my former letters to your Lordship, I have already recommended the introduction of trial by Jury in Criminal cases; and I have now only to repeat that I still continue of the same opinion. I am very well satisfied that no difficulty will be felt in obtaining a sufficient number of respectable petty juries, whose verdicts, under the guidance of a discreet and well-informed Judge, would give general satisfaction. The class of Society from which they might be selected is numerous, and might in my opinion safely comprehend all persons possessed of a certain amount of property, who had for a certain number of years enjoyed the privileges of free men, provided they had never incurred in this territory those disqualifications which incapacitated men from serving on petty juries at home.

16. The class of inhabitants, from which I should advise the selection of a Grand Jury, is much more limited, not exceeding, I think, the number of forty persons, so that it would frequently consist of the same persons; and, tho' I believe this circumstance is by no means uncommon in many of the counties of England, it will be for your Lordship to determine whether it might or might not be attended with injurious consequences in this Colony.

17. This number might be extended by including the more respectable and affluent of those, who have been transported to this country, and who have either satisfied the full sentence of the law or received a free pardon. Whether such persons should be admitted into the more important offices of civil Society is a question of vast importance, to be decided not on any theoretical grounds, but on a sober and minute consideration of its most remote practical consequences. My own opinion is that such persons ought not to be forced forward into Office or Society, contrary to the current of general feeling; and that the early received and honest prejudices of others in different situations are entitled to much regard and consideration. I hardly know of any case in which such persons could with advantage or propriety be introduced to the offices of Magistracy.* The utility

* Note 70.
of a Magistrate depends mainly upon his general respectability and his influence over the minds of others springing from that respectability and a variety of other causes. Many circumstances conspire to prevent such persons, (more especially if they have belonged to the lower and uneducated order of Society) from ever attaining that respectability and influence which can alone make them useful as Magistrates. On these grounds I lamented the appointed of Mr. Simeon Lord to the office of a Magistrate; and I conceive it was as contrary to publick opinion as it was painful to my own feelings, as a Member of the English Bar. Such appointments may tend to degrade the Magistracy in the publick estimation, but will very seldom either produce benefit to the community or raise the character of the individual on whom the Office is conferred.

18. If under these circumstances your Lordship thought it more prudent, the system of trial by Jury might beneficially, though partially, be carried into effect so far as it related to a Petty Jury, and the Grand Jury might be dispensed with. In this case, all offences might be tried before the Supreme Court and a Petty Jury by information filed ex-officio by His Majesty's proper law Officer in the same manner as I believe is the practice in Scotland in all criminal cases, and occasionally in England in cases of misdemeanor. The present mode of administering criminal justice here undoubtedly requires serious alterations, and, upon the most mature consideration I feel myself fully justified in recommending the introduction of trial by Jury on one or other of the plans now submitted to your Lordship.

19. The want of any Court of Criminal Jurisdiction, and of a Court of Civil Jurisdiction of sufficiently extensive powers, renders the situation of the Island of Van Diemen's Land truly deplorable. The New Charter has partly provided for its wants by the establishment of the Lieutenant Governor's Court, but as the jurisdiction of this Court is wholly civil, and extends only to matters not exceeding the value of fifty pounds, much is still wanted. The expence and difficulty of bringing causes to trial at Sydney, when the parties and witnesses reside at Van Diemen's Land, are so enormous that the honest Creditor is not only defrauded but insulted. In Criminal cases, similar causes have the effect either of permitting the escape of offenders altogether unpunished, or of sanctioning their punishment contrary to law. It is hardly possible to convey to your Lordship's mind an accurate idea of the state of misrule and uncontrolled profligacy in all classes at that Settlement from these and other
1814.
14 Oct.

Courts proposed for Tasmania.

Issue of colonial ordinances by governor.

Necessity for legal recognition of ordinances.

Court-rooms proposed in wing of general hospital.

causes. They render the establishment of distinct Courts of Civil and Criminal Jurisdiction in that island a matter of the most urgent necessity.

20. Knowing how much the inhabitants of the Settlements there are split into parties, I should advise the committing the administration of civil justice in every case whatever might be its nature or amount, in the first instance, to a single Judge, provided that Judge were a Barrister, reserving an appeal in all cases exceeding One Hundred Pounds in value, to the Supreme Court of Sydney, granting to such Judge such powers and authorities as are essential to the effectual administration of Justice. The administration of Criminal Justice I should in all cases entrust to a Court to consist of the same Judge and a certain number of the Magistrates of the Island under such provisions as are usual or might be thought necessary.

21. Filling the situation I do, I deem it a prudent and necessary measure on my part to direct your Lordship’s attention to the power exercised by the Governor of this Colony* of making laws of a most important and highly penal nature, and of imposing duties and taxes; and to remark that such power is not founded on any Act of Parliament, nor provided for by the Governor’s commission. These laws are in general issued by the Governor under the appellation of Government and General Orders—sometimes in the form of Proclamations—and are published in the Sydney Gazette. At all times they emanate from the sole authority and will of the Governor, and are made, revoked, altered or partially dispensed with as that will directs. But as cases may arise wherein the Judges may be called upon to enforce these Orders in their several Courts, and as they are bound by their oaths and their consciences to decide according to law, I hope your Lordship will deem it a matter of importance that this power should be fixed on solid grounds, so as to secure the interests of Justice, and to prevent the possibility of misunderstanding and disturbance. I would further recommend that all Colonial laws should be published with as much solemnity as possible, and be registered in the Courts of Justice. Should any of the measures I have had the honor to propose be considered worthy of being carried into effect, I should advise that they be founded on an act of Parliament, in which case I hope your Lordship will keep this subject in view.

22. Since I communicated to your Lordship the inconvenience experienced from the want of a proper place for the assembling of the Courts of Justice, the Governor has communicated to me a letter† from your Lordship suggesting the propriety of appropriating one of the wings of the New Hospital† to this purpose.

* Note 71.
† Note 72.
I have with the Judge of the Supreme Court visited the Northern wing of the Hospital, originally intended for the residence of the Colonial Surgeon, and we have jointly recommended to the Governor the fitness of this building for the purpose required. I am of opinion that this wing is sufficient to afford two convenient Courts of Justice together with proper offices for the Judge, and the several Officers of the Court, and a jury room, if it should be required. It will be sufficient for the wants of this Colony for many years, is peculiarly to be recommended from its capacity of being entirely detached from the Hospital, and can be fitted up for the purpose with little or no expense to the Government. The Governor has not yet returned any definite answer to this recommendation, but I trust that it will not be deemed wanting in moderation, as the building is otherwise destined for the residence of the Surgeon, who might be accommodated in the southern wing of the hospital, which contains two excellent dwelling-houses intended for the residence of two Assistant Surgeons.

23. I cannot conclude this letter without offering my sincerest thanks to your Lordship for the liberal increase of my Salary to the sum of £1,200. But at the time this indulgence was extended to me, your Lordship perhaps was not aware that the appointment of an additional Judge to preside in a separate Court would be attended with a material diminution of my emoluments, as there have been several fees taken by the Judge Advocate since the foundation of the Colony, amounting in the whole to something considerable to one in my circumstances, of which I am now deprived. By Regulations lately made under your Lordship's instructions, I am no longer provided with fuel; the issue of rations to my family is discontinued, and, although I have acted as Principal Magistrate of the Colony since my arrival till the present moment, I am no longer allowed the indulgence of having any Servants victualled from His Majesty's Stores. I was in hopes I should not have been deprived of these latter advantages, as I understood from Mr. Cooke, the Under Secretary in the Colonial Department, at the period of my leaving England, that they were to be part of the emoluments attached to my Office. These losses more than counterbalance the late increase of my Salary. The duties of my situation have been more laborious, and from local circumstances more difficult of performance, than those of any of his Majesty's Judges abroad. I have filled the office of Judge of the Court of Vice Admiralty here for some time, to which there is not any salary annexed. I have at all times been ready to assist the Governor with the best advice my abilities would enable
me to give, and at his desire done much business wholly unconnected with the duties of my Office. I may with truth add that my circumstances and my health have suffered from my time being so much engrossed by the multiplicity of my functions. These considerations will, I hope, excuse my application to the liberality of his Majesty’s Government for a still further increase of my salary.

24. Unknown as I am to your Lordship except from the situation I hold in this Colony, it may be presumption in me to intimate to your Lordship that I have for nearly five years performed all its various duties at a difficult period and wholly unassisted, that I have exerted myself to the utmost to perform them with diligence and impartiality, and have at all times been ready to do everything in my power to promote the welfare of the Colony. But I have little prospect of obtaining an independence here by any length of services. I hope I shall therefore be pardoned if under these circumstances I venture to suggest to your Lordship that, in the event of a vacancy in any of the Judicatures in the East Indies, it would be my highest ambition to be thought worthy of your Lordship’s patronage and an appointment there.

I have the honor to subscribe myself, with the utmost deference, My Lord, &c,

ELLIS BENT.
BENT TO GOULBURN.

The Representation I had the Honour of making to you as to the Courts of Justice in this Colony, I have found perfectly correct. There is not a Public Building of any kind for the administration of Justice; the whole business has been carried on in the Judge Advocate's Office, which is barely sufficient for the purposes of the Clerks discharging their various duties, and for the keeping the necessary Records; and, when any of the Courts are assembled, their Business must necessarily be at a stand.

In consequence of my Lord Bathurst's directions* for the converting one of the wings of the General Hospital* to this purpose, I viewed the Building and submitted my ideas to His Excellency the Governor, a copy of which letter with the Governor's answer I herewith transmit. I have subsequently viewed the Building in conjunction with His Excellency, and, I find that his ideas and mine do not coincide on the subject, the Governor having expressed his determination to put the Courts of Justice under the same roof with the patients and contending that that was the meaning of my Lord Bathurst in naming one of the Wings of the Hospital.

The Pile of Buildings known under the name of the General Hospital consists of a centre and two detached wings; the centre is divided into two grand compartments, having a separate entrance to each, with a ward on each side the entrances, and Similar apartments above. The Governor understands by one of the wings of the Hospital one of those compartments into which the centre Building is divided; on my part, I should understand by the term Wing one of the detached Buildings, on the same line with the centre, and enclosed within the same wall, and which are allotted, the Northern for the Residence of the Principal Surgeon, the Southern for the Houses of two Assistant Surgeons. All the Buildings are at this moment incomplete and unoccupied, and it will be proper to add that all the Surgeons are now occupying houses which have usually been allotted for their residence.

In referring you, Sir, to my letters to the Governor on this Subject, I trust it will not appear too much to have hoped that a Building, destined solely for the private, personal accommodation of the Principal Surgeon, should be converted into a Court-house for the Administration of Public Justice at a time when there was an absolute necessity of a Building for that purpose; and the more so when it is considered that, if the Plan I proposed should be adopted, no expence would be thrown upon the Government at Home, and no further expence incurred than was necessary to fit up the Building for its original design, that

* Note 72.
it can be easily and cheaply separated from the Body of the Hospital, that no other Court house need be erected, and the Buildings so converted would do away further expence for a long series of years. The Principal Surgeon might be well accommodated with one of the Houses in the Southern Wing, one of the Assistant Surgeons in the other; and, if another Assistant was necessary in that Department, he might certainly be provided with a residence at an infinitely less expence than a Courthouse could be built in another situation. I cannot conceive the Principal Surgeon can have any objection to either of the Houses in the Southern Wing. For my own part, I should neither expect nor desire a superior residence.

The Governor on the other hand proposes to fit up two of the Wards of the central Building for the Courts of Justice, Apartments, though large, perfectly inconvenient for the purpose, requiring considerable alteration and Subdivision, and under the same roof with the Wards destined for the reception of Patients of every description.

The Governor's main reason for this determination is, that it will be merely for a time till another Courthouse can be erected, preferring the private personal accommodation of the Principal Surgeon or the private convenience of an Assistant Surgeon (for it is reducible to that) to the proper, due and solemn administration of Justice, and inflicting, I may say, an unnecessary degradation on the Office, the character and the Persons of His Majesty’s Judges in the Colony.

I have to request you, Sir, to lay the case before my Lord Bathurst, any decision of His Lordship I shall most willingly submit to. And I have, &c.,

JEFFERY HART BENT,
Judge of the Supreme Court N. S. Wales.

[Enclosure No. 1.]

MR. JUSTICE BENT TO GOVERNOR MACQUARIE.

Sir,

Sydney, 3d October, 1814.

I feel it incumbent upon me to submit to your Excellency the Ideas which have occurred to my mind, from repeated examination of the Hospital, as to what part would be most fit to be converted into Courts of Justice and the alterations requisite for that purpose.

The Northern Wing appears to me the part best adapted, and I should propose to your Excellency the following distribution of the Apartments.

The Building contains 4 apartments in each of the two Stories, the Southernmost on each story, with a private communication
between them, are now preparing, I believe, as Chambers for myself, which purpose they will answer extremely well. The large and small apartments, adjoining on the lower story, appear to me to be suitable for the sitting of the Criminal Court, and a retiring room for the use of the Members; the remaining room on that Story I should recommend to be appropriated to the Sitting of the Supreme Court. These purposes I think the Apartments will answer very well, considering the Building was not originally so destined. There remains only three apartments over the Courts, which I should hope would not be considered as too much to be appropriated, together with the detached Offices, for my own private accommodation. There is another circumstance, which particularly points out the appropriation of this Wing for Courts of Justice, which is the great ease with which this Building can be entirely separated from the Body of the Hospital, which, whether I consider the Situation of the Patients, or that of the Persons engaged in the administration of Justice, or of those in attendance on the Courts, is in my opinion a Matter of the most essential importance.

I beg leave further to observe that I have viewed the Building in conjunction with the Judge Advocate, and communicated to him my Ideas on the Subject, and am authorized by him to say that the arrangement I have the honor of submitting to your Excellency, so far as it concerns him, perfectly satisfies his wishes, or expectations with regard to the Courts of Justice.

I have, &c,

J. H. BENT, J.

[Enclosure No. 2.]

GOVERNOR MACQUARIE TO MR. JUSTICE BENT.

Sir,

Sydney, 3rd Octr., 1814.

I have the honor to acknowledge the receipt of your letter of this day's date.

I have already given orders to prepare that part of the General Hospital, which can be best and most conveniently spared from the original purpose, for which it was intended, for a temporary Court of Civil and Criminal Judicature, and Chambers for yourself. But I shall very gladly make any alteration that may be more agreeable to you, in case it shall not interfere with the original design of these Buildings.

At present I am extremely busy preparing my Dispatches for England, but, as soon as I have dispatched the Seringapatam, I shall be happy to accompany you and the Judge Advocate to view the Apartments now fitting up for the Courts to assemble in.

I have, &c,

L. MACQUARIE.
1814. 16 Nov.

Oath and declaration of justice of peace for New Zealand.

I, THOMAS KENDALL, of Sydney in the Territory of New South Wales, Esquire, Do Swear that, as a Justice of the Peace at the Bay of Islands and throughout the Island of New Zealand in all Articles as a Justice of the Peace I will do equal right to the poor and to the rich after my cunning wit and power and after the laws and Customs of the realm of England and Statutes thereof made. And, etc.

[Here followed a repetition of the oath and declaration taken by William Henry; see pages 56 and 57.]

THOMAS KENDALL.

Dated 16th November, 1814. ELLIS BENT, Judge Advocate.

30 Nov.

Rooms allocated for court-house.

GOVERNOR MACQUARIE TO EARL BATHURST.

30th November, 1814.

[In this despatch, Governor Macquarie reported the arrangements for a court-house; see page 380 et seq., volume VIII, series I.]

Mr. Justice Bent to Under Secretary Goulburn.

Sydney, New South Wales,

16th December, 1814.

Sir,

I had the honour of forwarding to you by the Ship Seringapatam, copies of the correspondence between Governor Macquarie and myself, respecting the Rooms to be fitted up for the Courts of Justice. I now transmit Duplicates of the same, and also copies of what has subsequently passed on that subject. I think it proper to be mentioned that the Governor Macquarie has never consulted on that point, either with the Judge Advocate or myself, though, as persons materially affected by his determinations, we might reasonably have expected that his Ideas would have been fully laid open to us; and, from the tone of his answer to a recapitulation of the arguments I thought it my duty to lay before him, It is plainly to be gathered that he expected the signification of his resolutions should preclude us from any expression of our sentiments, though on a point in which our Characters, our Comforts and the decorous administration of Justice were so deeply involved. I have no doubt in my own mind that, before the decision of His Majesty's Government shall be known, that Governor Macquarie will have appropriated

* Note 45.
the Wings of the Hospital to their original design (the private dwellings of the Surgeons) and that His Majesty's Courts of Justice will have been compelled to sit in the wards of a Common Hospital; and I cannot refrain from saying that it strikes me with the greatest surprize that, out of the large expenditure within this Colony, No Governor has conceived it part of his duty, or felt the necessity, of erecting a Town Hall, or Court House for the suitable accommodation of the Courts of Justice; But that at this moment the Colony should be destitute even of a Single Room for the Meeting of the Magistrates. Upon this subject I have only to add, that I have been actuated solely from a wish to give a character and a consequence in the eyes of the Colony to His Majesty's Courts, and that all ideas of private advantage have been far from my mind. I have sustained considerable personal inconvenience since my arrival, but, not being aware of the sentiments of my Lord Bathurst with regard to a residence for myself, I Declined the having any expense incurred on that account.

I have further to inform you Sir, that the salary of my Clerk, which was directed to be paid out of the Colonial Police Fund from the 1st Feby., 1814, is still due and unpaid, though it is nearly five months since his arrival here, Governor Macquarie having postponed the payment on account of the lowness of the Fund, till the 1st January next, though the balance in the Treasurer's hands, as published in the Sydney Gazette, was upwards of £1,200. I venture, Sir, in consequence to express a wish, that those Salaries, which have been charged on that Fund by the Government at home, should be directed to be paid out of it previous to any other disbursements.

By His Majesty's Charter, every thing done by the Supreme Court, in its ecclesiastical jurisdiction, must be under the Seal of the Court. A Seal for that purpose having been omitted to be furnished from England, I have been under the necessity of directing one to be made in the Colony; I have taken as the Model the Seal of the Supreme Courts in India, viz., The Royal Arms with a Legend or Exergue around "Seal of the Supreme Court New South Wales." Should this not meet the approval of His Majesty's Government, It will be necessary to supply the want; and upon the arrival of a Seal from England, the one, I have been under the necessity to order, shall be destroyed.

I have, &c.,

J. H. BENT,
Judge of the Supreme Court N. S. Wales.

1814. 16 Dec.

Negotiations with L. Macquarie for accommodation for law courts.

Salary of clerk to J. H. Bent.

Seal for supreme court.

Sgr. IV. Vol. I—H
 Completion of temporary court-house.

Necessity for sittings of supreme court.

Internal fittings for court-room.

Former recommendation.

Criticism of L. Macquarie's decision re courts of justice.

HISTORICAL RECORDS OF AUSTRALIA.

[Enclosure No. 1.]

GOVERNOR MACQUARIE TO MR. JUSTICE BENT.

Sir, Government House, Sydney, 1st Decr., 1814.

The contractors* for erecting the General Hospital having reported to me that the four large Wards now fitting up as a temporary Court House, will certainly be completed by the 31st of the present month, and also that the two Rooms at present fitting up, in the Principal Surgeon's Barrack, for your accommodation as Chambers will be completed by the same time, I deem it proper to give you this early official Information thereof, in order that you may be enabled to assemble the Supreme Court of Civil Jurisdiction as soon as it may suit your convenience.

I am persuaded I need not suggest to you the propriety and expediency of assembling the Supreme Court for the Dispatch of the Judicial Business of the Colony at as early a period in the ensuing year as you conveniently can. The temporary Court House, as I have already stated, will be perfectly ready for opening the Supreme Court any day after the 1st January next you may think proper to appoint.

As I do not exactly understand how the inside of the Room for the Supreme Court ought to be fitted up, I request you will be so good as to favor me with your own Idea on the Subject; with a plan of the manner in which you wish it to be done, and I shall order the Inside of the Room to be fitted up in conformity thereto.

I have, &c.,

L. MACQUARIE.

[Enclosure No. 2.]

MR. JUSTICE BENT TO GOVERNOR MACQUARIE.

Sir, Sydney, 5th December, 1814.

I have to acknowledge the Receipt of your Excellency's Letter of the 1st Insr. relative to the Apartments now fitting up for the Courts of Justice in the General Hospital. In my letter of the 3d Octr. last,† I had the honor to submit to you my Ideas on this subject, and to recommend the appropriation of the Building, originally destined for the Residence of the Principal Surgeon, to that purpose, and in which I had the concurrence of the Judge Advocate.

Your Excellency's disapprobation of this proposition recommended by His Majesty's Principal Secretary of State, and by His Majesty's Principal Law Officers in this Colony, has given me much uneasiness, and the more so, as, from all I can learn, the Sole ground of your Excellency's declining to adopt this arrangement is that it will interfere with the accommodation

* Note 72.  † Note 73.
of the principal Surgeon; for I had hoped that your Excellency would have thought with me that the provision of suitable Courts for the administration of Justice ought not to be obstructed by any private consideration of this nature; and I never could have expected that your Excellency would have deemed the Wards of a Common Hospital likely to be very soon occupied by Patients of all descriptions, as a fit place for the assembling of His Majesty's Courts of Justice, when a convenient, eligible, detached, unoccupied Building was ready and capable of being appropriated for that purpose at a considerably less expence to the Crown.

I feel it my duty to state to your Excellency my difference of opinion on this subject, and to point out the advantages and disadvantages of the respective plans. I recommended the north Wing of the Hospital to be appropriated to the purpose in question because it is completely detached from the Body of the Hospital, and is capable of being exclusively devoted to this object without interfering with any other department. Its rooms are sufficiently spacious, and the distribution of them affords peculiar advantages in the essential points of communication, access and Retirement. In my opinion this Building may with advantage to the Public Service be permanently appropriated to the administration of Justice, and may thereby altogether relieve His Majesty's Government from all expence or anxiety on this subject, and no greater expence will be incurred by the adoption of this Plan, than will attend the carrying into effect the temporary arrangement proposed by your Excellency.

In consequence of a representation from me, one of the Wings of the Hospital was directed by Earl Bathurst to be appropriated to the use of the Courts of Justice, and in the conversations I had on this subject with the Under Secretary of State, when the Plan was produced, I certainly, and I have every reason to believe he understood by the Term Wing one of the detached Buildings which your Excellency now calls the Surgeon's Barracks.

The Wards of the Hospital proposed by your Excellency to be converted into temporary Courts of Justice, I may venture to say are deficient in every convenience except that of being spacious. It is highly desirable that Courts of Justice should be easy of access to all, but more particularly to the Judges and Officers of the Courts; and, from the peculiar constitution of the Courts of this Colony, the proper administration of Justice must be effectually obstructed unless the Judges and members of the Courts have the means of frequent retirement and of unobserved mutual communication on the different questions of difficulty.
and importance to be determined by their decrees. The Wards of the Hospital are obviously deficient in both these respects; so far from their affording any Room in which the Judges and Members may conveniently retire for consultation, there is not a single place where the Judges can conveniently robe themselves or to which they may with delicacy withdraw for the common purposes of nature; and there is but one and that a narrow Entrance to each of these Wards, and that must be indiscriminately open to all. These deficiencies cannot be remedied without altering the external Walls of the Building itself, and incurring other considerable expences. The rest of the Hospital must shortly be occupied by Patients labouring under different diseases, and this circumstance may in a variety of ways be injurious both to the sick and to those who are prepared to be placed so very near and under the same roof.

From my earliest I have been taught to look upon the administration of Justice not only as an object of the first importance, but as the very object and basis of civilized Society, and upon the office of a Judge as one of proportional importance and of eminent Trust. This is a country where the best Interests of Society require that their character should on all occasions be upheld. I think, therefore, that I might reasonably have felt hurt if my own private comfort had been postponed to that of Mr. Wentworth. But it becomes a most imperative duty in my eyes to remonstrate with your Excellency on the unnecessary degradation of my character and Office, and the injury it must sustain in the public opinion by your Excellency devoting a Building so suited to all the uses and purposes of the administration of Justice to the accommodation of a single Individual, and placing his Majesty's Courts of Justice and Judges in the Wards of a common Hospital.

I beg to suggest to your Excellency that the detached Building is at present unoccupied, and that the Principal Surgeon may be conveniently accommodated in one of the Houses of the Wing destined for the Assistant Surgeons, and that if necessary a House might be built for another Assistant Surgeon both in a much shorter time, and at a much less expence than must be incurred in the erection of a Court House. I may sum up these observations by adding, that there is not any Building except the one in Question that is fit for a Court House, while there are several which would conveniently accommodate an Assistant Surgeon.

I have to inform your Excellency that notwithstanding the inconveniences I have sustained from the want of proper Chambers for study and dispatch of business (a single Bedroom to
the incumbrance of my Brother's Family being all he could give), I am quite ready to assemble the Supreme Court as soon as the Court Room is ready and the Members are nominated, though it is my opinion that Public convenience will be consulted and Business in the end be forwarded by postponing the Meeting of the Supreme Court until the arrival of the Solicitors appointed for the Colony, even should they not arrive till after the 1st of January next.

I defer proposing any Plan for the interior arrangement of the Apartments destined for the Courts of Justice, until your Excellency has had an opportunity of seriously considering the contents of this letter; when, should your determination remain unchanged, I will pay an early visit to the Rooms in preparation and state what in my Judgment will be required.

I have,

J. H. Bent, J.

[Enclosure No. 3.]

GOVERNOR MACQUARIE TO MR. JUSTICE BENT.

Sir,

Government House, Sydney, 6th Decr., 1814.

I have been favoured with your letter of yesterday's date, and regret that you should have deemed it necessary to address so long a one to me on a Subject on which you had already been so fully in possession of my sentiments and determination from the conversation that took place between us in one of the Rooms of the General Hospital on the 14th October last.

I see nothing in your last letter that throws any new light on the subject, or that is of sufficient weight to induce me to alter my original determination upon it. It is therefore unnecessary to agitate it any further by correspondence.

I shall be glad to receive from you, at your convenience, your plan for the interior arrangement of the Apartment now fitting up for a temporary Court House in the new General Hospital.

It is for you to decide how far it would be proper to postpone assembling the Supreme Court for the dispatch of the Judicial business of the Colony after the 1st January next, but according to my Judgment the sooner it is assembled after that date the greater will be the convenience and accommodation to the Public.

I have, &c.,

L. Macquarie.

DEPUTY JUDGE-ADVOCATE BENT TO GOVERNOR MACQUARIE.

Judge Advocate's Office,

Sydney, 17th February, 1815.

I beg to acknowledge the receipt of Your Excellency's Letter to me of the 8th instant, with the several enclosures acknowledged.
therein mentioned, relative to certain circumstances* which have occurred on Van Diemen's Land, and to the situation of the Settlements there, of which Your Excellency does me the honor to request my serious consideration and advice.

I beg to inform you that I have attentively perused and considered all the different papers and matters to which you have been pleased to call my attention, and as to the papers No. 1 relative to the charge against Mr. Francis Williams, I am of opinion that, as this charge has already been submitted to the Magistrates at Hobart Town, who have not thought proper to commit Mr. Williams for trial, and have sent up only the copies of the depositions of Mr. Edward Lord and Mr. Bush, and, as there are not any witnesses on the Spot to substantiate the charge, it would be advisable for Your Excellency to refrain from taking any steps in this matter for the present.

As to that part of inclosure No. 2, which relates to the plundering of the house of Dennis McCarty, and as to enclosures No. 3 and 4, I have only to recommend that, in these and all other similar cases, the Magistrates should take full, correct and minute depositions of all the facts from the persons injured, and all others who can give material evidence, as early as possible after the outrage, and exert all such means as they conceive best adapted for identifying the guilty, and issue their Warrants for the apprehension of those, to whom reasonable suspicion attaches; the constable in the execution of these Warrants may be assisted by a Military force, if necessary, or, if such cannot be spared, I conceive it would be proper to Swear in a sufficient number of additional Constables, who might be employed in the pursuit of the offenders, and who could legally call upon all His Majesty's Subjects to assist them when reason requires. It appears very clear that those, concerned in these outrages, cannot be taken without some extraordinary exertions, and trouble and expense; it might therefore be always advisable to offer rewards to those who should apprehend and bring in any run away prisoner or other notorious offenders, who have fled from Justice.

As to that part of enclosure No. 2, which relates to the notice, served by Dennis McCarty on Lieutenant Governor Davey, and the Magistrates of Hobart Town, I am not prepared to offer any opinion to Your Excellency, not being sufficiently informed of the circumstances which have given rise to the notice, nor of the particular point on which my opinion is required. I will merely observe in general that no person can maintain an action against a Justice of the Peace for any thing done by him in the execution of his office, without first giving a written notice to

* Note 74.
such Justice of his intention, in which he must express the distinct cause of his complaint; which is done in the technical Language adopted in Law pleadings; upon this subject I may further add that the one Warrant under which Dennis McCarty is now confined in the Gaol at Sydney is irregular, in not expressing sufficiently the cause of his commitment, which is necessary in all commitments by Magistrates, that it may appear on the face of them, that they have not exceeded the bounds of their Authority. I would wish also to mention that a man “Thomas Bailey” is sent up from Port Dalrymple, and confined in Gaol here, without any Warrant, and that both these Persons made application to me for their discharge, under the Habeas Corpus Act, but that I have declined to interfere in the business, on account of certain doubts which I entertain, relative to the construction of that Act. In the case of Bailey, I think it is to be lamented, that the Magistrates did not either commit him for Trial, and take the necessary measures for giving effect to the prosecution, or otherwise dis-charge him.

As to the charges against Peter Mills, they appear to rest in a great measure, in the evidence of Thomas Hinton, an accomplice, and I regret that the Magistrates have not been able to send up other depositions in corroboration of Hinton’s testimony, which in certain points appear to be weakened by other depositions. No steps can at present be taken towards the trial of Mills, John Thomas or Dennis Curry, as I do not find any of the witnesses have arrived to support the charges on which they are committed. I do not find any thing in the papers before me, that bears against the latter person Dennis Curry. I now come to that part of Your Excellency’s letter, in which you observe that your late Proclamation had not been attended with the desired effect, and request my legal opinion as to what steps may be most adviseable to adopt, under the present peculiar circumstances of Van Diemen’s Land. The two principal objects seem to be, to bring in all run away prisoners, or others, who have fled from Justice, and to adopt such measures as may diminish this evil in future; and here I feel it necessary to express my conviction that all plans of police, however judicious in other respects, must be insufficient and inadequate to the maintenance of good order in the Settlements at Van Diemen’s Land, until there are proper Gaols there, and competent courts of civil and criminal Jurisdiction to try and punish delinquents of every description, without the necessity of having recourse to the dilatory, expensive, and I may say almost impracticable method of applying to the courts of Justice, at Sydney; until
such a system is adopted, I can only recommend some precau-
tionary measures. I would advise the employment of a body of
armed Constables, or Soldiers, acting under the civil authority,
in the sole and active pursuit of the description of persons above
mentioned, against whom the Magistrates should issue their
Warrants in His Majesty’s name, accompanied with a descrip-
tion of their persons; upon the apprehension of any such persons,
if any serious Felonies are laid to their charge which can be
substantiated by legal evidence, the Magistrates would do right
to commit them for trial, and to transmit to me the depositions
taken in the several cases, together with the names of the
prosecutor and witnesses, and the bonds to prosecute and give
evidence; in the case of free persons apprehended, associating
with Bushrangers and leading an idle and disorderly life, if no
specific charge of felony or other outrage can be brought against
them, I should recommend the Magistrates to proceed against
them under the vagrant act, and to punish them accordingly.
I would also advise the very frequent mustering of all prisoners,
and the apprehension and punishment of all such who are found
out of their habitations after a certain hour, or going from one
district to another without a written pass, given by a Magis-
trate or their Master. I should require all Masters, to whom
prisoners are assigned as domestic Servants, to see that they
retire to their places of rest at proper hours, and to give imme-
diate notice to the nearest Magistrate or Constable of the flight
of any of their Convict Servants. All persons harbouring, con-
cealing, or in any way assisting felons, or run away prisoners,
should be brought to Justice, and punished as strictly as the
Law will allow. All compounding or compromising of felonies
and other offences should be discouraged and punished, and every
facility and support be given to the prosecution of offenders. It
is the duty of all persons, who have suffered by the depredations
of others, to prosecute the offenders, and for that purpose they
should resort to a Magistrate as early as possible after the
commission of the offence, and make a deposition on Oath of all
the circumstances of the case, which deposition should be
strengthened by the depositions of all, who can throw any light
upon the transactions; when the offender is taken, the party
and the different witnesses should be bound with sureties to
prosecute and give evidence; the expences of the prosecution
should be defrayed out of the Police Fund, and, where the
parties are really poor, they should be allowed a compensation
for their trouble and loss of time. One or more of the Magis-
trates should sit daily for the hearing all complaints, taking
depositions and transacting the business, arising out of the
matters above mentioned, and a strong night watch be kept up in the town; those, who live on contiguous farms, at a distance from a town, might be exhorted to associate, for their own defence, by keeping watch and giving Mutual alarm and assistance when required.

Above all, the Magistrates should be impressed with the conviction, that to them is intrusted the important office of preserving the Peace of the territory, and that the value and efficacy of every place must depend upon their activity, impartiality, firmness and intelligence.

My being unacquainted with the precise local circumstances of the Settlements at the southward prevents me from offering any precise plan of police for your Excellency's consideration, and obliges me to confine myself to the general observations, I have already made.

Should the measures which may be taken prove fruitless, and should the disturbances at Van Diemen’s Land, continue as flagrant as ever, and threaten a general and ruinous disorder, I know of no other Step which can be adopted in such a case but the declaration of Martial Law, and adopting the most summary measures and punishments for the restoration of tranquility; but, as many inconveniences and evils would follow such a Step, it ought not to be taken, but on mature deliberation and a perfect conviction of its necessity.

Having endeavoured as far as I am able to fulfil Your Excellency’s wishes on this subject, I have now the honor to return the Papers transmitted to me by Your Excellency and to subscribe myself,

Sir, &c.,

ELLIS BENT.

GOVERNOR MACQUARIE TO EARL BATHURST.

24th February, 1815.

[A copy of this despatch and its enclosures, which reported the drafting of new port regulations by deputy judge-advocate Bent, will be found on page 394 et seq., volume VIII, series I.]

GOVERNOR MACQUARIE TO EARL BATHURST.

24th March, 1815.

[In this despatch, Governor Macquarie reported the delay of Mr. Justice Bent in opening the supreme court; see page 466, volume VIII, series I.]
1815.
25th April, 1815.

Proclamation of Martial Law by Lieut.-Governor Davey.

[Proclamation of martial law in Tasmania.]

Governor Macquarie to Earl Bathurst.

22 June, 1815.

Refusal to admit ex-convicts as attorneys.

[In this despatch with its enclosures, Governor Macquarie reported the refusal of Mr. Justice Bent to admit ex-convicts as attorneys; see page 479 et seq., volume VIII, series I.]

Governor Macquarie to Earl Bathurst.

1st July, 1815.

Proposed recall of E. and J. H. Bent.

[In this despatch, Governor Macquarie recommended the removal of Ellis and J. H. Bent; see page 620 et seq., volume VIII, series I.]

Deputy Judge-Advocate Bent to Earl Bathurst.

Sydney, New South Wales, 1st July, 1815.

Disagreement between L. Macquarie and E. Bent.

My Lord,

1. I am sorry to have to communicate to your Lordship, that a difference of opinion between Governor Macquarie and myself relative to the regulations of this port and the correspondence to which it has given rise, as well as other circumstances of His Excellency's conduct towards me, which have occasioned me much anxiety and alarm, render it necessary for me not only to trouble your Lordship with a concise statement of the matter to which I have above alluded, but to request your Lordship's attention to the very unpleasant situation in which I am at present placed.

2. Sometime since the Governor delivered to me a draft of certain port regulations or rather of a code of laws regulating the trade to this Port, and the conduct of persons engaged in it while in this harbour, requesting at the same time that I would peruse and put them into legal form and language: in the course of an attentive consideration of them in compliance with this request, I found so much that appeared to me directly adverse to the laws of England, and to that system which has been established by the Legislature at various times for the regulation of the trade between the Mother Country and its Colonies, and which the Governor of this Colony is bound by

* Note 75.
† Note 76.
‡ Note 77.
BENT TO BATHURST.

oath to support, that I considered it to be my duty, to submit to the Governor my observations on the subject, accompanied by a reference to the different Acts of Parliament on which they were grounded.

3. In consequence of this step, I had the honor of an interview with his Excellency, at which, after admitting that he had not thought it necessary to peruse the authorities to which I referred, and that my observations might be perfectly legal, his Excellency contented himself with remarking that the local circumstances of the Colony required regulations which might materially depart from the law of England, and have the appearance of being arbitrary and (in direct opposition to my opinion given to him as the principal law officer of the Crown) nevertheless required me, as such law officer, to draw up the regulations referred to me by him, with such alterations only as were approved by him in certain marginal notes* annexed to them.

4. Painful as it was to my feelings to be forced into such a situation, I felt myself called upon by a sense of duty to decline the heavy responsibility, which it appeared to me I should incur by a compliance with his Excellency's request, and the charge to which I felt I should expose myself by attempting to give the form of law to regulations, many of which I did and do believe to be illegal.

5. The Governor has observed that the peculiar circumstances of this Colony require its Port regulations to be different from those of any other British Colony. The only peculiar circumstances, of which I am aware, that at all concern this question, are those which require the adoption of some precautions to prevent the escape of persons transported to this Colony, For at present this Port is open to the importation of every description of merchandise on paying the regulated duty. On this point, I should imagine that this Colony, in respect to the escape of its convicts, may not be improperly compared to His Majesty's plantations in the West Indies in respect to the escape of their Negroes; where, I believe, it was never thought necessary to subject the free persons to restraints such as those contained in these regulations. The object in question may be effected, (as far as it can be effected merely by regulations), by obliging each person about to leave the Colony to present himself at the Secretary's office, and by mustering the Crews and Passengers on board of every vessel at the very moment of its departure: but by no means requires any essential deviations from the Plantation Laws.† I have most seriously and attentively examined this

* Note 78. † Note 79.
1815.
1 July.

Tendency of proposed regulations to increase power of governor.

Proposed regulations inferior to English law and impossible to draw up.

Doubts re powers of governor to issue regulations.

Claim of governors to make laws.

Local laws made by governors on personal responsibility.

subject, and am satisfied that the due enforcement of the Plantation laws here would be highly beneficial to the general interests of His Majesty's Government and revenue, and that any material departure from them has no other tendency, and cannot be adopted with any other view, than that of increasing the influence of a Governor by giving him a power to make on this subject such regulations as he may think proper, and consequently to enforce or dispense with them in particular cases or in favor of particular persons according to the dictates of a discretion subject to no control. In many respects I will venture to say that the very objects of these regulations are much more amply and more certainly provided for by the law of England than they are by the regulations themselves, which your Lordship will see; from the very extensive subject they embrace, it is almost impossible to reduce them into technical language, and at the same time to avoid the palpable dangers of two great abbreviation, within any moderate compass.

6. But admitting that local circumstances did require any material deviations from the law of England on this subject, it highly concerns me as a Judge to enquire whether the Governor of this Territory, under the pretence of local circumstances requiring it, can abrogate Acts of Parliament which he is sworn to enforce, and establish (not measures meant to meet a pressing and temporary emergency but) a permanent system, affecting the general trade and commerce of the Colony, in many respects totally adverse to the spirit of the Plantation Laws.

A slight review, however, of these regulations, and of the general orders* passed from time to time by the Governor, will satisfy your Lordship that a Governor of this Colony claims and exercises a power to make laws in this Colony, not merely bye-laws and police regulations, but general laws, upon all subjects, intended to be binding upon all classes, highly penal in their consequence, and in many instances directly contrary to the spirit and principles of the law of England, and the enforcing of which is in many cases referred not to the Courts established by His Majesty, but to the decision of one or more Magistrates.

I may further add that, in by far the greater number of cases, this power is exercised without the smallest reference to His Majesty's law officer and without any enquiry how far the law of England may have provided for the subject matter of them, and that they are not regularly registered in any of the Courts of Justice here, nor, as far as I have been enabled to learn, submitted to His Majesty for approval.† I hope I am not presuming too much when I express a humble confidence that it never could

* Note 45. † Note 80.
be intended that so vast a power should be placed in the hands of any one man without the smallest provision against its abuse; a power which, as far as this Colony is concerned, and under the bare pretence of local circumstances, I will be bold to say, sets the Governor of New South Wales above the Legislature of Great Britain, and at once resolves the rule of action here into the mere will of the Governor, a will not subjected to any previous advice or control.

My Lord, I feel it my duty as one of His Majesty’s Judges, anxious to perform my duty conscientiously, humbly to offer my opinion, formed after an intimate experience of this Colony, that where there is reason to suppose that local circumstances require extraordinary deviations from the laws of England, that the Governor should point out these circumstances to His Majesty’s Ministers, and that the remedy should come from that quarter which can alone give it legality. But that a Governor of N. S. Wales of his own authority implied from, but by no means granted by the words of his commission, should make laws imposing penalties of £500, or hard labour at the Coal Mines for three years, upon free British subjects to be inflicted at the discretion of magistrates, who cannot be supposed to be conversant in the laws of their country, or experienced in the regular mode of administering justice according to the forms of that law, is a circumstance which I cannot but consider to be wholly unknown to His Majesty’s Ministers.

7. The Governor, in his answer* to my observations, says it is not to be expected that the subordinate Officers of the customs here should be acquainted with the minutiae of the Plantation laws; but those laws are well known to the Masters of Ships trading here, and I conceive it to be the duty of the Naval Officer, who is here the principal officer of the customs and is liberally compensated for his trouble, to make himself acquainted with them, and give the proper instructions to those employed under him, and, were he once apprised of the necessity of it, I am sure he would do so: but the truth is that, according to the present system, the Naval Officer is himself the mere Agent of the Governor, levying and receiving, or discharging or giving credit for duties, not according to the practise of the Colonies or the system laid down by the Commissioners of Customs, or according to any settled system whatever, but simply according to the directions of the Governor. I have always understood that ignorance of the law was no excuse for disobeying the law, and that the public had a right to expect that persons, who accepted situations requiring knowledge of a peculiar description, should bring with them the degree of knowledge necessary

* Note 78.
to the performance of their duty: it is certainly highly desirable that that ignorance should be removed, but the system of Governor Macquarie has a necessary tendency to foster and encourage it, and, if the argument proposed by him were followed up and acted upon to its full extent, it would lead to a total neglect and disavowal of both the law and the authority of the Mother Country.

My Lord, the state of this Colony has most essentially altered within the last ten years; yet the system adopted by Governor Macquarie is the same as prevailed when its population was almost wholly a Convict population; many of those Convicts have now become affluent, very many respectable free settlers and merchants have established themselves here, and a free generation is rising into existence. These circumstances require the consideration of His Majesty's Ministers, and of themselves operate as a powerful check upon the peculiar circumstances alluded to by the Governor. In a Colony so situated, I have important judicial functions to exercise, and as a matter in which I consider both my conscience and my responsibility are concerned, I wish only to be informed whether I am justified in considering the orders of the Governor as the rule of my judicial conduct, without enquiring whether or not they are conformable to the law of England.

8. I now beg to transmit for your Lordship's consideration copies of the Port regulations referred to me, and of my observations thereon with the Governor's marginal notes, which I have endeavoured to arrange so as to consult perspicuity and to abridge your Lordship's labour in considering the subject; and I have added for your Lordship's further observation the Port regulations now in force, and copies of the Governor's answer to my observations, and of the correspondance which has taken place between His Excellency and myself on this subject.

9. I now beg to assure your Lordship that on this and every other occasion I have been actuated only by a sincere wish to discharge my duty according to law, and that I have ever been zealous to render the Governor every assistance in my power; and I humbly hope that I may with some confidence appeal to the whole of my conduct, since I have filled the offices I have the honor to hold, as the best criterion of the truth of my assertion. I am solicitous to satisfy your Lordship, that, throughout this business, I have acted conscientiously and from a feeling that I should not be doing my duty, if I advised the Governor to adopt, and assisted in drawing up regulations contrary to the law of the land, and in my opinion both inexpedient and beyond the Governor's legal authority to enforce.
10. But it gives me much concern that I have to complain of other parts of His Excellency's conduct towards me. I had considered that the peculiar circumstances under which I came to this Colony, my standing at the Bar, and the offices I hold, entitled me to expect from the Governor that consideration, confidence and personal respect, which are essentially necessary to the proper performance of my duties. But it seems that the Governor considers me merely as a Subaltern Officer, a mere cypher, a person sent out simply for his convenience and merely to execute his commands as one of his staff. His Excellency has thought proper to tell me, that it was my duty to wait every morning at Government House to receive His Excellency's commands; and unequivocally to inform me that he considered me as an officer of the civil staff, and comprehended in an order which he thought proper to publish, directing that no officer whatsoever of the civil staff should go more than seven miles from Sydney without his special permission. I beg now to state to your Lordship that I never did or could consider my appointment as a military one, that such a supposition is incompatible with the due performance of its functions, that I have never drawn any military or staff allowance of any kind, nor have any military rank or honours. And I appeal to your Lordship whether the holding such a tone to, and attempting to impose such a restraint on a person filling the stations of principal civil and criminal Judge of this territory, a magistrate throughout its extent, and Judge of the Court of Vice Admiralty here, is not both arbitrary and illegal. I conceive that, as His Majesty has thought proper to confide such important duties to me, I have a right to expect that a Governor will so far confide in me as to suppose that I will not neglect them or be delayed by unnecessary absences. The restraint attempted to be imposed upon me manifestly tends to diminish my respect in the public opinion, and would reduce me to a worse and more dependent situation than that of my clerk, and, in reference to my conduct, was both unnecessary and unjust, for I have not slept out of my own house for eighteen months, and my absence from Sydney has never but once exceeded ten days, and then in company with the Governor. But it is the favorite maxim at Government House that Sydney is a garrison and that the Government is a strictly military Government, and according to that maxim the Colony is governed.

11. While I am on this subject, I hope I shall be excused if I direct your Lordship's attention to the tenor of my commission of Deputy Judge Advocate* of N. S. Wales, a copy of which I

* Note 81.
have now the honor to transmit. I trust your Lordship will agree with me in opinion that that title is beneath the importance and unsuited to the character of the judicial functions annexed to it. By it I am placed in a most equivocal situation in regard to the Governor, and so long ago as October, 1811, in a letter* which I had the honor to address to the Earl of Liverpool, I pointed out to His Lordship how much the comforts and independance of a Judge Advocate in the exercise of his judicial functions might be endangered by the conduct of a Governor, though at that time I was far from imagining that I should have to apply this observation to Governor Macquarie. I am now convinced that it is impossible for me, unless some alteration takes place in the opinions and conduct of Governor Macquarie, honestly and uprightly to perform my duties under such a commission, without a total sacrifice of my peace of mind, and injury to my health already much broken. I trust these considerations will induce your Lordship to recommend that, with the functions of a Judge, I should also have the title, and that independance of the Colonial Government which in my opinion is so essential to the upright execution of my Office.

12. Notwithstanding it has greatly interfered with my other functions, and was in my opinion improper that the principal Judge of the Criminal Court should perform the ordinary duties of a Police Magistrate, a wish to render myself as useful as possible has induced me till of late to preside at the weekly meetings of the magistrates. Under these circumstances, I think I had a right to expect that any general order, touching those magistrates as a body, would be communicated to me, before it made its appearance in the Sydney Gazette; I was therefore much hurt at seeing the General Order, a copy of which I have the honor to inclose, inserted in that official paper without the smallest previous intimation to me, or, I believe, to any of the magistrates, by which the magistrates are severely and publickly reprimanded for the neglect of certain orders relative to the signing the petitions of persons applying for pardons. The Magistrates of this Colony, I am sorry to say, have not the means of commanding that respect which is necessary to the efficient performance of their duties, and I cannot but think that such a conduct on the part of the Governor is calculated to diminish even that little which they do command.

I conceive it to be by no means consistant with a sound, and liberal policy for any Government to hold up those who are entrusted with the execution of the laws to public censure, and that on the present occasion particularly, when the matter in

* Note 82.
question concerned the Governor's private convenience only, a private admonition to the persons alluded to would have answered every good purpose. To myself it was wholly inapplicable, and, as to the circular letter alluded to in the order, it had never been communicated to any of the Sydney Magistrates or to myself. Under these circumstances, I conceived it to be my duty to point out my view of this matter to the Governor, who simply assured me that I was not the object of the order in question, but seemed to consider that my feelings were too acute, and added that he would cashier any magistrate who would not attend to his orders; an expression however hasty, which I cannot but think highly indicative of the Governor's habits of thinking on these subjects and illustrative of the observations I have before made. The state of my health and a conviction, that under existing circumstances I could no longer be useful, has since induced me to discontinue presiding at the weekly meetings of the magistrates. I believe the Governor has considered my not having made a previous communication of this step to himself a mark of disrespect to him. It was not by any means so meant by me, for I am unconscious of ever having been guilty of disrespect towards his Excellency on any occasion; but I feared that the Governor would misconstrue the communication and consider me as applying for permission to do that which I conceive His Majesty's Charter placed within my own discretion.

13. I am satisfied of the necessity of a professional person presiding at the meetings of the magistrates in this territory for some time to come, but I am at the same time of opinion that, in a Colony circumstanced as this is, he should be consulted in the nomination of these magistrates; and, taking it for granted that none would be appointed but those who were deserving of confidence, I think that to them should be entrusted the execution of the laws, the control and superintendence over the gaols, and the prisoners confined under the sentences of the Courts of Justice, and the carrying the same into execution; and that, as they in the course of their duties must necessarily have the best opportunities of judging of the characters of individuals, they should have not only the nominal, but the actual granting of licenses for selling spirituous liquors, upon which last circumstance the peace and good order of the Colony greatly depend.

14. Though I have little doubt that His Majesty's Government intended to intrust the Magistrates with the exercise of these powers, (for such seems to be the proper duties of Magistrates and the natural construction of the Charter), yet in
Control of magistrates by L. Macquarie.

Method of control exercised by L. Macquarie.

point of fact they possess no such authority; they seem to be rather Agents of the Governor than a part of the government. What I consider to be the greatest impediment to the effectual administration of justice here is the direct interference of the Governor in the duties of the Magistrates: His Excellency is unfortunately not satisfied with the general control and superintendence of their department, but seeks to have the very conduct of it, and to take to himself, all the patronage and influence belonging to it. I consider such a policy injurious in several ways; it renders the magistrates if not contemptible at least of no weight in the eyes of the public; it has a tendency to encourage an ignorance of and to make them careless and inattentive in their duties, and teaches them too often to resort and appeal to the Governor and to shelter themselves under his responsibility; it deters persons of knowledge and talents from acting as magistrates, and, if any such did act, it must necessarily cramp them in the exertion of those talents; and the interference is itself not likely to be attended with benefit in any case.

15. I will take the liberty of stating to your Lordship the mode of this interference, and wherein it is injurious to the interests of justice and the credit of the Magistrates. The Magistrates usually met every Saturday, and the business which generally came before them was either the investigation and punishment of petty offences committed by prisoners, or the transaction of such other business as is usually transacted by justices of the peace in England. The magistrates are, however, directed to lay the proceedings of each day immediately before the Governor for his inspection; this circumstance occasioned a considerable increase of trouble to me and prevented me from conducting business in the manner in which it is usually conducted at home. However necessary such a measure might have been at one time,* I consider it wholly unnecessary in the present advanced state of the Colony; it is of too military a cast, and originated I believe in the Governors of this Colony having been always selected from the Naval service, and the magistrates for a considerable number of years having been almost uniformly Military officers. I think no person can visit N. S. Wales without being forcibly struck with the idea that it is rather a military than a civil government; the guard of soldiers put on board each Ship on its arrival in the port, and the town of Sydney being much more frequently distinguished by the name of Camp than by any other, in some degree illustrates this remark.

* Note 83.
16. From the best information I have been able to collect, I have always understood that licences to vend spirituous liquors had always been not only nominally, but actually granted by the magistrates at each district; and I think your Lordship will agree with me in thinking that such a system is most accordant to the law of England and the dictates of reason. It is in my opinion much to be lamented that such a system no longer prevails; but the influence and patronage arising from this source is now wholly engrossed by the Governor to the injury of the Publick in my opinion, and greatly to the diminution of the influence of the magistrates. During the time I presided at the meetings of the magistrates I received from the Governor's Secretary the list of persons, who were authorized by the Governor to receive such licences, accompanied by a letter containing his Excellency's directions to the magistrates to make out such licences accordingly. I am sure your Lordship will be surprised on hearing that this list was never in any instance previously communicated to me or to any of the magistrates, nor was I ever consulted with regard to a single person named in the list; and I cannot but conceive that it would have been much more delicate and less injurious to the credit of the magistrates as well as equally legal, if His Excellency had directed them to have been made out and granted exclusively by his Secretary; for, by the mode I have mentioned, the magistrates were utterly deprived of all discretion, although they were made to assume the appearance of acting from their own discretion, when in point of fact they were merely acting as the clerks to the Governor. By this means, improper persons have succeeded in obtaining licences, who never would have been indulged with them in the regular way; and in particular, a man of the name of Charles Gierke, convicted of felony before His Majesty's Court of Criminal Jurisdiction, and sentenced to hard labour at the Coal river, not only succeeded in obtaining his remission from that sentence without any previous consultation with me, but actually received and still has a license to keep a publick house, and this only a short time after he had received the sentence of the Court.

17. Having thus informed your Lordship how licences to keep publick houses are granted, I have the honor to transmit to your Lordship the copies of two of the Governor's General orders, by which your Lordship will perceive that they are taken away by the same authority; your Lordship will observe that this is done simply on the report of the magistrates not stated to be made after an examination on oath or any judicial examination
whatever, and that the punishment is not to take place immediately but prospectively. Upon this point, I shall make no further observations than to add that all persons taking out licenses pay to the Colonial Fund for every such license the sum of £20 Sterg., and that I cannot but think that the Governor in such measures has exercised a species of Criminal Jurisdiction not only not granted to him by his commission but expressly given by His Majesty's Charter to the Court of Criminal Jurisdiction.

18. The next instance of interference on the part of the Governor, which appears to be prejudicial, and to which I should therefore wish to direct your Lordship's attention, relates to the Gaol and what is called the Gaol-Gang. The Gaoler makes daily reports of the state of the Gaol to the Governor and receives directions from him in regard to it. I conceive that it would be much more expedient and more conducive to the respectability of the magistrates, if the Governor, when he required any information, or wished to give any orders on this subject, were to convey them through the medium of the Magistrates, under whose immediate control the Gaoler ought to act. The Governor also, upon the Gaoler's reports, orders the punishment of prisoners for different offences without any hearing or examination before him, and without the knowledge or intervention of the magistrates: instances of corporal punishment inflicted in the lumber-yard by the mere authority of the Governor and without any previous hearing or trial are frequent, and persons have been flogged in the publick market place by a similar warrant granted in the same manner.

It is true that in all these cases the offenders have been prisoners in the service of Government, or of individuals to whom their services have been assigned by Government; but formerly no punishment was inflicted even on a prisoner, but by order of the Magistrates or of the Criminal Court upon a hearing of the parties concerned; and I consider that it would have been better if that system had not been discontinued.

19. One of the most effectual punishments, which the Criminal Court here has the means of inflicting, is that of imprisonment and hard labour in the Gaol-gang: this under proper regulations might, I think, be rendered very effectual and useful, but, as it is at present managed, it is little more than a name. The Gaol Gang ought to be under the special control of the magistrates, and employed as much as possible in a body and in publick; and by them I think the streets of the town of Sydney or of the different towns to which they are attached might be constantly
kept clean and in a proper state of repair. The more incorrigible should be chained together or employed in the meaner or harder description of labour. There is a class of offenders in this Country so steeled against shame and so irreclaimable, that the lenient punishments of the English laws have no effect on them. The means of solitary or separate confinement are here extremely limited indeed, for the Gaol at Sydney is by no means adequate to the population. To the punishment of death recourse should be had as seldom as possible; but how is this to be avoided, when every other punishment is so relaxed in its execution as to become almost useless. At present the Gaol Gang, in common with every thing else, is under the sole and immediate control and direction of the Governor; and it has of late been much employed in the rooting up stumps and laying out a road in the Governor's domain, where much of the effect of the punishment is lost from its want of publicity.

20. As the principal Judge of the Criminal Court, to whom the rest of its members look for advice in the fixing and apportioning the punishments to be inflicted upon those convicted of crimes by its sentence, I am almost entirely at a loss what measure or mode of punishment to recommend. The punishments decreed by the Court are frittered away and rendered nugatory in the execution. It is not the fault of the magistrates, because, as I have before said, they have no authority in these matters, and none can venture to interfere with the Gaoler, when all must see that he makes daily reports to, and receives instructions from the Governor himself. I have no wish I am sure to force my advice upon the Governor, but I think that in many instances the want of confidence in and consultation with me on the subject of persons found guilty by verdicts of the Criminal Court has been injurious. I allude particularly to the exercise of the discretion vested in the Governor of pardoning or remitting the punishments of persons under the sentence of Courts of Justice, which has been exercised in many cases not only without such consultation, but in the most informal and irregular manner. It is not seldom that I meet in the streets of Sydney with persons, upon whom but shortly before I have been under the necessity of passing the sentence of death, or of some other punishment intended to be exemplary. Without meaning to contest the motives of the Governor in granting a remission of their sentences to such persons, I would wish to add that the irregular mode of granting them tends in my opinion much to reduce the authority and influence of the Criminal Court. I conceive that the Governor has no authority to remit the sentences imposed by the Criminal Court but by pardon under the
1815.
1 July.

Influence of governor over punishments inflicted by criminal court.

Decision of L. Macquarie for accommodation of law courts.

134

HISTORICAL RECORDS OF AUSTRALIA.

seal of the Colony, and that the persons to whom it is granted should be brought before the Court in order to plead that pardon, and be discharged by the authority of the Court; and I think your Lordship will be sensible that these formalities would be a considerable check on the exercise of the discretion. But the irregular and informal exercise of the power of pardoning is apt to render it too frequent, and either is in my opinion calculated to render of little consideration both the power and the punishments of the Court. So much evil is likely to result from the injudicious pardoning of Criminals, that it ought to be done with the utmost caution, and I should imagine that a Governor would derive assistance in the exercise of this power from consultation with the Judge who tried them.

21. I feel it now to be my duty, my Lord, to direct your Lordship’s attention to the subject of providing a room for the accommodation of the Courts of Justice here, and your Lordship will be best able to judge whether the Governor has on this subject shewn a proper attention to the wishes of His Majesty’s Government, or regard to my feelings. Finding that your Lordship had recommended* the appropriation of one of the wings of the hospital† to this purpose, I imagined that the Governor would have felt no hesitation in following up that recommendation, by the adoption of which a commodious building would have been devoted to the purposes of Justice, which might have been fitted up at a trifling expense and at an eventual saving to His Majesty’s revenue of several thousand pounds.

22. The Governor, however, most unfortunately for the comforts of His Majesty’s Judges here, thought proper to disregard this recommendation under the idea that it was not an order, and to devote the building, which would in every respect have answered the purpose intended for very many years, to the use of Mr. D’Arcy Wentworth, the Colonial Surgeon, for his residence. This determination of the Governor was formed without the smallest communication either to the Judge of the Supreme Court or to myself, and in such a manner as to render all remonstrance on our part of no avail. The building in question was well adapted to the purpose for which your Lordship recommended it; it was detached from the main body of the hospital, capable by a wall or paling of being completely insulated in regard to it, and thus the two departments were not likely to be interrupted or interfered with by each other. The building of a new Court of Justice would have been entirely saved, the expense of fitting it up for the purpose would not have exceeded that which has already been incurred in another

* Note 72.
place, and which is completely temporary, and even the uniformity of the range of buildings not have been interrupted. Your Lordship will thus see that the comforts of the Judges and others, concerned in the administration of justice, nay even the interests of the publick, have been made to bend to the convenience of Mr. Wentworth, who is thus provided with a residence, I do not scruple to say, far beyond what his rank in the Colony can entitle him to expect, and such as must tend to promote and excite jealousy in the minds of other officers in the Colony.

23. In the mean time half of the large building composing the Colonial Hospital, consisting of four rooms or wards, has been applied to the use of the Courts of Justice; an arrangement, which, as soon as the patients occupy the rest of the building, I will venture to say is in every respect improper and inconvenient. The mutual annoyances and interruptions, which must result from it, are so obvious that I shall not detail them to your Lordship any farther than to express my astonishment how the head of the medical department here could encourage the idea.

24. The other detached wing of the hospital contains two excellent dwelling houses, which, had your Lordship’s recommendation been adopted, might have been appropriated to the use of the Surgeon and the assistant Surgeon; these dwelling houses are far superior to the quarters of any General Officer in England and have detached Kitchens, coach-house and Stables belonging to them. But by the present arrangement they are to be occupied by two assistant Surgeons; and thus two buildings (one of which (the northern wing) might have been so advantageously devoted to the use of His Majesty’s Courts of Justice) and which have cost not less than £14,000, are given up to a Surgeon and two assistant Surgeons, while His Majesty’s Courts of Justice are to be held in the wards of a General Hospital till a new building be provided for that purpose at the unnecessary expense of several thousand pounds.

25. My Lord, my health has suffered very much from the want of a proper Court-house. I have lately had a very severe attack of illness, and am in a state of health, which leaves me everything to fear from cold or damp; yet even now, though your Lordship’s letter on this subject has been in the Colony eleven months, I am under the necessity of holding the Criminal Court in the midst of winter in one of the large Wards of the General Hospital, which is still damp and ill suited in every respect to my present state of health. But, if your Lordship’s recommendation had been adopted, the proposed wing could
by this time have been finished, and I should have had no occasion to trouble your Lordship with further complaint on the subject. My Lord, I will not occupy more of your Lordship's attention with this subject, except by adding that, when I consider the Governor's language and conduct towards me on this business, the forwardness he has expressed, and the reluctance he has shewn to provide for my convenience and that of the Publick in this respect, the early promises he made to me, by which I was prevented from making an early representation to His Majesty's Government of my situation in this respect, the many comparatively unnecessary buildings erected by the Governor, the enormous expences incurred for the Governor's pleasure on the Government houses and domains at the Hawkesbury, Parramatta and Sydney, expences unknown to your Lordship; When I consider these things, I conceive I am warranted in concluding that the Governor has never been really anxious to provide proper places for the decorous administration of Justice, and I may add that I have every reason to believe that, had it not been for the kindness of your Lordship's interference, no part even of the General Hospital would have been appropriated to that purpose.

26. I have now to communicate to your Lordship another and most unlooked for instance of His Excellency's interference with the Courts of Justice here, which has caused me much alarm, and is likely to be attended with very unpleasant consequences. Some considerable time ago, I was most reluctantly induced, from what appeared to me the necessity of the case, to permit three persons, who had been transported to this Colony, of the names of Crossley, Eager, and Chartres to practise in the Court of Civil Jurisdiction, not as Attornies but as the Agents specially appointed of such suitors as chose to employ them to conduct their causes. Neither of them were ever admitted Attornies of that Court, and, to prevent any idea of that kind being assumed, I distinctly explained to them that they were not so to consider themselves, and that, if respectable solicitors were sent out here by His Majesty's Ministers, the permission would be withdrawn; and such I conceived to be the condition on which it was originally granted.

28. Knowing how essential the establishment and observance of proper forms and rules of practice were to the due administration of justice, and thinking that those objects would be greatly promoted by the assistance of respectable attornies. I had the honor of addressing a letter* to the Earl of Liverpool, dated 19th October, 1811, in which with the express concurrence and

* Note 82.
sanction of Governor Macquarie I recommended His Majesty's Government to send out some respectable professional persons to practise in the Courts of Justice here. Had I considered that persons convicted of infamous crimes could either legally or with propriety be admitted as Attornies in the Court, at which I presided, I never should have made such an application. Had the Governor entertained such an opinion, I do not suppose he would ever have sanctioned it; and I cannot conceive that any respectable persons would have come out, had they supposed that such a measure was in contemplation.

29. In the middle of last year it was generally known that Your Lordship had with much liberality adopted my suggestion; and in January last Mr. Moore, one of the solicitors appointed for this purpose, arrived, and Mr. Garling his Colleague was daily expected, though unfortunately he is not yet come. As I supposed that the necessity, which had induced me to permit the persons above named to practise in a qualified manner in the Civil Court, was terminated by these appointments, and as I had taken care that they should never lose sight of the terms on which that indulgence was granted them, I did not immediately foresee any difficulty or trouble.

30. My opinion on this topick has been ever the same; that opinion was well known to Crossley and Eagar, who, being well aware that they could not even with decency apply to me, thought proper, previous to making any application to the Courts, to petition the Governor to interfere in their behalf, officially, with the Governor's Court and the Supreme Court. Upon what ground they could make this application except with the hope of unduly biasing those Courts, I do not know. They had never been employed by or rendered the smallest service to Government, and the Governor could not be personally interested in the question; and I should have thought would have considered himself bound to consult the feelings and protect the interests of the Solicitors, appointed by His Majesty's Government under a recommendation sanctioned by himself. For my own part, I considered my own faith pledged by the recommendation I have mentioned as far as this: that, if respectable Solicitors were sent out agreeably to it, they should at first have no competitors of this description to oppose them.

31. I am sorry however to inform your Lordship that the Governor was persuaded to write a letter* to the Judge of the Supreme Court, in his official capacity as Governor, recommending those petitions to the favorable opinion of the Governor's Court and the Supreme Court; and this recommendation was adopted without the smallest attempt on the Governor's part

* Note 84.
1815.
1 July.

Want of discretion in L. Macquarie.

Report by J. H. Bent.

Result of L. Macquarie's action.


138 HISTORICAL RECORDS OF AUSTRALIA.

to ascertain the feelings or opinions of the Judges or of Mr. Moore. Having had a so much better opportunity of forming a correct opinion of the characters and conduct of those petitioners than the Governor, and knowing the precise situation in which they stood, I had I think some right on that score alone to expect that the Governor would have had some conversation with me on the subject; and I am at a loss to account for a conduct so inconsistent with the attention due to my station, and so ill suited to the exercise of a sound discretion on the subject.

32. The answer, which was given to the Governor's letter, will be laid before your Lordship by the Judge* of the Supreme Court, who, as they more particularly affect him, will detail to your Lordship the subsequent proceedings to which this unfortunate measure has given rise; the public disturbance has been great. the proceedings of the Court have been interrupted, and a clamour has been endeavoured to be raised against the Judges, whose sole wish it is to administer justice impartially according to their oaths and to insure the respectability of His Majesty's Courts.

33. Let me now state to your Lordship the situation of the persons recommended by the Governor to be admitted as Attorneys of the Courts of Justice here. George Crossley was struck off the Rolls of the Court of King's Bench and transported to this Colony for perjury, a crime peculiarly obnoxious in one of his profession and abhorrent to the feelings of those concerned in the administration of justice. Eagar has been transported here within the last six years for forgery, and has never, as I can learn, been admitted an Attorney of any Court. And Chartres has been sent here for a species of the crimen-falsi within the last five years, and at this moment keeps a public-house, and both are still under the sentence of the law. As to Crossley, I must add that I believe him to be a most unprincipled and dangerous man, and, from a strict observance of his conduct in the course of his practise before me, I consider him unfit for the situation of an attorney: neither of them has ever been admitted into the Society of gentlemen, or been considered as such; indeed Chartres keeps a common publick-house. Such are the persons whom the Governor wished to associate with Mr. Garland and Mr. Moore; such are the persons whom the Governor recommends to His Majesty's Court solemnly to hold up and accredit to the world as persons qualified in all respects (tam moribus quam doctrina) for the highly trust worthy situation of an attorney, who to use the language of Lord Mansfield and the Judges of England should be above all suspicion.

* Note 85.
BENT TO BATHURST.

34. I have to inform your Lordship that the gentlemen (Richard Brooks and Charles Hook, Esquires), who were associated with me at the Court where I preside, were so satisfied of the necessity of the step, and of its being in accordance with the real sentiments of the respectable inhabitants of the Colony, that the Court unanimously adopted a regulation,* the object of which was to exclude persons, who had been struck off the rolls and transported to this Colony for infamous crimes from being allowed to practise as Attornies of that Court. The consequence of this has been that the Governor has sent me a letter,* a copy of which with my answer I have now the honor to inclose, requiring me to furnish him with a copy of such orders as have been made by the Governor’s Court on the subject of the admission of Attornies. Of the further measures intended to be adopted by the Governor I am yet ignorant, for, up to this moment, my advice or opinion has not been solicited. I shall at all times be happy in furnishing the Governor with every information in my power in regard to that Court, though I cannot but request your Lordship to observe, that his Excellency founds his right of interference on the tenor of the late Charter, although, except as to the appointment of the two members, there is not an iota in it which relates to the Governor as far as regards that Court.

35. As to the legality of admitting persons convicted of infamous crimes to be Attornies of His Majesty’s Courts of Justice, I do not think that there can be two opinions in Westminster Hall. The Statute 3 vic 1 c. 7 enacts that none shall be admitted Attornies, but those who are of honest dispositions. And the Stat. 12 Geo. I c. 29 is particularly pointed against Attornies convicted of the Crimes of Forgery and perjury, and denounces the penalty of transportation, to be inflicted in a summary manner, against those who continue to practice as such after having been convicted of those crimes. And though that Statute should not be considered in force in this Colony, yet the preamble is general, and strongly expressive of the sense of the Legislature as to the unfitness of such persons to be Attornies. This principle has also been fully admitted and acted upon as appears from a Case reported in Mr. Cowper’s Reports (page 829 entitled ex parte Brounsal) after a solemn consideration by the twelve Judges of England, whose opinion was delivered in the Court of King’s Bench by the Earl of Mansfield. To these authorities I feel it to be my duty to pay the utmost deference.

36. But it has been said that this country is so peculiarly circumstanced as to require a relaxation of these principles and

* Note 86.
that sound policy requires that long tried good conduct should restore a Convict to his rank in society. This proposition, by the very terms of it, is not a rule but an exception and can therefore only be made use of in reference to particular cases, and here I conceive the utmost caution to be necessary lest the exception should be so frequently and improvidently made as by degrees to be taken for the rule; it is a theory apparently simple, but requires so much caution and delicacy in its application to any practical purpose, that it may fairly be said to be too fine for use. To what lengths is it to be extended? Where is the line to be drawn? What is to be the criterion and who is to be the Judge of long tried good conduct? If any criterion could be pointed out beforehand, I should say, that a free imperceptible unforced admission into society of undoubted respectability by a common and tacit consent was that criterion—but not one of the instances brought forward by Governor Macquarie will stand this test; for it is notorious that they were forced forward against the common feeling, and not one of them, notwithstanding all the Governor's exertions, is generally received or countenanced; nay even those magistrates, who have espoused the cause of Crosley, though they sit on the Bench with Mr. Lord, will not admit him to their table, and would consider it the greatest insult I could offer them, if I were to invite them to meet those persons at my house, whom they would admit as Attorneys of His Majesty's Courts of Justice. I think a voluntary and general admission into good society ought to precede the appointment of such persons to offices, which may force them in some degree into such society against the will of those of whom it is composed. It must also be considered that offices are not made for the benefit of the individual, who may be selected to fill them but for the benefit of the publick; and to answer the purpose of their institution the respectability of their character must be supported; it is not sufficient to shew that the habits of a person, convicted of felony, have been so far improved as to qualify him to exercise the office of a magistrate or the duties of an attorney with propriety; but it is necessary also to be satisfied in the one instance, that the character of the office, and in the other that that of the Court may not be injured by the introduction of persons so circumstanced; a long exercise of the duties of a magistrate in this Colony enables me to say that the character of the magistracy has been much injured by the introduction into it of persons who came out as transports to this Colony; and I am sure that the respectability of the Courts of Justice will be utterly destroyed if a similar class of persons be admitted as Attorneys.
37. The respectability of the Court, my own feelings as a Barrister and as head of the Court, the interest and the feelings of Mr. Garling and Mr. Moore and the claim they have upon the attention of Government in consequence of their having left their country and the exercise of their profession in England to come here, are all matters entitled to some consideration and all involved in the determination of this question, but which hitherto seem to have had no share of the Governor's notice, though I do not doubt they will meet with due attention from your Lordship's justice and liberality.

38. The manner in which the Governor has acted on this subject has been most ungracious, and altogether deficient in the attention and respect due to my station and my experience. Though the matter most deeply affected me and in no respect affected the Governor, I have not been in the smallest degree consulted: every step has been taken without my knowledge, and if upon any advice, upon none, I will be bold to say, that ought to have had that weight with a Governor of this Colony as the opinion of His Majesty's first law Officer in it; and I cannot but think that, as the feelings and opinions of the Judges here were with such reason adverse to a measure which affected them so nearly, that, in the first instance at least, deference should have been paid to those feelings until the pleasure of His Royal Highness the Prince Regent were known.

39. My Lord, I trust that I may indulge a hope that the circumstances which have taken place, and the enormous power claimed by the Governor of this Colony and exercised without advice and control, which in his opinion entitles him to interfere with the Courts of Justice in such way as he thinks proper, will satisfy your Lordship of the necessity of adopting such measures as will secure to them a proper independance. I cannot see how the judicial and the executive departments can clash, as their functions are so dissimilar and distinct; or how a firm and honest discharge of their duties can be expected from the Judges if they are made to be under a species of military control. The Governor because he is a military Officer thinks he is a Military Governor—and by the copy of a General Order* here-with transmitted, your Lordship will see that the Court of Criminal Jurisdiction, though a Court of Record, bound to decide according to the Criminal Law of England and as nearly as possible according to the practise of the Criminal Courts there, is by the Governor looked upon as a species of Court Martial and assembled by a Brigade Order issued from Head Quarters. I considered it highly necessary that these notions

* Note 87.
1815.
1 July.

Proposed constitution of supreme court with two judges.

should be done away; and, agreeably to the letters* I had the honor of addressing to your Lordship in February and June, 1814, I beg again most earnestly to recommend to your Lordship the constitution of one Supreme Court of Judicature for this Colony possessing both Criminal and Civil Jurisdiction, composed of a Chief Justice and a Puisne Judge, both to be Barristers of not less than five years standing, with powers sufficient to enable them to administer Justice with effect and in which all the Colonial Laws should be registered, as a measure highly calculated to put an end to the present and to remove all cause of future disturbance, and to promote the lasting interests of the Colony.

40. I beg to assure your Lordship, that it has been my most sincere wish to render every possible assistance and advice in my power to Governor Macquarie on all occasions, though I think your Lordship will be sensible that these wishes have not been met on the part of the Governor with that liberal and honorable confidence which I had a right to expect. In the representations I have had the honour of making to your Lordship, I have not been actuated by any animosity towards the Governor, but by a sense that it was a duty which I owed to myself without further delay to lay before your Lordship a faithful picture of a part of a system pursued by Governor Macquarie and of my present situation, which is such as to fill me with alarm and anxiety.

41. My Lord, I fear that the details into which I have deemed it necessary to enter have been too great an intrusion upon your Lordship's time, though I trust that I may in some degree be excused by their importance. In the confident hope that they will meet your Lordship's serious attention, and that my endeavours to satisfy your Lordship of the correctness of my conduct and the purity of the motives by which it has been influenced have not been in vain.

I have, &c.,

ELLIS BENT.

[Enclosures Nos. 1 to 6.]

[These papers will be found on page 400 et seq., volume VIII, series I.]

[Enclosure No. 7.]

GOVERNMENT AND GENERAL ORDERS.

Government House, Sydney,
Saturday, 10th December, 1814.

Civil Department.

MONDAY last being the day appointed in the Government and General Order of the Ninth of January, 1813, for receiving Applications for Free and conditional Pardons, and Tickets of Leave His Excellency

* Note 88.
the Governor was much surprised to find, that notwithstanding the
instructions contained in the Government and General Orders alluded
to, upwards of Five Hundred Memorials were presented to him on
this occasion.

As the Tenor of these Government and General Orders appears to
have been unattended to, not only by the Applicants, but the Magis-
trates whose special duty it was to make it the invariable Rule of their
Conduct in subscribing Memorials, the Governor was under the un-
pleasant Necessity of rejecting a Number of Applications which came
before him in so irregular a Form; and which, although they bore the
Signatures of the Magistrates, were in many instances (within His
Excellency's personal knowledge) not entitled to the Consideration
they solicited.

In the Government and General Orders alluded to, of the 9th of
January, 1813, it is expressly directed, that the Clergyman and Prin-
cipal Magistrate of the Districts, wherein the Memorialists reside, shall
certify for those persons only whose characters they are personally
acquainted with; and that they are "industrious, sober, honest, and
truly meritorious"; and such Orders further prescribe, that Certificates
of the good Conduct of the Applicants, residing at Sydney, should be
signed by the resident Chaplain and the Superintendent of Police
there; without which they would not be attended to.

On the late Occasion, His Excellency saw with much concern and
disappointment, that the Magistrates at Sydney and those in the
Interior had given their Signatures to Memorials without appearing to
have attended to, or to have been guided by the Tenor of the Orders in
Question; whereby an unnecessary Accumulation of Trouble was
imposed on him, and which had in the first instance misled the Appli-
cants, who were induced to consider the Signature of a Magistrate as a
sufficient Pass-port on this occasion.

In order to prevent the recurrence of such unpleasant circumstances,
His Excellency desires that in future not only the Magistrates of the
Colony, but also all Persons intending to apply for Mitigation of their
Sentences of Transportation, will strictly and invariably conform them-
selves to the specific Terms of those Orders; and that the Magistrates
in particular will bear in mind, and be governed by the circular com-
communication made to them by Letter dated the 7th December, 1813, and
especially the concluding Passage of it, which for general Information
is here repeated; Vizt.:

"The Number of Applications made yesterday for free pardons or
Emancipations, having far exceeded the Governor's Expectations, and
being in fact more than double the Number he can Comply with for
two Years yet to come, it is his desire that you shall not countersign any
further or new Applications of that Nature, until those you have
already certified shall have been finally disposed of."

And His Excellency now directs, that no Magistrate shall sign any
Petitions or Memorials for conditional Pardons or Tickets of Leave,
for the ensuing year of 1815, until such as they have already signed
are disposed of; nor is any Magistrate at Sydney, excepting the Super-
intendent of Police, authorised to sign or to recommend Memorials for
Pardons or Tickets of Leave. Private Individuals have only a right
to certify to the good characters of their own Servants on their
Memorials; which, however, must also be countersigned by the Magis-
trate and Chaplain of the District wherein such Memorialists reside.
His Excellency the Governor therefore orders and directs, that all Memorials and Petitions which shall be presented to him in future, either for Conditional Pardons or Tickets of Leave, shall be strictly examined by the Magistrates and Chaplains previous to their affixing their Signatures to them, and also have the undermentioned Certificate attached thereto, signed by the Magistrate and Chaplain; vizt.:

"I (or we) do hereby certify, that from my (or our) real Knowledge, the Petitioner is an honest, sober, and industrious character," and such Memorials or Petitions as have not the said Certificate on the Face of them, signed as herein especially prescribed and directed, will have no Attention whatever paid to them.

By Command of His Excellency The Governor.

J. T. CAMPBELL, Secretary.

MR. JUSTICE BENT TO EARL BATHURST.

My Lord,

Sydney, N. S. Wales, 1st July, 1815.

It is with much regret that I have to acquaint your Lordship with circumstances, which have arisen on the first formation of the Supreme Court, in which a line of conduct has been pursued by His Excellency Governor Macquarie and the Magistrates associated with me in that Court derogatory in my opinion to its respectability, and utterly subversive of those objects which I conceived His Majesty’s Government had in view, when they sent out respectable Gentlemen to practise as Attorneys in the Courts here.

It has been endeavoured, on the part of Governor Macquarie and the Magistrates conjoined with me in the Supreme Court, to force me to admit as Attorneys and Solicitors, persons convicted and transported here for infamous crimes, and on no other Ground and principle but one so sophistical and delusive that I did not think it could ever by any sober mind be attempted to be carried into practice.

In order that your Lordship may comprehend the whole progress of the Dispute and the correspondence relative thereto, the whole of which I have the honour to transmit, it will be proper that I should apprise your Lordship of the Characters of the only Persons who have practised, or who have made any pretensions to practice in the Courts, and also of the Magistrates whom I found I should be likely to have associated with me on the Bench.

Previous to my arrival in this Colony, The Judge Advocate, finding it impossible to form any Rules, which would be attended to or understood by the Ignorant Persons who were the Suitors in the Courts, and to get through the business before time, thought it advisable to permit persons, who had been transported, to appear as Agents for those who ventured to employ

* Note 89.
them, under special powers of Attorney; but at the same time giving them to understand that they would not be admitted Attornies of the Court, nor considered in that light, and that such indulgence would cease in the Crown sending out respectable Solicitors to practise. For a length of time the business was confined principally to one person, and has never been in the hands of more than two, till the Sittings previous to my arrival.

The Individuals who have practised or who claim a right to be admitted as Attornies are George Crossley, Edwd. Eagar, George Chartres, Michael Robinson and Wm. Fleming; with regard to their characters George Crossley is a Man notorious in the annals of Westminster and his infamous and base character is well known to most practisers in His Majesty's Courts at home; He was transported to this country at an advanced period of Life, being convicted of wilful and corrupt perjury, and it was matter of congratulation at Westminster Hall when he met the punishment due to his misconduct. His behaviour in this Colony has been far from meritorious, and he has repeatedly deserved exclusion from that practice which he had heretofore been permitted to have.

Edward Eagar was transported to this Country in the year 1810, having been convicted in Ireland of a Felony in the year 1809, and received conditional emancipation in the year 1813 from Governor Macquarie, so that he is still under the Sentence of the Law and could not return home without rendering himself liable to capital punishment; at the same time he does not state himself to have been an Attorney, or even an articled Clerk, but disguises the truth in a way, which marks the little trust that can be placed in him, by saying he was bred an Attorney and admitted a Member of the King's Inns, and by such a statement would deceive an inexperienced person into a belief that he had been admitted an Attorney. George Chartres was convicted at the Dublin Assizes, July, 1810, of a Felony and was transported to this Colony in the year 1811, and only received a conditional emancipation in June, 1814, and he has been sent once since his arrival in this Colony to the Coal River for misconduct, and is also still under the Sentence of the Law. Michael Robinson was transported for writing a threatening letter to Mr. Oldham Oldham in order to extort money. His case is well known and is reported in East Crown Law and in Leach's cases. He is at present employed as the Chief Clerk in the Office of the Governor's Secretary; but, not having petitioned to be admitted, I am not able to state whether he was ever admitted in England or not.
Mr. Fleming was transported from Ireland, I believe, for uttering a Note knowing it to be forged, and had been refused permission to practise in the former Court of Civil Jurisdiction from unfitness and improper Conduct. These are the only 5 persons who have any ground for pretending to a right to practise. The two first of these Individuals George Crossley and Edwd. Eager petitioned the Governor and requested his interference, fearing they should be excluded from their practise and together with George Chartres petitioned the Supreme Court to be admitted as Attornies. The two latter have contented themselves with silently waiting the event of their application.

My Lord, I could scarcely have expected that Governor Macquarie would have felt it right to interfere at all, as to the persons to be admitted Attornies in the Courts of Justice, and I still less expected that Governor Macquarie should express a decided opinion that such persons as George Crossley and Edwd. Eager should be admitted, and that he would as Governor in chief over this Colony write an official Recommendation of them to the Supreme Court.

From the circumstance of every person in this Colony being more or less dependent on the Governor, I instantly felt the Impression that such a letter as Governor Macquarie's of the 18th April (marked A) would have on the minds of the Magistrates, and more especially when it is recollected that these Magistrates were not taken from the principal Officers or more respectable part of the Inhabitants of this Territory. In order that your Lordship may see the whole extent of Governor Macquarie's policy, It will be proper to state, that there are only four Magistrates in Sydney upon whom the Duty of sitting as Members of the Supreme Court would more especially fall. These Persons were Mr. Wentworth, Mr. Simeon Lord, Mr. Wm. Broughton and Mr. Riley.

Mr. Wentworth is the principal Surgeon of the Colony, and came out to this Colony under circumstances of great degradation, though not as a Convict, and he is not at this day admitted to general society among the respectable Officers and Gentlemen in this Territory; It is scarcely, My Lord, three years ago, since Sir Wm. Garrow, His Majesty's Attorney General, stated in a speech at Westminster, as an illustration, the singular circumstances attending Mr. Wentworth's being charged* in open Court at the Old Bailey, where he was sitting in the Gallery, by Sir Henry Russell, late Chief Justice of Bengal, with robbing him of his watch on Hounslow Heath, and Mr. Wentworth being allowed to depart as he stated he was about to embarked in the Fleet bound then to this Colony, and that his detention would

* Note 90.
be ruinous, and the fact of the Watch having been picked up where he had been sitting after he had left the Court. This Gentleman was first appointed a Magistrate by Governor Macquarie; but, as the Facts took place at a remote period, and as he had been honoured with His Majesty's Commission, I should not have mentioned these circumstances except as illustrative of the present state of the Magistracy.

Mr. Simeon Lord came out to this Country as a Convict and was also appointed a Magistrate by Governor Macquarie. His character for principle and Integrity is too well known to many Merchants in the Royal Exchange.

Mr. Broughton is a Depy. Asst. Commy. in this Colony, and the fourth only in point of Rank in his own department. Mr. Alexr. Riley is a Merchant at Sydney and one of the Contractors for building the new General Hospital,* by the continuance of which monopoly, he together with Mr. Wentworth has been considerably benefited. Mr. Broughton and Mr. Riley were the two Magistrates associated to sit with me in the Supreme Court, and I must beg your Lordship not to suppose that the Magistrates here are possessed of the same legal information with the Magistrates in England; Both these Gentlemen came here in early inexperience of Life, and in humble circumstances, Mr. Broughton in as low a Court situation as a free person could well fill, and he for a long time was merely a Clerk to the Storekeeper in Norfolk Island; beyond the service which he has been in, He knows little; and both of them are entirely ignorant both of the Law and the common form and proceeding of a Court of Justice.

Mr. Riley had sat frequently as a Member of the former Court of civil Jurisdiction and in the Course of hearing a number of causes had never once differed in opinion from the Judge Advocate; Mr. Broughton had I believe sat only once in that Court. Both these Gentlemen are under great obligations to Governor Macquarie, and I was afraid that the Governor's sentiments, when so publickly expressed, would govern them in the line of conduct they would adopt.

The Event justified my fears; they both distinctly declared that George Crossley, a Man convicted of Perjury, was a fit and proper person to be admitted an Attorney; and I found myself obliged to come to a determination to refuse to admit or swear in persons so circumstanced, and to declare that, if the attempt was persisted in to force them upon me, till His Majesty's Pleasure should be known, I should be compelled to discontinue the Sittings altogether.

For the other circumstances attending this Dispute, I beg leave to refer your Lordship to the Correspondence between

* Note 72.
the Governor, the Magistrates, and myself together with a short statement of Facts, and the Speech with which the Magistrates felt so offended, as to declare they could no longer sit on the same Bench with me, though they thought proper subsequently to alter their determination. Your Lordship will see clearly that, had I yielded to the decision of Messrs. Broughton and Riley, and admitted Persons, who had been Convicts, to practise as Attornies of the Supreme Court, I could not have refused to have sat upon the Bench with Mr. Simeon Lord, who had also been a Convict, and in that case I should have found myself sitting as Judge in a Court different from all other Courts of Justice in His Majesty’s Dominions, degraded in my own estimation, and in that of my Profession, and in a situation I never could have contemplated when I was honoured with the office I now hold.

I do not hesitate to say that the appointment of Mr. S. Lord as a Member of the Supreme Court would have been the next step Governor Macquarie would have adopted, and It was an argument strongly urged, in favour of admitting transported Attornies, That persons also transported had been raised to the Bench, and might be appointed to it in a Judicial Character in the Supreme Court, whenever the Governor thought proper, if a Judge could be found so fallen in his own esteem and so degraded in point of principle as to sit with them.

I will now only intrude on Your Lordship’s time, by giving a short view of those reasons which influenced my Judgment, and on the other hand the arguments which were adduced in support of such an extraordinary attempt on the part of the Magistrates.

The Statute* 12 G. I, c. 29, Sect. 4, without extending its penalties to this Colony, was in my mind decisive of the sense which the Legislature have entertained as to the unfitness of the Persons in question to be admitted to practise in any Court, and the Case, Exparte Brounsall, Cowper’s Reports 829, was equally in my mind decisive of the Law on that point; in that Case Lord Mansfield and all the Judges of England were unanimously of opinion that a Man, who had been convicted and punished for stealing a Guinea, though he had subsequently practised without imputation for four or five years, ought to be struck off the Rolls, and was an improper Person to be continued an Attorney, a situation which ought to be above all suspicion.

To meet these cases, Messrs. Broughton and Riley adduced a maxim laid down in a Letter† of Governor Macquarie, and printed in the Report of the Committee of transportation, that “long

* Note 91. † Note 92.
tried good conduct should lead a Man back to the Rank in Society he had formerly filled,” leaving out the words “as far as the case would admit”; a maxim, My Lord, I will venture to say, impossible to be reduced into practice, and which has not been strictly acted upon by its first propounder, Governor Macquarie himself.

Without enquiring what shall be the marks by which to discover long tried good conduct or whether the mere circumstance of not having been brought before a Criminal Court in this Colony is a proof of it, I may safely assert, that the good conduct of the Persons in question, and who were immediately before the Court, had neither been long, nor tried; but in order to shew the futility of this maxim, It is only necessary to state that there are both Military and Naval Officers, who have been transported here for Felonies; and I do not think, It will ever be proposed to restore them to their Rank in the profession they formerly belonged to; and I may here state the Fact, that one of the Charges, brought forward against Lieut. Wright of the 73d Regt. at a Court Martial held here by Governor’s Macquarie’s Warrant, was that he had associated with Mr. Isaac Nichols, who had been a Convict, and who was then, and now is the Post Master of the Colony appointed by Governor Macquarie; I must also mention that all Mechanics transported here, such as Smiths, Carpenters, Stone Masons, etc., etc., are invariably taken into Government Employ, and there are few instances, I believe, of any of these Men, how good soever his Conduct may have been, obtaining a conditional emancipation or even a Ticket of leave; but they have almost invariably been kept to Labour for Government till the Terms of their transportation have expired; while those Persons who, from their former habits of Life, have not been accustomed to Labour, and who are therefore useless to the Crown and burthensome to maintain, generally obtain both Tickets of Leave, and conditional emancipations.

The Local circumstances of the Colony, and the nature of the Population, have also been urged as reasons why transported persons should be admitted as Attornies. The Local Circumstances of this Colony have, from its first formation, been an excuse for every illegality that Caprice, or Ignorance, could dictate; and, unless the particular circumstances which will support or justify any variation from the Law are pointed out, It is an excuse which should obtain little attention; For, if the local nature of the population required them to have Convict Attorneys, by a parity of reasoning they would require Convict Magistrates and Convict Judges and that in all cases Convict
1815.
1 July.

Practise in former court of civil jurisdiction.

Special conditions imposed on practise.

Allegation re inability of appointed solicitors to cope with work.

Proposed rule for admission of attorneys.

Officers of every description should have the preference in appointment. These general Arguments failing, The Magistrates had recourse to those drawn from the particular situation of the Individuals.

It was said, these transported Attorneys had been admitted Attorneys in the Court of Civil Jurisdiction (which was not the case) that they had advanced considerable Sums in causes depending and that their constituents abroad would sustain inconvenience and Loss, as their causes could be carried on by them only. I need only say, when they were allowed to practise, they were informed, they were not looked upon as Attorneys of the Court, but as Agents or Servants merely, and were obliged to produce a special power from every person who ventured to employ them; They were also informed that they would not be allowed that indulgence, should the Crown send out Solicitors to practise; If they have made advances, they have made them with their Eyes open, and the Fact in my mind is very doubtful, as it cannot be supposed that Men could in the space of two Years be in a situation so to do to any large extent, or that they would be much inclined to trust the Clients. they must necessarily have in this Country. But were that the Case. It was very easy to prevent them from sustaining any Loss if any fair claim could be made out; Their constituents abroad are in no worse situation than other persons who appointed as their Agents respectable Individuals, who have never practised in the Courts, and I have been informed that the persons in question do not hold any powers of Attorney for any person out of this Colony, and it is worthy of remark that they have never stated the name of any person or House abroad who had so employed them.

It was further urged that the Two Gentlemen, sent out by the Crown to practise, would not be sufficient to conduct the business of the Colony; yet for a considerable time, one Person (Crossley) had alone practised, and, till the month previous to my arrival, the bulk of the business was in the hands of two only, and Crossley and Eagar have both stated that they had each a majority of the business; In fact The greater number of the Causes are what we should technically term rotten causes, being undefended and heard exparte; and three fourths of all the Causes are under £50. But it was never in the Contemplation of the Judge Advocate, nor of myself, that the Solicitors sent out by the Crown should have a perpetual exclusive privilege of practising. The Rule I should have proposed to adopt was the Rule in India, viz., that all admitted Attorneys in England or Ireland, or articled Clerks to such, bringing with them Certificates of good conduct, and all Persons, who had been articled
BENT TO BATHURST.

Clerks to Attornies admitted here, should be admitted Attornies of the respective Courts, and that without any limitation as to number unless His Majesty’s Government should think such a limitation adviseable.

My Lord, such a Rule would in a few years have given a succession of honourable and useful Members to the Colony, and it was a measure opening a field for the Sons of Gentlemen here, and a prospect of an ample provision, which I have understood many would have gladly embraced, and which the admission of such persons as Crossley, Eagar, Chartres, and the rest, would totally prevent.

If, on the other hand, those who had been Convicts were admitted, how would it be possible to refuse to admit any persons coming from England or Ireland, struck off the Rolls at home, or of bad conduct, and, with the fear of it before them, such would naturally flock here; and, if it is not possible for the Judges at home with the assistance of an honourable and learned Bar, and every means that Attornies and Officers habituated to correctness in business can give, to prevent the frauds and mischiefs which Individuals suffer from the malpractises of those who are a disgrace to the profession and a nuisance to the Public, How could the Judges here, without such assistance or means of prevention, guard against the chicanery and the never ceasing tricks of those who have been expelled their Profession and transported here in punishment of their misconduct.

These Persons have never been admitted into the company of Gentlemen here, or at all considered as respectable members of society. The Respectable Inhabitants, who are neither few nor inconsiderable, naturally felt alarm at their qualified admission, and, though strong necessity urged it, It has been a matter of doubtful benefit, and met with strong objections.

The Interests and Feelings of the Solicitors sent out by the Crown, unused as they are to such associates, ought to be taken into consideration, and certainly they never understood that they were to be exposed to such Fraternity, but, on the contrary, that they would have the practise, exclusive of such persons, and at first entirely to themselves, till in the course of time other unobjectionable persons could be admitted; and, in Faith and confidence of that, Gentlemen were induced to come out. The Practise of these Men (Crossley, Eagar, etc.) such as it was has been always slovenly and irregular, and I have not the slightest doubt that Messrs. Garling and Moore would get through business to a much greater extent, in a better and more regular manner. and more satisfactorily to the public.
1815.
1 July.

Alleged result of exclusion of ex-convicts.

Appointment of solicitors.

Determination of J. H. Bent.

Interference of L. Macquarie.

It has been stated that an abstract principle, such as I would introduce, would be ruinous to the dearest Interests of the Colony. I have, in fact, never proposed any abstract principle whatever; I have always confined myself to the Individual case before the Court; and I cannot conceive how the Interests of 5 persons transported here can be considered as affecting the dearest Interests of the Colony. Allusion has also been made to the cases of Mr. Fulton, one of the Assistant Chaplains, who had been concerned in the Irish Rebellion, and Mr. Redfern, one of the Assistant Surgeons, who had been concerned in the Mutiny at the Nore; but those offences were strictly against the Crown, The King's Person and Dignity; and, His Majesty having been graciously pleased to pardon the offence committed and to grant them Commissions in his Service, They could not fairly be put as analogous to cases of moral turpitude, such as Perjury, Forgery, etc.; and, even had such a case as their's occurred, I should still have considered it my Duty to know His Majesty's pleasure, before I could venture to admit a person who had once thrown off his allegiance.

It is scarcely necessary to bring to your Lordship's mind the view with which Solicitors were sent out by the Crown to practise in the Courts of Justice in this Colony; an appointment that would be altogether unnecessary and nugatory, if there existed no intention on the part of His Majesty's Government to exclude such persons of the description of Crossley, Eagar and the Rest, who are in fact now no longer Members of the Profession.

I have now laid before your Lordship the motives, which influenced me in the determination I formed, not to admit or swear in such persons as Crossley, etc., Attornies of the Supreme Court, and, if attempts were persisted in to force them upon me at every Meeting of the Court, to decline holding the Court altogether, till His Majesty's pleasure should be known.

Your Lordship will perceive by the correspondence, that the Magistrates (Messrs. Broughton and Riley) had complained to Governor Macquarie of my conduct, and His Excellency had thought proper to call upon me to make a Report of the Proceedings of the Court in order to his assuming a Jurisdiction and a Power, where His interference was most improper, and I sincerely believe was the Cause of all the differences which have arisen.

I have felt it my Duty to resist all interference on the part of the Governor with the Courts of Justice in any manner not authorized by His Majesty's Charter; For His Excellency's Tone and Language I must refer to the Letter itself; But, had His Excellency expressed a wish to mediate and conciliate, and not
to encourage so gross an outrage upon my character and Feelings, I should have been ready and happy to have given him every Information. But, in this Instance The Governor had prejudged the Question in the outset; and Instead of affording support to His Majesty's Judges, or acting with a delicacy due to their Feelings and their station, and deferring this matter till His Majesty's pleasure was communicated, he has evidently expressed a wish to assume a Jurisdiction where he had none, and wished to inculcate the Principle, that, if he should be pleased to order such Persons to be admitted, It would be my Duty to Obey.

The Rule and Principle of action of Governor Macquarie has been that Quod Gubernatori placent, legis habet vigorem, and It has been carried in this Colony to the greatest Extent; I can not conceive upon what other reason Governor Macquarie should have adopted his Line of Conduct, except from a levelling principle, and a desire to impress on the Colony that, compared with him, The Judge and the Convict were at the same distance. Whatever measure has been adopted, altering or affecting the Law, has been adopted without any consultation with His Majesty's Judges, and the Governor has taken his advisers, as to the Steps he has pursued on this occasion, I have reason to believe, from the very persons who were most in question.

In further Justification of my Conduct, I may say, that from the constitution of the Court, (every act of which must be under my hand and seal), I am the Person most in the view of the Public, and upon whom every censure would fall at any measure unworthy, illegal or unjust being adopted. From Gentlemen, who could treat the opinion of the 12 Judges with so little ceremony, I could expect little attention to mine; I should have become a Cypher in the Court of which I am constituted the Judge, and should have been compelled to endure every Insult and every kind of contumacy, assured that I never should be supported in endeavouring to suppress it.

Such, My Lord, is the Situation in which I have been placed, subjected to the alternative of sitting in a Court unexampled in any part of His Majesty's Dominions, and submitting to be disgraced in my own Opinion, in that of my Profession, and of the World, or otherwise by supporting my own character, and the respect due to my public station, by resisting the admission of improper persons and opposing improper interference, call upon myself the personal enmity of the Governor.

The Judge Advocate and the Two respectable Gentlemen, composing the Governor's Court, have unanimously made an order,* excluding all persons who are circumstanced as the Persons so

* Note 86.
often alluded to from practising in that Court. And though Requisitions have been set on foot for meetings of the Inhabitants, in order to censure my conduct, they have entirely failed from the Refusal of any of the respectable Inhabitants to subscribe them.

I can not conclude without again expressing my regret for the unpleasant differences which have arisen, and my hopes that Gentlemen will accede to the proposal I have made to terminate them.

I beg to assure Your Lordship, that I have throughout been actuated solely by disinterested motives, and a conscientious regard to my Duty and my Honour. I feel confident that your Lordship will render me every Justice, and take the earliest means of removing the difficulties of my situation, which has been absolutely without a parallel.

I have, &c.,

JEFFERY HART BENT,
Judge of the Supreme Court N. S. Wales.

[Enclosure.]

STATEMENT BY MR. JUSTICE BENT.

A FEW days previous to the 18th April, 1815, at an accidental Interview with Governor Macquarie, His Excellency mentioned that he had received Petitions* from certain Persons who had been accustomed to practise in the Courts here, stating their fears that they would not be allowed so to do in future. He asked if he had done right in receiving them and whether I had any objections to read them, if he sent them to me. I replied that he could not refuse to receive any Petitions properly addressed, and that I would read them, but that I could do nothing in them, The Proper place of application being to the respective Courts, as every Court had an exclusive Power as to whom they thought fit and proper to be admitted to practise.

After a conversation of this kind I was much surprized to receive a letter from the Governor, (a Copy of which marked A is herewith transmitted) wherein His Excellency officially recommended the Petitioners Crossley and Eagar to the favourable consideration of the Supreme Court and in a manner almost to preclude denial, at the same time sinking all mention of circumstances of which His Excellency could not be ignorant and on which the whole case turned, viz.: the fact of their having been transported for Perjury and other infamous Crimes. A Report had reached me before I received the letter and was general throughout the Town that the Governor had so recommended

* Note 93.
them and I had some difficulty at the time in believing that the Governor would take such a step without any communication of his intentions to His Majesty's Judges.

In my Reply (marked B), I detailed the arguments which weighed upon my mind in refusing to admit these Persons and shewed the Insidiousness of the Petitioners in keeping back circumstances, which were most in point.

The Supreme Court met on the 1st May, and Petitions were presented by George Crossley and Edwd. Eagar, who had petitioned the Governor, and also by George Chartres, praying to be admitted Attorney of the Supreme Court. In the meantime, Copies of the Correspondence between the Governor and myself had been given from the Secretary's Office and industriously circulated by George Crossley who had publicly declared that, as the Governor was on his side, He did not care for the Judges; and the Magistrates associated with me as Members of the Supreme Court admitted that the Governor's recommendation had come to their knowledge.

On the 5th May, the Petitions came in to be heard. The Petition of Edwd. Eagar being argumentative and filled with irrelevant matter was dismissed at my suggestion; The other Members of the Court with great difficulty consenting to such a step, though the Petition was too improper to have been received by the Clerk. He had liberty given to present another, and it was only after a second attempt to break through all order, that he would fill a Petition proper to be received. The Petitions of George Crossley and George Chartres were heard, and both distinctly asked whether they had further arguments to urge in support of their Petitions. The Members of the Court wishing time to consider the Subject, the Court was adjourned to Thursday, 11th May, and, on the Tuesday (9th May) previous, the Members had a meeting at my Chambers, when I laid before them the reasons which influenced my Judgment and endeavoured to bring them to some consideration for my Honour, The honour of the Court and the Interests and feelings of the Solicitors sent out by the Crown. Finding the Members decided upon admitting them, I put the Question to each whether they thought George Crossley and George Chartres fit and proper persons to be admitted Attornies of that Court and whether the Prayer of the Petition should be granted or not. They both replied in the affirmative.

On Thursday Morning previous to my going into Court, They requested to see me again on the Subject. They then endeavoured to mix a general abstract principle with the case before the Court; I told them the Court had only to decide the Cases
before them and had nothing to do with any general principle, except so far as the decision of the Case before them affected it, and so far as it might be used in the way of argument, and as the Reason of any individual Judgment; and, having been called out by my Clerk, I detained them as I met them retiring, and in order that there might be no mistake put the question whether the prayer of the Petition should be granted, and whether George Crossley, a Man convicted of perjury, was a fit and proper person to be admitted to practise in the Supreme Court; Mr. Broughton one of the Members replied decidedly he was and Mr. Riley the other said He saw no objections.

On entering the Court Room, I admitted Mr. Wm. Henry Moore, one of the Gentlemen sent out by the Crown for that purpose, as an Attorney and Solicitor and administered the Oaths; when George Crossley got up to address the Court, I stopped him, telling him he had already been heard, the Court had considered the matter and formed their Judgment and that he must sit down; when in a most indecorous manner I was told by Mr. Broughton that I had said he might be heard in argument vivâ voce, and Mr. Riley asserted the same, tho’ the Petitioner had been heard and the Court had formed their decision, thus supporting Crossley in following a course of contumacious conduct, for which he had previously become notorious in all former Courts; I then was obliged to state that I had asked him at the hearing whether he had any more arguments to urge, which statement was openly denied by Messrs. Broughton and Riley and distinctly admitted by Crossley, when put to him, to be correct, and that he had no right to say another word; and he declined saying anything further.

Before stating the determination I had come to on the Subject, I observed upon the last petition, that Eagar had presented, that he had not stated that he had been admitted an Attorney at home or even an articled Clerk, but that, in order to mislead and to disguise the real truth, he had stated he had been bred an Attorney and admitted a Member of the King’s Inns in Ireland, and he confessed he had no Certificates of admission to produce; I observed, upon the Petition of Chartres, that he was then a Publican and that was an objection valid with all, as long as it continued; with respect to Crossley, I then stated my determination from a Paper, a Copy of which is subjoined, that I neither could nor would admit him or persons in his circumstances to practise in that Court. Mr. Riley expressed his opinion that Persons of that description might be admitted, and Mr. Broughton, on being asked if he wished to state his Sentiments, said he concurred with Mr. Riley.
In consequence of what passed this day, a Correspondence took place between the Magistrates and myself, Copies of which (marked 1 to 10) are herewith transmitted. The Magistrates had declared their determination not to sit with me; I had adjourned the Court to the 18th May; but upon their request further adjourned it to the 28th May, when they sent me word they should resume their Seats, The Governor not permitting their secession; But, previous to going into Court that day, I thought it proper that I should know their intentions in order that the Court might not be made a scene of discussion. I found them determined to persevere in their opinion; I proposed all further discussion should cease, till his Majesty's pleasure should be known. They declined the proposal and Mr. Broughton expressed himself determined to make a public harangue in the Court, and to force me to listen to any language He might think proper to use. From their vehemence of demeanour and expression, I have no doubt that I should have been compelled to remain, (had I entered the Court), while they admitted Attornies and did any other act they might have in contemplation, and that even personal violence would have been had recourse to in order to retain me for that purpose. For that reason I declined going into the Court, and sent my Clerk to postpone the Meeting till the 1st July. Though the Court can not be constituted without my presence, and notwithstanding Messrs. Broughton and Riley had scarcely a moment left me, They took their Seats, and sent my Clerk on his entering to execute my orders, as they had previously done the Provost Marshal to acquaint me that they waited for me. On the Clerk's postponing the Meeting of the Court to the 1st July, Mr. Broughton with an Oath threatened to commit him to the Common Gaol.

Soon after the Governor's Return from the Interior, I received a letter from him in which he demanded a Report of the Proceedings. I subjoin Copies of this Letter and my Answer, and also the Governor's Reply for more particular Information. They are marked respectively (C, D and E).

Since these Circumstances took place, an Attempt has been made to hold a Meeting of the Inhabitants and come to resolutions disapproving of my Conduct. For this purpose a Requisition was handed to the Provost Marshal for a Meeting of the Inhabitants to enquire into the Circumstances that had taken place in the Law Courts which Requisition was signed by a Magistrate as the Course is and other persons. The Magistrate Mr. Simeon Lord came out a Convict; The other Persons were very insignificant and almost all came out Convicts also, and
what is most singular, This Requisition was brought to the Pro­vost Marshal by Crossley, Eagar, and Chartres, who had taken it about to obtain signatures.

This Requisition was laid before the Governor by the Provost Marshal to know his pleasure thereon, when I have been in­formed, The Governor replied that the names were not suffi­ciently respectable; But that, if other more respectable persons subscribed, he would comply with their request.

In consequence of that a Canvass took place, but it was found that it did not meet with the approbation of the respectable In­habitants, and a new Requisition was set on foot, to enquire into the Judicial, Commercial, and Agricultural State of the Colony. This was also handed about, and to many persons, who had been transported here and acquired considerable property, when they declined signing any requisition of such a nature, being con­vinced it was an advantage to the Colony that such persons, as George Crossley, etc., etc., should be prevented from practising, and feeling themselves safer in regard to their persons and their property in the hands of Gentlemen of respectability. At the same time, attempts were made at other parts of the Territory to procure similar Requisitions, which also proved abortive, clearly evincing the great pleasure felt by most at the exclusion of the persons in question from practising. The Characters of the Individuals, who first promoted them, are thus fully shewn, and that, to compass their ends, They would have recourse to every means of Intimidation.

Subsequently to the Meeting of the Supreme Court, the Gov­ernor's Court assembled, when The Judge Advocate and the two respectable Gentlemen composing that Court unanimously made an Order* that Persons, who had been transported to this Terri­tory should not be admitted as Attornies of that Court.

JEFFREY HART BENT,
Judge of the Supreme Court.

[Sub-enclosures A and B.]

[Copies of these letters will be found on page 489 et seq., and page 495 et seq., volume VIII, series I.]

[Sub-enclosures C, D and E.]

[Copies of these letters will be found on page 534 et seq., volume VIII, series I.]

[Sub-enclosures Nos. 1 to 10.]

[These papers will be found on pages 516 et seq., and 529 et seq., volume VIII, series I.]

* Note 86.
LIST OF PERSONS who signed the Requisition for a Meeting of the Inhabitants of Sydney to enquire into certain Circumstances which had taken place in the Courts of Law.

Simeon Lord Magistrate came out Convict
T. Crook a Missionary Do Free
— Hoskins Master of the Orphan School Do Free
— Bowden Public Schoolmaster Do Free
G. Howe Government Printer Do Convict
Jh. Underwood came with his Brother a Convict Do Free
— Rushton a Brewer came out Convict
— Clarkson Do Convict
J. Laurie Clerk to Messrs. Wentworth, Riley & Blaxcell, Contractors for building the Hospital; in 1810, was driving the Govt. Bullock Carts Do Convict
C. Thompson a Baker Do Convict
Ie. Nicholls Postmaster at Sydney Do Convict
W. J. Speed Transported for Bigamy about 2 or 3 years ago, lately emancipated Do Convict

J. H. Bent, J.

ADDRESS OF JUDGE IN SUPREME COURT, 11TH MAY, 1815.

It is with considerable Regret I have to state that the undue steps resorted to with regard to these Petitioners has in some degree prevailed; And that Gentlemen have been found, who have thought proper to differ from me on a point of pure professional feeling and practice, and to say that those Persons whom they confess it a disgrace to admit to their Tables, or to suffer any part of their families to associate with, are fit and proper Persons to be admitted to the situation of Attorney in His Majesty’s Supreme Court notwithstanding Gentlemen have been sent out by the Crown for that purpose.

Since Gentlemen have thought right to pay so little deference to my opinion in points of Law and Practise and to hold the feelings and Honour of the Judge, the Dignity and respectability of this Court of so little Account, I have come to a determination on this subject which I will shortly state; For I will never suffer my Honour and my Character to be trifled with by any set of Men whatsoever. It is my intention to state the whole of this transaction to his Majesty’s Government, and to forward the Names of those Persons who would so completely disgrace His Majesty’s Courts of Justice, and I do not doubt that Measures will be taken to prevent such insulting Applications or so derogatory to the Character of any Court, in future; In the mean time that the Petitioners may not be vain enough to imagine that they will be permitted to practise, I do now
Address of J. H. Bent re admission of attorneys.

1815.
1 July.

Solicitor Moore to Mr. Justice Bent.

Dear Sir,

George Street, Sydney, 12th June, 1815.

I hope I shall not be deemed intruding on your time in troubling you with a letter on the subject of the late difference between you and the Members of the Supreme Court respecting the admitting of certain Persons to practise as Attornies and Solicitors. It may appear rather strange that I should now offer to address you, after remaining silent during the time the Court was occupied in considering the Petitions those persons had presented for their admission; but the Question appeared to me of so simple a nature, and so contrary to the Laws I have been brought up in, that I considered any thing that I might have had to say upon the subject, would have had very little additional weight to induce the Court to dismiss those petitions, and that therefore it would only unnecessarily taking up the time of the Court for me to have urged the propriety of so doing.

It is hardly necessary for me to remind you, from your having been greatly instrumental in obtaining for me the situation I have the honour to fill, that I came over to this Colony under the sanction of the British Government for the purpose of acting as an Attorney and Solicitor of the Courts established here by the late Patent, and that Mr. Garling is now on his way, and hourly expected hither to hold a similar situation to myself; it was certainly held out as an inducement to us both to accept these situations, that we should be allowed to enjoy the practice

solemly declare that I will not admit as Attornies of this Court, nor administer the Oaths to Persons who have been transported here as Felons. It is contrary to Law, and no circumstances and no necessity can exist so strong in my mind as to induce me to it.

I will not submit to have Persons of that description foisted in upon me contrary to my Feelings and Opinion; and, if any attempt should be made by these Petitioners to practice directly or indirectly, I shall know how to punish it; and, if any steps are taken to force them upon me, I will close the Supreme Court altogether.

I had hoped to have been able to lay before the Court Rules and Orders to govern its future proceedings; but, harassed as my Mind has been by the unexpected opposition I have met with, and on a point which so intimately involved my Character and feelings, and on which as a Judge I had a right to expect implicit deference on the part of those appointed to sit as Members of the Court, I am under the necessity of adjourning the Court to Thursday next.

[Sub-enclosure H.]

SOLICITOR MOORE TO MR. JUSTICE BENT.

I hope I shall not be deemed intruding on your time in troubling you with a letter on the subject of the late difference between you and the Members of the Supreme Court respecting the admitting of certain Persons to practise as Attornies and Solicitors. It may appear rather strange that I should now offer to address you, after remaining silent during the time the Court was occupied in considering the Petitions those persons had presented for their admission; but the Question appeared to me of so simple a nature, and so contrary to the Laws I have been brought up in, that I considered any thing that I might have had to say upon the subject, would have had very little additional weight to induce the Court to dismiss those petitions, and that therefore it would only unnecessarily taking up the time of the Court for me to have urged the propriety of so doing.

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160 HISTORICAL RECORDS OF AUSTRALIA.
of the Courts here in exclusion of those persons who had hitherto been permitted to conduct business as agents, and who are now applying to be admitted as Attorneys. I have only to regret that I did not bring over with me any written instructions to that effect; it is more than probable Mr. Garling may; I know he is the bearer of some Official Papers from Earl Bathurst's Office.

You must be aware that we are both become great charges on the Colonial funds for I will not pretend to say that the Salaries directed to be paid to us are not very heavy burthens upon so young a Colony, and it is hardly possible to suppose that His Majesty's Ministers would have consented to such a Measure unless some probable benefit was likely to result to the Colony therefrom, and it is very evident that if these Men are allowed to practice here, that it will have the effect of almost entirely excluding Mr. Garling and myself, the far greater number of the Suitors here being Men of the same Stamp of Character, and under the same circumstances in life as the persons who are now petitioning the Court.

With respect to the side of the Question the two Members of your Court have thought proper to espouse directly contrary to your opinion of the matter, I can urge nothing further to shew the illegality of complying with them, than what you must be already acquainted with. It would be not only in express opposition to two Acts of Parliament on the subject, but also to the established practice and rules of the Courts of Law at Westminster for ages past. I do not mean to say that the Courts here are bound to follow or in any way to notice the decisions of the Courts at Westminster, but I should hope that the determination of so learned a body of Men, as have presided as Judges in those Courts, may be very properly used by me as powerful arguments to submit to your Consideration.

The delay, which the Question has already occasioned in the Supreme Court's proceeding to business, as well as the delay which is likely to ensue, is I grant of the most serious consequence to the Colony; but, as it would be establishing a precedent for the future practice of the Court, which would be deemed at once illegal and unconstitutional by the Laws of England, and would in the end tend to the subversion of all Justice, I have no doubt that the whole of the respectable part of the Inhabitants of this territory will feel fully compensated by any further delay they may suffer in having the question properly determined, and I am very sure, that they, as well as myself, will be perfectly satisfied with any decision you may make upon the point.

I am, &c.,

Wm. Hy. Moore.
Mr. Justice Bent to Earl Bathurst.

Sydney, New South Wales, 4 Novr., 1815.

My Lord,

On the first of July last, I had the Honour of addressing your Lordship on the subject of the unpleasant differences, which had arisen on the first formation of the Supreme Court, between myself and Magistrates, Members of that Court, with regard to the admission of certain Persons, transported as Felons, to practise therein, and I then transmitted to your Lordship the Correspondence resulting therefrom; I have now to inform Your Lordship that Mr. Garling the other Solicitor appointed by the Crown to practise in the Courts here, having at last arrived, I thought it my Duty to reiterate my proposal made to Messrs. Broughton and Riley the Members on the 26th May last, and I am happy to add that they have acceded to my proposition of letting the matter rest, till your Lordship's sentiments have been communicated; and the Supreme Court is now about to meet for the dispatch of business.

I must however, while on this subject, mention that, since my last addressing your Lordship, I have discovered that Governor Macquarie has himself been the origin and first mover of those unpleasant differences; I have every reason to believe that the transported attorneys would have silently submitted to their deserved exclusion from the Courts of Justice, Had not Governor Macquarie sent for George Crossley and desired him to petition him on that subject, and he would place the matter upon a right footing; and my Authority for this Statement is a Declaration to that effect by George Crossley to the Judge Advocate before a Witness, and farther that the Petitions requesting the Governor’s interference were presented in consequence of his expressing that wish.

I have now however to regret that a new difference has arisen between Governor Macquarie and myself, in regard to which I am anxious to justify myself to your Lordship.

Your Lordship is aware that, previous to my arrival here, Turnpike Roads had been established by Governor Macquarie, and, from all payments to the Tolls collected on such Roads, He had exempted himself and the Lieut. Governor and their respective Families and Suites, and it is proper to observe that such Exemptions do not appear on the Face of the Proclamation* of the 30th March, 1811, establishing such Tolls, but were given by what is called a Government Order on the 6th April subsequent.

Though I well knew that the Power assumed by Governor Macquarie to establish such Tolls was absolutely illegal, I beg to 

* Note 94.
assure your Lordship that, having found the Tolls already established, it was never my Intention to produce Discord by raising objections, and the more so, as considerable advantages were derivable from such Roads if properly managed; and your Lordship will perceive that the Steps I have taken have been in a great measure forced upon me.

It will be evident that in order that such a measure as the establishment of Tolls might be satisfactory to the Public, it would be proper that the Tolls should be managed in the mode usual in England, and that no Immunities of any kind should be given; but, if Immunities were proper at all, I should hope, that your Lordship would not think that it was too much for His Majesty's Judges to expect the same Privilege which had been given by the Governor to himself, the Lieut. Governor, their Wives and Servants, and to the Governor's Secretary and the other Persons of his Suite and their Servants.

From the month of July, 1814, the time of my arrival, to the month of August, 1815, no demand had ever been made upon me for Toll; but, at that time a demand being made, a correspondence ensued between Governor Macquarie and myself, which I have the honour to transmit.

Notwithstanding the mortifying distinction made between the Lieut. Governor and the Judges, and the illegality of the whole measure, I should have been happy to have contributed to an establishment that, fairly managed, would have been productive of great advantage to the Community; but it may be proper here to apprize your Lordship that the Principal Road was frequently scarcely passable, particularly after the slightest Rain; that the Money was not appropriated to the purpose or to the Roads on which it was levied, but was carried to the general Colonial Fund; that there were no Persons responsible for their good repair, but that the Governor, who contributed nothing to the Roads, having from the Outset exempted himself and others from a payment enforced from the Public, was the only Person who could expend the Money collected, or who could order any repair; and the natural consequence of the money levied being carried to the general Fund was, that it was devoted to the payment of other demands, the Roads being entirely neglected, and every remonstrance as to their disrepair treated with Contempt.

Your Lordship, no doubt, well knows that the Tolls in England are by no means a Branch of Public Revenue, but are exclusively appropriated to the maintenance of the Roads, from whence they arise, and are managed by those who are generally the greatest contributors to them.
1815.
4 Nov.
Reasons for action by J. H. Bent.

Prosecution and conviction of J. H. Bent.

General order issued censuring J. H. Bent.

Treatment of judges by L. Macquarie.

As no Demand had been made upon me for Toll for upwards of Ten months after my arrival, however bad the Roads might be, I did not conceive myself called upon to interfere; But, upon such a Demand being made, I thought myself justified in endeavouring to bring about a proper and satisfactory arrangement with regard to them, and, on experiencing a contemptuous reply, in refusing to pay what I knew was demandable by no legal authority.

In consequence of this refusal, Mr. Wentworth the Magistrate of Police, without any communication to me, and by the orders as I have since been informed and believe of Governor Macquarie, took depositions, and issued a Summons requiring me to appear personally before him; and, notwithstanding my informing him that I was not amenable to his Jurisdiction were it founded on legal Authority, upon my not appearing, which was scarcely to be expected, He proceeded to conviction and to fine for the alleged offence. I pass over various errors arising from his Ignorance in the form of the proceedings, and confine myself to the general tenor of such a measure, and to the disrespect with which I found myself treated; Hitherto, They have not ventured to levy the Fine which they thought proper to impose; But Governor Macquarie has published in the Sydney Gazette a Government and general order,* which I forward to your Lordship, and inserted it in the order Books of the Regt. in Garrison here; in which order, after accusing me of want of Public Spirit in declining to pay a Toll, from which he had exempted himself, he passes a Censure on my Conduct, and authorizes the Toll Collector, their Convict Servants and other persons to proceed to personal violence against me. I have, in consequence not unnecessarily to court insult, contented myself with not becoming liable to any Tolls here established, and with laying the whole matter before your Lordship.

I have from my first arrival in this Colony experienced, on the part of Governor Macquarie, by no means that cordiality, that support, and that wish to give weight and respect to the Judicial office, which I humbly conceive not only to be both prudent and politic, but which every Judge has a fair title to expect: on the contrary I have found myself harrassed by a variety of petty mortifications, and a desire has throughout been clearly evinced by Governor Macquarie to hold the Judges out to the Colony in an inferior point of view, and to diminish the respect which ought to be shewn them, and is on every account so justly their due. But, My Lord, I little expected that even Governor Macquarie would have converted the Public Gazette into the means of gratifying his displeasure towards one of his Majesty's Judges.

* Note 94.
no opportunity being afforded of explanation, no Communication being made of his intention so to act; and I am certain that even where there was authority to censure (which I humbly contend Governor Macquarie has not), a similar mode of censuring, by publication in a Gazette, or by orders inserted in a Regimental Book, never was resorted to in any other part of his Majesty's Dominions, and could never be contemplated in any country where the Independence and Dignity of the Judicial Office were thought objects worthy to be attended to or secured.

Your Lordship will perceive, in this instance, the arbitrary and military principles of Governor Macquarie's Government; and, as I am so personally attacked, I hope to be excused in stating that my Conduct in this Colony has in every instance been disinterested; That I have neither Land or Cattle; that I have neither tendered Supplies to the Stores nor required any indulgence from them; and, in the whole of my private Conduct, I may boldly challenge every enquiry; and, with regard to my Public Station, Your Lordship has every transaction unreservedly before you. It is to your Lordship, therefore, I with confidence appeal for the vindication of my Character and Station from the open violent and undeserved attack of Governor Macquarie, and to your Lordship's decision I shall willingly submit.

I will now avail myself of this opportunity humbly to lay my sentiments before Your Lordship as to the present System of Judicature and to recommend an arrangement, which I think would obviate all present difficulties and remove every ground of future dissension.

The long and serious illness of my Brother, The Judge Advocate, forces one observation immediately upon my notice; viz. That, under the present Charter of Justice, There are three persons holding Judicial Offices, whose Duties are entirely distinct, and neither of whom can act for the other, and, in case of Death or indisposition, no Provision is made to supply the place either by a reciprocal performance of the Duties imposed on each, or by any legal power of appointment.

Your Lordship is aware that the Governor's Court, and the Court of Criminal Jurisdiction can be held only by the Judge Advocate; And the want of some Provision of the Kind above mentioned is now (I regret extremely to say) become very obvious, from the uncertain and precarious state of his health; and I am the more earnest upon this subject, as your Lordship will perceive in the Sequel that the important Duties of the Judge Advocate were very likely to have been confided either to Persons, who, from their not belonging to the Profession, were incapable, or to Persons who are of that Branch of it, from which...
Defects in charter of justice.

Judicial Officers are not usually chosen, and who are not generally supposed fit for performing those Duties so as to give full satisfaction to the Public.

I now beg leave to mention to your Lordship a few of the other Defects in the last Charter; and I have firstly to premise that Difficulties are likely to arise from a want of concurrent Jurisdiction in the Supreme Court in all cases under £50. I observe also that Jurisdiction is given to the Supreme Court in all cases where the Party Defendant was resident in the Colony at the time the Cause of action occurred. But, if, upon the Plaintiff being filed and the return of the Summons, the Defendant should be out of the Colony, no further proceedings are pointed out or authorized by the charter. Again with respect to Van Dieman’s Land, from the uncertainty of the Communication it is impossible to comply with the Letter of the Patent, which requires all Writs to be made returnable at a day certain; since my arrival here, an Interval of Six Months has elapsed without any communication from hence; and it is scarcely possible for a Party to try his action or for the Court to compel the attendance of Witnesses from that Island; For, if a Party were obliged to tender a proper recompense to a Witness for his expenses, etc., He would be ruined in trying his Cause, and it would be unjust to compel a Witness to undertake a Voyage by Sea of 600 Miles, and to leave his occupation and family perhaps to his certain ruin, without adequate remuneration.

The first application to me after my arrival was for the purpose of obtaining a Writ of Habeas Corpus. But no Power has been granted to any of the Courts or to the Judges thereof to issue such Writs; It would be improper that a Power so important to the Subject should rest on vague or uncertain ground; and if a Judge were to assume such a Power from implication, or from any analogy to what has been done in other Courts, He might not only perhaps incur personal reprehension, but would be unsafe in so acting.

In consequence of these and other great defects in the present System, I have with much submission to propose to your Lordship that there should be only one Court in the Colony of New South Wales, to be called the Supreme Court, and that this Court should be composed of a Chief Justice and Two or more Puisne Judges, to be appointed by Commission under His Majesty’s Sign Manual, and that such Court and the Judges thereof should have similar powers, privileges and Precedence with the Judges of the Courts of King’s Bench in England. That they should be empowered to form Rules and orders, and to appoint proper Officers, and to fix their Fees Subject to the consent,
approbation, alteration or amendment of His Majesty in Council. That such Court should be a Court of Criminal and Civil Jurisdiction. That, sitting as a Court of Civil Judicature, The Decision of the Majority should be final; That any two Judges should form a Court; and that there should be no appeal, except in Cases exceeding the Sum of £— and then only to His Majesty in Council; That It should be a Court of Equity and also have the granting of Probate of Wills and of Letters of administration. That 4 Terms or Sittings in the Year of not less than 28 days each should be held in this part of the Colony, and one such Term or Sitting in Van Dieman’s Land; and I should recommend that Power should be given the Court to hold monthly Sittings or otherwise, as the Court should order and appoint, before any one or more of the Judges for the Trial in a Summary way of all Personal Pleas not exceeding £10; but at the same time levying an option to the PM to proceed in a more regular manner if he thought proper. I should propose that, when sitting as a Court of Criminal Jurisdiction, It should be composed of one or More of the Judges, and, in case Your Lordship should not think it adviseable to introduce the Trial by Jury, that in this part of the Colony Five Officers of Army or Navy, and in Van Dieman’s Land Three such Officers, to be taken in rotation, should be conjoined with the Court in the Trial of all Offenders. That the Court should hold a Sessions of Oyer and Terminer and general Gaol Delivery, four times in the Year, one of which Sessions should be held in Van Dieman’s Land. The Judges of a Court formed upon such a Plan, Your Lordship will Perceive, would have to go a Circuit to Van Dieman’s Land, being a Voyage by Sea of 600 Miles; I should propose that the Burthen of such circuit should fall upon the Puisne Judges, in case the Chief Justice should decline going. I certainly think a Court so constituted would fully satisfy the wishes of the Colonists in Van Dieman’s Land. If It should be thought advisable to establish such a Court, I would very readily exchange my present situation for a Puisne Judgeship in it, and would willingly take the onus upon myself of going such Circuit to Van Dieman’s Land, on proper accommodation being provided for the passage down, and abode there while in the exercise of my Duties.

The Minor Offices in such Court, as Examiner, Sworn Clerk, etc., might with some small salary annexed be filled by the respective Judge’s Clerks.

But I should recommend a proper Person to be sent out to act as Prothorrary, Register, and Clerk of the Crown, as there is no Person in this Colony properly qualified for such office.
1815.
4 Nov.
Necessity for a master in equity.

Another Indispensable Officer is a Master in Equity, and, for want of such Officer, I shall be obliged in the Supreme Court to make all references to myself and to take all the accounts. Should no alteration be thought proper in the present System, I should recommend that a Person of character and Integrity be appointed from home; and I will shortly point out a mode by which it may be done with much advantage to the Community, and no additional Expence thrown on the Crown.

The Present Police establishment is composed of a Super­intending Magistrate at £200 Pr. Annum, an Assistant Super­intendant at £80, But who is only a Constable and whose Duties properly belong to the Chief Constable, and also Two Clerks. I should propose that, instead of the present establishment, which is badly managed and filled by improper Persons, The Master in Equity should be Magistrate and be placed at the Head of the Police establishment, with a Salary of £300 a year, and also be Chairman of the Bench of Magistrates; and that he should be allowed a Clerk at £80 a year who should also be Clerk of the Peace.

The Principal Grounds for my recommending this measure are that Mr. Wentworth, the Principal Surgeon of the Colony, is the present Superintendent of Police, and, in consequence of his holding that Office, His Medical Duties are almost entirely neglected; He is an improper Person to be at the Head of the Police, from his Ignorance of the Law, and from the Fact of his being one of the principal Dealers in Spirits in the Colony; I have in a former letter* detailed to your Lordship the circum­stances affecting his Character while in England, and he is by no means among the most respectable here. His Clerk is a transported Attorney of bad Character, and is also a Publican; and, in the general Conduct of the Office, This Man is the Chief Adviser; and I must farther add that Mr. Wentworth has the principal controul over the Licenses and the Public Houses; and the whole conduct of the Office by no means gives satisfac­tion to the Public.

I must be permitted now to draw your Lordship's attention to the Island of Van Dieman's Land. Your Lordship will no doubt have heard of the declaration of Martial Law in that Island, and the execution† of some Bush Rangers and Marauders there, illegally though perhaps deservedly. I may perhaps be going beyond the Sphere of my Duty, when I mention to your Lord­ship That, while we have in this part of the Colony alone Three Government Houses‡ exclusively devoted to the occupation of the Governor, and within the compass of 35 Miles, and on which

* Note 95. † Note 75. ‡ Note 96.
the Labour of the Government Servants and Artificers, Government Materials and means have been expended to an extremely large amount, yet, in the whole Island of Van Dieman’s Land, there is neither Gaol nor Court House nor Church; and, while new Settlements and Establishments are forming, nothing is done either for the Welfare, the Security and the alleviation of the wretched state of the Old. In the present state of Van Dieman’s Land, It is almost in vain to attempt to carry any System of Jurisprudence into effect, where there are no means of confining either the Criminal or the Debtor.

I have now only to apprise your Lordship That the Judge Advocate, having formed some hopes of speedier recovery by proceeding to Europe, had applied for and obtained Leave of absence for that purpose; In the Event of his departure, It would become necessary that some Person should take his Duties during his absence; In consequence of having understood that the Governor had requested the opinion of the Judge Advocate, as to whom it would be proper to appoint, and that It had been recommended to be first offered to myself, In order to shew my readiness to do all in my Power for the Public Service, I offered to take upon me those Duties in addition to my own, not looking at all to any remuneration for so acting. I may mention that there is nothing in the office of Judge Advocate that renders it incompatible with the situation I have the honour to hold, And the Judge Advocate was of Opinion that his Sitting in the Court of Appeal, as he had no voice and was merely Assessor to the Governor, was not a sufficient objection to the appointment of the Judge of the Supreme Court to act for him; yet Governor Macquarie has thought proper in his answer, which I forward to your Lordship, to state that such appointment would be illegal and irregular; I know of no other illegality but the appointment by the Governor, whose authority so to do is by no means clear, But I was willing to share the responsibility, considering the Step justified by the necessity of the Case. But your Lordship will see that Governor Macquarie was actuated by personal motives merely, and expressed himself so to be; And an Offer was then made to Mr. Garling, one of the Solicitors sent out by the Crown to practise; and which Gentleman, whatever his abilities may be as an Attorney, is wholly unfit to fill a Judicial Office.

Mr. Garling induced by the promises held out to him by Governor Macquarie, that he would recommend him to His Majesty’s Government in case of a vacancy, and that he should, besides his Salary as a Solicitor, have an Income of £600 P. annum and the Fees and House attached to the Office, had consented
1815.
4 Nov.
Office accepted by F. Garling.

Solicitors to be debarred from office.

1815.

Departure of E. Bent cancelled.

Transmission of despatch.

to accept it, and would by his Secession from his Duty of Solicitor (a Duty which he was sent out expressly to fulfil) have revived a Question,* which had just been set at rest, and have brought about difficulties greater than those which he fancied he was remedying. In case of his refusal, I have understood the office of Judge Advocate was to have been filled by the Governor's Secretary.

I should hope that your Lordship would see the necessity of directing, that the Solicitors sent out by the Crown should by no means be appointed to any office inconsistent with their Duty as Attorneys.

Their appointment to such Offices would plunge the Colony into the same state from which His Majesty's Government had relieved it by sending out those Gentlemen; and a declaration against it will prevent much future difficulty and close a great source of Petty Intrigue.

The Medical Attendants upon the Judge Advocate not thinking him sufficiently strong to undertake the Voyage, He subsequently declined proceeding; and by that Means a Measure has not been carried into effect, the contemplation of which created considerable alarm, which was deprecated by all Ranks of Society, and was casting a great indignity upon myself.

It remains only for me to offer my apologies for this Letter, The Inducement to which has been the harrassing situation in which I am placed; and I crave your Lordship's Indulgence for any part that may be considered unseasonable or prolix.

Mr. John Liddiard Nicholas, the Bearer of this Letter to your Lordship, and who has been some time resident in this Colony, and who is returning to Europe via China, will be ready and is able to furnish every explanation of those points in which I may not have been sufficiently clear, and any further Information respecting the Colony that may be deemed necessary.

I have, &c.,
JEFFERY HART BENT,
Judge of the Supreme Court, N. S. Wales.

[Enclosures.]

[Copies of this correspondence will be found on page 11 et seq., volume IX, series I.]

EARL BATHURST TO DEPUTY JUDGE-ADVOCATE BENT.

Sir,
Downing Street, 11th Decr., 1815.

I have had the honor of receiving your letter of the 14th Octr., 1814, containing a Variety of Suggestions with respect to the Judicial Establishments of the Colony, and your own

* Note 97.
Situation as Judge Advocate. On the former Subject I should willingly have taken your observations into Consideration, if there had been on the part of H. M.'s Government any intention of remodelling a Charter, which has so lately been promulgated in the Colony, and which has not been framed without a due Consideration of all the Improvements which you had previously recommended. The Reasons, which induced me to decline a more general Adoption of the Opinions conveyed in your previous letter to Lord Liverpool, have been amply detailed in my Dispatches to the Governor. With respect to the Trial by Jury, it was a matter of doubt whether, in a Society so constituted as that of New South Wales, Individuals might not bring with them into Court Passions and Prejudices ill fitted for the discharge of their duty as Jurymen, and it was also feared that, if Free Settlers (whose feelings towards Convicts and their Descendants have in many instances appeared to be but little under restraint) were to sit in Judgement on Convicts, and that too in Cases where Settlers might be parties, the principle of Jury trial that a Man should be tried by his Peers could not fairly be acted upon.

As far as regards your individual Situation, I can assure you that the Title of Judge Advocate was not continued to you without due Consideration. The Colony did not appear to H. M.'s Government sufficiently advanced to admit of withdrawing that appearance of Military Restraint, which had been found necessary on its first formation, and which the Composition of its Population had rendered it indispensable. Subsequently to maintain. The Continuance therefore of a Judicial officer, who bore a Commission exclusively Military, and who, tho' a Military officer, was by the Charter placed above the Civil Judge appeared to have many advantages with a View to the Maintenance of that due Subordination in the Settlement upon which it's Welfare depends.

On these points I confess I see no reason to change the opinion, which I originally formed, nor do I, after the fullest Consideration of the Objections which you have urged to the present Charter of Justice, see any advantage to be gained by its revision, which could in any degree counterbalance the inconvenience of unsettling the Minds of the Colonists by again altering and so immediately the Judicial Establishments. Whenever the Population of Van Dieman's Land shall have so increased as to render it's Establishment as a separate Colony an advisable measure, an opportunity will be afforded of making improvements in the Judicial Arrangements of both Settlements, of which H. M.'s Govt. will no doubt then be anxious to
1815.  
11 Dec.

Issue of government and general orders by governor.

On the other Subjects adverted to in your letter, I have only to observe that the Power of the Governor to issue Government and General Orders, in the Absence of all other Authority and the Necessity of obeying them, rests now on the same foundation on which it has ever stood since the first formation of the Colony; for to these Subjects the new Charter has no reference, and can with respect to them have made no Alteration. The due Publication of such orders is undoubtedly a point of much importance, and I am sure that, if you conceive the means at present adopted insufficient to their object, the Governor will readily attend to any improvements which you may have to suggest. The Registry of such orders in the Courts of Justice is a Measure to which I must decidedly object, as tending to give but little, if any Additional Publicity to Govt. Orders, while it tends to encourage an Opinion that the Sanction of the Court is necessary to give validity to the Acts of the Governor.

With respect to the difficulty, which you express as to the Extent of Assistance which you are, in appeals to the Governor's Court, to afford to the Governor, and the mode in which it is to be afforded, I must confess myself unable to afford you any definite Instruction. For, if the Governor and The Judge Advocate act cordially together in the Exercise of their Official Duty, all Explanation on this point is unnecessary; if, on the other hand, they are animated by a different feeling, all Definition is impracticable. I must content myself therefore with impressing upon you, in the strongest manner the Necessity of maintaining a right Understanding with the Governor, and affording him on all occasions your ready and cordial Cooperation. Filling as you do the Situation of Judge Advocate in the Colony, it is more particularly incumbent upon you to uphold the Governor's Authority and to set an Example of due obedience to it: for there could not exist a greater Misfortune to a Settlement, of so peculiar a description as New So. Wales, than a spirit of Resistance, or any thing more calculated to produce such a Calamity than an Appearance of Misunderstanding between the Governor and yourself, or a Suspicion that you were disposed to question or disobey his Orders.

I was certainly not aware, when I recommended the Increase of your Salary from Eight to Twelve Hundred Pounds a year, that the appointment of Judge would have the Effect of depriving
GOULBURN TO BENT.

Sir, Downing Street, 11 Decr., 1815.

I received only on the 7th Inst. your letter of the 16th Decr., 1814, and enclosing a Duplicate of a former letter of the 14th of Octr. preceding relative to the Arrangements, which had been made for the Accommodation of the Supreme Court at Sydney. I did not fail to lay them immediately before Lord Bathurst; His Lordship could not but feel considerable regret that any Arrangement should have been made, which was not perfectly consonant with your Views of Convenience and Utility, and still more that any thing should have arisen, so soon after your Arrival in the Colony, to disturb the Cordiality between the Governor and yourself, which is most essential to the Public Service. Lord Bathurst had hoped that, previous to your departure from this Country, you were so far aware of the Nature of the Colony, to which you were about to proceed, as not to expect the same Degree of Consideration or the same personal Conveniences as you would have received in a Colony more advanced in Civilization and Improvement. He has no difficulty in admitting that a separate Court House and a Variety of other Public Buildings would be desirable Acquisitions for that or any other Colony, and, as soon as the means of the Colony are adequate to such Undertakings, there is no doubt that they will be readily applied to that and similar purposes. At present however the Provision made by Govr. McQuarie, in obedience to the orders received from home, appears to Lord Bathurst deserving of Approbation; and, if compared not with the Judicial Accommodation in this Country, but with that which the Courts of
New South Wales previously enjoyed, the Improvement is by no means inconsiderable. Whether it might have been more convenient to apply a residence allotted to the Surgeon of the Colony to judicial purposes is a point, which Lord Bathurst cannot undertake to determine. The Governor, who is aware of all the Claims and Expectations of the several Officers serving under his Command, must decide upon their respective merits, and Lord Bathurst has no reason, from his previous Conduct, or from that adopted towards yourself, to impute to him any disposition to undervalue those of the Judicial officers of the Colony.

A Communication will be made to Govr. Macquarie on the Subject of the payment of your Clerk, which appears to have been so long delayed.

It only remains for me further to express Lord Bathurst's earnest hope that you will not permit any points of subordinate importance to disturb the Cordiality of the Governor and yourself, and that, if you occasionally should hereafter find reason to regret the disadvantages of your Situation, you would attribute them rather to the State of the Colony than to any Disregard to your interests either on the part of Lord Bathurst or the Governor.

I have, &c.,

HENRY GOULBURN.

Commission of J. Wylde* as Deputy Judge-Advocate.

In the Name and on the Behalf of His Majesty George R.

GEORGE THE THIRD, by the Grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, To Our Trusty and Wellbeloved John Wylde, Esqre., Greeting. We, reposing especial Trust in Your Loyalty, Integrity and Ability, Do by these Presents constitute and appoint you to be Deputy Judge Advocate in Our Settlements in New South Wales. You are therefore carefully and diligently to discharge the duty of Deputy Judge Advocate in the said Settlements by doing and performing all and all manner of Things thereunto belonging; And you are to observe and follow such Orders and Directions from time to time as you shall receive from Our Governor of Our said Settlements, or any other Your Superior Officer. Given at Our Court at Carlton House, the First day of January, 1816, in the 56th Year of Our Reign.

By Command of H.R.H. The Prince Regent in the Name and on the behalf of His Majesty.

Countersigned,

BATHURST.

* Note 98.
Mr. G. Heath to
Crown Office Row, Temple,
5th Jan., 1816.

Dear Sir,

I hope you understand that I have no other objection to N. S. Wales than the smallness of the Income compared to the Dignity of the Office, etc. If his Majesty's Government should ultimately deem it expedient to place it on a more liberal Scale by raising the entire Emolument to £2,000, I should then very much wish to be the successful Applicant. With many thanks for your kind recollection.

I remain, &c,

G. Heath.

Under Secretary Goulburn to Mr. G. Heath.

Sir,

Downing Street, 6 Jan., 1816.

I have laid before Lord Bathurst your letter of yesterday's date, and his Lordship has directed me to acquaint you that, tho' he cannot sanction the increase of the Salary of Judge of the Supreme Court in New So. Wales from £800 to £2,000 per Ann., his Lordship will keep your Wish for Employment in the Colonies in his Recollection in the Event of another Vacancy elsewhere.

I am, &c,

Henry Goulburn.

Mr. J. Moore to Earl Bathurst.

My Lord,

Conduit Street, 9th Jan., 1816.

Mr. Heath has informed me of Your Lordship's goodness in offering him the office of Chief Judge in New South Wales. Fortunately Mr. Heath's talents and knowledge are bringing him forward at the Bar, for his prospects have improved since I had the honor of writing to your Lordship. And, as the salary fixed by Government for that office in this new Settlement is very moderate, especially for a married man with a family, he considers it most prudent not to accept of the appointment.

I believe that Mr. Heath has decided right, but I remain most grateful to Your Lordship for the kind proposal.

I have, &c,

James Moore.

Mr. G. G. Heath to Under Secretary Goulburn.

Crown Off. Row, Temple,
9th Jan., 1816.

I have many Thanks to return for your last stating that Lord Bathurst, altho' he could not increase the Salary of the Ch. Just. of N. S. Wales from £800 to £2,000, would on some future Occasion have me in his Recollection.
I should not have again troubled you but from a Wish to rectify a Misconception which has taken place of the meaning of my former Letter to you. I never supposed a Possibility of raising the Salary of £800 to £2,000, but to increase the entire Emolument, which you stated at about £1,200 to that sum, and that to be done either by Fees, Land or any other convenient Mode in the Colony.

Considering the Distance, and how much in a new Experiment in this singularly formed Colony, must depend on the Person sent out having some Practice as well as Knowledge in Law, and also understanding that the Judge Advocate makes as much as the Sum I mentioned, it occurred to me to be possible that his Lordship might ultimately consider it useful to this Colony to place the Chief Justiceship upon a higher Level.

I am, &c.,
G. G. Heath.

Mr. J. Wylde to Under Secretary Goulburn.
Sir,
1 Elm Court Temple, 15th Jany., 1816.

Properly appreciating the favor of the Interval allowed me for considering, whether my general Situation would permit me to avail myself of the appointment in New South Wales, you did me the Honor of suggesting might become open to me, and seeking the protection of your Assurance, that my resolution was to have reference only to my own personal Circumstances, and would not in any case make me appear to your Department as wanting in proper feelings of respect and Delicacy; I beg leave to state, that great as is my anxiety to obtain a public Appointment, yet the certain Necessity of being obliged to leave behind me my six Children from 2 to 10 years old, as there are no means whatever, I find, of giving them a proper Education at the place, and all communication in this respect or as to their proper settlement in Life will be lost to me on account of the distance to almost any beneficial purpose, will, I trust, hold me excused in begging permission, under so serious a Disadvantage only belonging to so distant an Appointment, not in this Instance to take advantage of the Honor proposed to me, yet earnestly deprecating the loss of that opinion and Influence, which permit even the Honor of this Communication. I have, &c.

J. Wylde.

Deputy Judge-Advocate Wylde to Under Secretary Goulburn.
Sir,
1 Elm Court Temple, 27th Jany., 1816.

I beg leave to express my sense of the Honor done me in respect of that communication you were pleased this morning to
make to my friend Mr. F. Pollock. The assurance, I have received, will permit me to withdraw immediately from appearing in my professional Character here, and only urges me respectfully to request your favorable Consideration to those points of serious Interest to me, which my friend took the liberty of suggesting to you. As to the time of quitting this Country, on my part I shall feel most happy and feel it my Duty in every respect, as far as my means allow, to conform to your Views on the subject, though I am sure it will occur to you that the Arrangements, necessarily to be made with so large a family as mine for such an office and at such a distance, must be seriously important and difficult, and that expedition much urged in this respect must occasion many Causes of personal Inconvenience and increased Expenditure; but I will not further intrude on you at present. I shall do myself the Honor of being in waiting on Friday next at the office, as my friend informs me you were pleased to direct, when I hope to approve myself as anxious, at the greatest personal Inconvenience, to have chiefly in my consideration that Interest which I deem it so high an Honor to have committed to my Charge.

I have, &c,

JNO. WYLDE.

MR. R. BENT TO EARL BATHURST.

88 Great Portland Street,
My Lord, 29 January, 1816.

As the Father, of Mr. Jeffery Hart Bent, and Mr. Ellis Appeal of Bent, of New South Wales, I presume to address your Lordship. I truly and sincerely lament the difference, that has arisen between Governor Macquarie and My Sons, and that, in their disputing the will of Governor Macquarie, they had incurred the displeasure of His Majesty's Government, insomuch, I am informed by a friend, a very respectable Barrister, of your Lordship having offer'd one of their situations (not the Judge Advocate's I believe) to a Gentleman on the Bar, and with it a considerable increase of Salary, but who declined the Acceptance.

Presuming my information correct and that no new appointment has taken place, as a Father, and an old Man, I beg, nay, entertain your Lordship, to reconsider the matter before it be too late.

My Sons may have Err'd in resisting the Will of Governor Macquarie; but they did it, I firmly believe, from the purest of motives, the Wish to Uphold the Honor of the Crown, and the purity of British Justice. They are Men of Honourable and
pure Minds, and woud. part with Life than do an Act, disgraceful to themselves or to the situation they hold; and whose greatest pleasure and Pride would be to serve their Country uprightly.

I understand, by my Letter from New South Wales, Business was proceeding in, But that all further discussion concerning Convict Magistrates and Convict Attorneys was defer'd, till His Majesty's Pleasure should be known.

As such, I assure your Lordship I can answer for my Sons—that, to the decision of His Majesty's Government on every and any particular point, they will pay prompt and implicit attention and obedience.

With the feelings of a Parent More than 70 Years of Age, I will thank your Lordship to inform me your Lordship's further intentions; I hope and trust the matter will be for the once passed over, when, I am persuaded, all things will go on smoothly.

I had the Honor of being Known to your Mother, the late Lady Bathurst, when resident at Apps Court—that, was She upon Earth, she woud. of her Goodness I am persuaded speak for me. I have to be, &c.,

ROB. BENT.

will your Lordship be kind enough to allow me an interview.

Under Secretary Goulburn to Mr. R. Bent.

Sir,

Downing Street, 31st Jany., 1816.

I am directed by Lord Bathurst to acknowledge the receipt of your Letter of the 29th Instant, in which you express your hopes that His Lordship would so far overlook the differences, which have arisen between the legal Officers of New South Wales and the Governor of the Colony, as not to make any alteration in the situations of your Sons in that Settlement.

Lord Bathurst very much regrets his inability to comply with your request. He has for some time past had occasion to fear from the correspondence of your Sons that they were too much disposed to resent the authority of the Governor, and to withhold from him that cordial cooperation, without which the Business of the Colony could not be satisfactorily conducted. The recent Dispatches from New South Wales have confirmed Lord Bathurst's previous suspicions, and the occurrences to which they refer are of such a nature that his Lordship feels himself unable to reconcile their continuance in the Offices, which they hold, with any feelings of justice to the Governor, or of consideration for the real interests of the Colony. Under these
circumstances, Lord Bathurst has been compelled to nominate other Gentlemen to the legal Situations in New South Wales, But at the same time Lord Bathurst is happy to assure you that, in consideration of the services which Mr. Ellis Bent rendered to the Colony at an early period, he will not consider him disqualified from holding a Judicial Situation in any other Colony or be unwilling to attend to your wishes for his advancement in that line of his profession.

I am, &c.,
HENRY GOULBURN.

DEPUTY JUDGE-ADVOCATE WYLDE TO UNDER SECRETARY GOULBURN.

Mr. John Wylde presents his respectful Compliments to Mr. Goulburn and herewith returns the Charter for New South Wales, for the perusal of which Mr. Wylde hopes that he has not taken a longer time than was intended to be permitted. As it would be expedient that Mr. Wylde should have a Copy of the Charter to take out with him, he would beg to be indulged with an opportunity of having it copied, if there be no printed forms in the Colonial office, and Mr. Wylde is correct in presuming that there can be no objection to such a purpose.

Mr. Wylde begs to take the Liberty of inquiring whether the Sydney Gazettes, which Mr. Goulburn had the Goodness to promise him a sight of, are to be seen at the office or to be entrusted to his private perusal, as indeed also the official Correspondence with the present Judge Advocate, or any reports from him of a public Nature, which may generally advise Mr. Wylde as to the Duties, etc., of his Appointment.

As Mr. Wylde, under the Circumstances, intends to give up his own Chambers in the Temple and lives at some distance from Town (Cheshunt, Herts), he begs to suggest to Mr. Goulburn, that Mr. Pollock, 18 Serjeant’s Inn, Fleet Street, will take in Letters and papers for Mr. Wylde, into whose hands they will be delivered without delay.

1 Elm Court Temple, Friday morn.

MR. R. BENT TO UNDER SECRETARY GOULBURN.

Sir,
88 Great Portland Street, 5th February, 1816.

I have to acknowledge the receipt of your favour of the 31st of last month.

It will be matter of unceasing pain and regret to my mind that my Sons have failed in acquiring the entire approbation of Lord Bathurst, knowing as I do that they have sought it as a
1816.
5 Feb.

Regret of R. Bent at recall of his sons.

solace, amidst many painful and severe Struggles in the performance of an arduous Duty, to the discharge of which, they have brought none but the purest motives and intentions and an ardent zeal for the Public Service.

This Blow, I am the less able to bear, from having been induced to hope that hitherto Lord Bathurst had approved their conduct, and my mind was totally unprepared for the event; at the same time, I feel consoled by Lord Bathurst’s kind assurances that he will not consider my Son, Mr. Ellis Bent, disqualified from holding a judicial Situation in any other Colony, nor be unwilling to attend to my wishes for his advancement in that line of his profession, and I beg through you to convey to his Lordship those grateful acknowledgements on the occasion, which can alone flow from the heart of a Father tenderly alive to the honor and welfare of his Children.

I hope and trust Lord Bathurst will be so good as to direct arrangements to be made for my Sons’ return; otherwise they will be most unhappily situated. I have, &c.,

ROB. BENT.

An interview in some leisure moment, I should esteem a personal favor.

GOVERNOR MACQUARIE TO EARL BATHURST.

20th February, 1816.

[In this despatch, Governor Macquarie reported the refusal of Mr. Justice Bent to pay tolls for the reason that their imposition was illegal; see page 3 et seq., volume IX, series I.]

GOVERNOR MACQUARIE TO EARL BATHURST.

24th February, 1816.

[In this despatch, Governor Macquarie reported the appointment of Frederick Garling as acting deputy judge-advocate; see page 31 et seq., volume IX, series I.]

MR. JUSTICE BENT TO EARL BATHURST.

Sydney, New South Wales,

25th Feb'y., 1816.

My Lord,

In my letter to your Lordship of Novr. 4th, 1815, I had to apprize your Lordship of the serious Indisposition of my Brother Mr. Ellis Bent, Judge Advocate of this Territory.

The mournful Duty has now fallen to my Lot of announcing to your Lordship, that, on the 10th November, 1815, but a few days after I closed my letter, He departed this Life, and (with-
out any partiality) I may add to the universal and sincere regret of the whole Colony; I trust I shall be excused when I state to your Lordship that I consider, and my Brother himself also thought, that the disease, which carried him to his Grave, was brought on and aggravated by the labours and the unceasing anxieties attending the Office which he had the honour to fill in this Colony, and was a Consequence to be expected from the miserable and unhealthy Court Room, in which he was for so long a time compelled to sit; And, when I mention to your Lordship that he died when little more than 32 years old, and when I state the labours he has gone through, and the Duties he has performed (to the entire satisfaction of every one), I think your Lordship will conclude that no Man ever fell so much a Sacrifice to Public Duty.

Your Lordship is well aware that the Judge Advocate of this Territory has all the Duty attending the Courts of Criminal Jurisdiction within the Colony; on my Brother's first arrival He acted also daily as a Magistrate; for, though a Sitting Magistrate for the week was appointed, in point of fact all the business from various causes came before the Judge Advocate, or was referred to him by the Sitting Magistrate; and he also acted as Chairman of the weekly meetings of the Bench of Magistrates till the Christmas previous to his death, when, from Disgust at the contumely with which the Magistrates were uniformly treated by Governor Macquarie, He withdrew himself from that Office, not wishing his name should any longer be mentioned among those, who were so degraded by the treatment adopted towards them, and with some of whom an honourable and a cultivated mind, for other reasons, could by no means wish to associate.

In a Colony composed as this is, The Presiding in the Court of Criminal Jurisdiction furnishes ample employment; and, in this branch of His Duty, The late Judge Advocate had a task of no small moment both with regard to the number of the Criminals and the variety of the Offences, My Brother, in the discharge of his Duty, having tried no less than 863 Prisoners and for crimes of every description from a common Assault to those of the greatest enormity.

Untill the month of August, 1814, when the late Patent was first promulgated, The late Judge Advocate had also all the Duties of the Court of Civil Jurisdiction, Duties still more laborious than those of the Criminal Court, inasmuch as the business before the Civil Courts is of a more complex nature; and, independent of the difficulties attending all other Courts in giving satisfaction to the Suitors, independent of the Duties
1816.
25 Feb

Duties of E. Bent in civil court.

Testimony in favour of E. Bent.

Causes tried in civil court.

Duties in chambers;

and in vice-admiralty court.

usually belonging to a Judge in England or in any other Colony. The late Judge Advocate had, from the total absence of all precedent, the peculiar difficulty of having every thing to arrange and bring to a System of Order and Legality; And He had, from the singular circumstances attending the Courts in New South Wales, viz., the absence of all the Officers usual in a Court of Justice, the peculiar Duty thrown upon him of Registrar, Prothonotary, Master, etc., without a single Person in the Colony, to whom he could look for the least assistance and not a single Practiser in the Courts, upon whose Abilities, whose Honesty, or even whose Oath he could rely; In such a situation, The Merits of the late Judge Advocate will be sufficiently obvious to every one; But when I add that the Colony had the greatest and most implicit (and with Pride I say it) well founded confidence in his Talents, his strict impartiality, and his undeviating Integrity; That His Decisions gave uniform satisfaction even to the losing Party; That Appeal was resorted to more as a measure of delay, than from doubt as to the Decision given; and that in every Appeal, even in those to His Majesty in Council, every Judgment of the late Judge Advocate was affirmed; I may feel justified in asserting that he has ably and honourably discharged his Duty to his Sovereign and his Country, and that few Individuals could have been found, so well qualified in every respect for the office he so long held, or who could so well have discharged its various Duties.

If any thing more were wanting to shew his Indefatigable attention and his great Labour. It will be supplied by stating that, in the Court of Civil Jurisdiction from the 19th March, 1810, to the 2nd August, 1814. He tried no less than 2,539 Causes from the Amount of 40s. to the Sums of 10, 20, and 30,000 Pounds: independent of the Court of Magistrates, in which every week almost without Intermission He presided, and wherein innumerable petty Causes under 40s. were disposed of. But the Labours in the Public Courts were nothing in Comparison to the Duties that awaited the attention of the late Judge Advocate at his Private Chambers; In the Criminal Department, The Preparation of all Indictments, In the civil. The issuing of all Writs, and which, from the Ignorance of the Parties suing, was usually a work of great fatigue and vexation. From the absence of a Notary Public, All Protests and notarial business of whatever kind were done and made by him: and further the Duties of the Office of Judge of the Vice Admiralty, an Office without any Salary or any other remuneration but what is too trivial to be mentioned. This Office He was only induced to hold, as a means of preventing the many and great illegalities that had
been committed in that Court here from the complete Ignorance that every one, even the Governors, were in as to the Powers and Duties of that Office. Several important Cases came before my Brother in this Court, and much trouble fell upon him in consequence, inasmuch as he was obliged literally to do what the Registrar and the Marshal from ignorance were not able to perform.

Another unpleasant Duty of an extraneous nature was that of presiding at such general Courts Martial as might be assembled, and, at some Courts of this Kind and of some importance, The late Judge Advocate was also called upon to act. And this was another addition to his Burthens and to his anxieties. So much indeed was his time occupied by one or other of the Public Courts that, at one period of his Life, He sat daily for six months and upwards without any intermission. I have passed over the Duties of the limited Ecclesiastical Jurisdiction as an appendage to those of the Civil Court and dispatched at the same time.

To such a Catalogue of Public Labours, It would be imagined There required nothing more to be added; Yet after these Duties, He was liable to be called upon for his opinion on every case stated or matter referred to him by the Governor; And These calls upon the late Judge Advocate's time and attention were neither unfrequent nor of small length. The Police Regulations and a variety of other Papers, which were drawn up by him, and opinions, which probably have been before your Lordship, shew that he was never backward on any occasion where his assistance could be useful; And I may here refer your Lordship for a proof of the Labour and Pains bestowed by him to the Port Regulations, and his observations upon them, which he himself transmitted to Your Lordship; And I may farther add that he never refused any Labour of any Kind on the Governor's call... except with regard to the Regulations alluded to; when Governor Macquarie called upon him to draw up what my Brother had given his written opinion was illegal, and when the Governor expressed his opinion that the Judge Advocate was bound to be his Drudge and to do whatever he required, notwithstanding a Secretary is allowed by Government with an adequate Salary, and whose peculiar Province it is to frame and draw up whatever the Governor may find necessary; and this was a pretension of such a nature, and so lowering to the Dignity of a Judicial Office, that it could not but be resisted.

As a last Instance of the Judge Advocate's close attention, I have the Honour to forward to your Lordship the Rules and Orders of the Governor's Court* drawn up and completed by him a short time previous to his decease.

* Note 99.
It is not necessary, in order to justify my Brother's title to every praise, that I should mention his known moderation; but I may observe that my Brother's mildness of manners and evenness of disposition are known and admitted, and what every Gentleman at the King's Bench Bar, or upon the Northern Circuit can bear testimony to; and it is to this Character and Disposition, and to the confidence that his Abilities inspired, I do not hesitate to say that the Colony is indebted for even the state of quiet it has enjoyed during Governor Macquarie's administration.

My Lord, Labours, such as these, the sedentary life consequent thereon, the confined Court Room he was for so long a time compelled to sit in, even at periods when the Heat of this Country was distressing, brought on the disease which has terminated his existence; and, in his opinion and in my own, this disorder was increased and brought sooner to a termination by the anxieties consequent on Governor's Macquarie's conduct towards him, and the public measures the Governor had the Intention to carry into effect.

I trust your Lordship will excuse me for mentioning that the emolument, which the late Judge Advocate derived from his situation, was little more than sufficient to maintain a respectable appearance consistent with the station which he filled. His salary for three years was only £720 pr. annum net money, and the fees attached to the Office were by no means great, and out of them was to be defrayed a variety of expenses consequent thereupon; and the late Judge Advocate had abandoned a great proportion of the fees to his Clerk, out of a wish that he might be enabled to preserve a decent appearance in this Colony and be placed above temptation. From this statement, it will be sufficiently evident to your Lordship, that he could not be able to lay up much provision for a widow or a family; and indeed, the main reason for my addressing your Lordship at this length is to put forward the claims of his family to the liberality of His Majesty's Government. The late Judge Advocate has left a family of four young children, and a widow, Mrs. Eliza Bent, pregnant with a fifth. The property he has left, together with a sum arising from an Insurance on his life, will leave but a small if any surplus after the discharge of his debts. After a life of labour, anxiety and public duty, (and I may say sacrificed from a continued attention to it), I can not conceive that His Majesty's Government will suffer the widow and children of such a servant to be devoid of the means of
respectable support, and of future advance in Life; At present the Widow and orphan children of the late Judge Advocate look up to me for a maintenance and an education, unless it should graciously please His Royal Highness the Prince Regent to bestow that means of support, which I trust the Services of the late Judge Advocate will appear to have earned.

I have now only to assure your Lordship that I have given no exaggerated account of the Labours and anxiety attending those Offices, which my Brother the late Judge Advocate filled; and I am sure that one fourth of the attention and abilities displayed in their performance would, if employed in any other way, have gained him ease and affluence and his Family a future Independence. In this view of the Subject, I have to request that your Lordship will have the goodness to consider and recommend the claims of the Widow and orphan Children of the late Judge Advocate to the notice of His Royal Highness The Prince Regent.

The anxiety, which I must naturally feel on this Subject, must be my excuse with your Lordship for the length of my present communication, which I close with a confident reliance that the Widow and Orphans of a Deserving and Honourable Servant of the Crown will not plead in vain for the Liberality of His Majesty's Government or for your Lordship's exertions in their behalf.

I have, &c.,

Jeffery Hart Bent,
Judge of the Supreme Court, N. S. Wales.

Deputy Judge-Advocate Wylde to Under Secretary Goulburn.

Sir,

Temple, 1st March, 1816.

Understanding that the Registrar and Clerk of the Judge Advocate of New South Wales has heretofore been appointed upon the permitted Nomination and recommendation of that officer, I beg leave to recommend as my Registrar and Clerk Mr. Joshua John Moore as duly qualified for the Situation and to beg on his behalf the usual Indulgencies and Facilities in that respect.

I have, &c.,

Jno. Wylde.

Deputy Judge-Advocate Wylde to Under Secretary Goulburn.

Sir,

1 Elm Court, Temple, 7th March, 1816.

Having had the honor of a Communication from you that the Appointment of Judge of the Vice Admiralty Court would be joined with that of the Judge Advocate of New South Wales, I beg leave to suggest, that in my recommendation of Mr.
Joshua John Moore to be my Registrar and Clerk as the Judge Advocate, it was my wish and intention to recommend him also, if permitted me, to the office of the Registrar of the Vice-Admiralty Court.

JNO. WYLDE.

GOVERNOR MACQUARIE TO EARL BATHURST.

8th March, 1816.

[In this despatch, Governor Macquarie reported the seizure of the schooner Traveller by the Revd. Benjamin Vale; see page 42 et seq., volume IX, series I.]

MR. W. H. MOORE TO EARL BATHURST.

Sydney, New South Wales,

13th March, 1816.

About two Years since, I received from Your Lordship an Appointment as a Solicitor in this Colony, and I have been here now about fourteen Months. I am sorry I should so soon feel myself obliged to state to Your Lordship the grievances of which I consider I have just reason to complain. I conceived I was well recommended to his Excellency the Governor by your Lordship's letter* to him of 5th July, 1814, No. 31, and I expected to have met with a very different reception to what I have experienced, especially having a Younger brother and two Sisters dependant on me.

Soon after my arrival, I applied to his Excellency to know what indulgencies I might expect; he gave me an order to receive a ration for myself only and told me I should shortly have a grant of Land and a few men on the Stores for a short period; he declined from time to time telling me the quantity of Land I might expect; and it was not till I had been here a full twelve-month that his Excellency on my importuning him told me I should shortly receive an order for Eight hundred Acres. I stated to him that, from Your Lordship's Letter, I conceived myself intitled to a much larger Grant; that the Deputy Commissary General, his Assistant, the surveyor General, the provost Marshal, the late Judge Advocate and other Colonial Officers had each of them received Two thousand Acres; that the Surveyor General's two deputies and the principal Surgeons, who had all come Prisoners to the Colony, had had the same quantity, and that the Deputy Commissary General's Two Sons, both boys, and one of whom had not yet left school, had each of them Seven hundred Acres given them; and I considered I was intitled to expect that a little greater preference would have been shewn

* Note 100.
to me; he replied that I ought to consider it a very liberal grant, and that, if I was not contented, I had better represent it to His Majesty's Ministers at home. I told him I would not refuse to accept the Eight hundred Acres, but that I should state the circumstances as he directed. This I should scarcely have thought necessary to have troubled Your Lordship upon, had not other events transpired in which I consider myself most cruelly and unjustly treated.

On the nineteenth of February last an American Vessel laden with Tea, Sugar, etc., direct from China came into this harbour; there was at the time an English Merchant Vessel here, waiting to dispose of her Cargo; there were also three Indian Vessels laden with Tea, Sugar, etc., lying at the Derwent, the next port, to dispose of their Cargoes; they immediately took the Alarm and murmured at an American Vessel being allowed illegally to deprive them of the Trade they were intitled to; but they dared not complain; in the course of conversation Mr. Vale, a Clergyman to the Settlements, declared he would step forward and put a stop to this illegal Traffic; he applied to me Professionally for my advice on the subject. I told him there was no question as to the illegality of the traffic; he desired me to accompany him on board the Vessel, and on the twenty third we went and declared the Vessel and Cargo Seized in the name of His Majesty as forfeited for a breach of the Navigation Acts, and instructions were given me to proceed to the legal condemnation of the Vessel; at this time the Governor was up the Country; I conceived it my first duty to prevent if possible the escape of the Vessel, and for that purpose I gave a Written Notice to the Lieutenant Governor amongst other persons informing him the Vessel had been Seized, and requiring him to take such Steps as he conceived necessary to prevent her Escape. A few days afterwards, his Excellency came to town; he immediately sent for Mr. Vale, said his conduct was most mutinous, insolent and disrespectful, and ordered him immediately under close Arrest, and he has since been tried by a Court Martial.

I acted no other part than that of a mere Agent in the business. I am not aware that I shewed any disrespect to the Executive Government of the Colony; then how great was my surprize when I received an Official Letter from the Secretary informing me that my Salary and the Ration hitherto allowed me were stopped, and that the Governor would recommend to his Majesty's Ministers to discontinue them for the future. I immediately wrote a Letter of remonstrance to his Excellency, but have received no Answer, and must therefore conclude he is unaltered in his determination.
I trust Your Lordship will see the great hardship this is upon me to be deprived of a Salary of Three hundred Pounds Per Annum for a professional duty, which I could not decline performing, and in doing which I was protecting the Interests of the British Government; and that without a Trial or any inquiry into my conduct, and at a time when I am prevented from exercising my profession by the suspension of the functions of the Courts of Justice, which I have no doubt Your Lordship has before this been made acquainted with; so that I am now in this Colony with a family dependant on me and somewhat involved in debt (from the necessity I was under of building myself a house) without one farthing Income. I trust Your Lordship will see the injustice of the Case, a greater penalty being inflicted on me than on persons convicted of the most enormous crimes, and that Your Lordship will grant me relief by directing my Salary to be paid me with all arrears, or to institute some inquiry into the business in order that I may have an opportunity of clearing my Character from the imputations that are unjustly thrown upon me. I fear I have already taken up too much of Your Lordship's time and shall therefore trust to the Severity of the Case pleading a powerful Cause for me and to Your Lordship's liberality and justness of sentiment to give such directions respecting my case as Your Lordship shall think proper.

I have, &c.,

WM. HY. MOORE.

MR. JUSTICE BENT TO EARL BATHURST.

My Lord,

Sydney, New South Wales,

16th March, 1816.

In my letter of Feby. 25th last, I have informed your Lordship of the lamented death of my Brother Mr. Ellis Bent, Judge Advocate and Judge of the Vice Admiralty; not wishing to mix anything extraneous with the subject of that Letter, I now address myself to your Lordship, in order to state the Events which have taken place in this Colony in consequence.

In a Letter (dated Novr. 4th, 1815), and written a short time previous to my Brother's decease, I hinted to your Lordship what might be expected to take place, and which was only prevented at that time from actually doing so by the circumstance of my Brother being obliged to abandon his intention of sailing to Europe; On a communication being made to that effect to Governor Macquarie, at the same time expressing a hope that my Brother would be able soon to resume his Functions, The Governor thought proper to say that, if that event did not take place, He should be under the necessity of appointing
another to sit during his illness; Your Lordship will easily con-
ceive that such an intimation was not likely to prove a restora-
tive to my Brother's Health, and indeed in less than a week from
that time he died.

As soon as Decency would allow, after the decease of a Person
so universally respected in the Colony as the late Judge Advo-
cate, The Governor, notwithstanding there were two Persons
bearing Judicial Commissions* in the Colony, passed over both
those Individuals, to whom the Public naturally turned, and ap-
pointed Mr. Garling, one of the Attornies sent out here to prac-
tise, to fill the vacant Situation of Judge Advocate, till the
Sentiments were known of His Majesty's Government; and there
being some doubts as to the Power of a Governor to fill such
a vacancy, in order to give whatever legal authority he un-
doubtedly could, The Governor appointed Mr. Garling the day
previously a Magistrate of the Colony.

The Motives to such an Appointment will be very obvious to
your Lordship, and I will be very short in my observations upon
them.

The Difference, that had arisen between the Magistrates and
myself, had at last been terminated by the Members of the
Supreme Court coming into my Terms, viz., That the Convict
Atornies should cease to practise, till His Royal Highness The
Prince Regent's Pleasure was made known. It was very appa-
rent, in the Event of the late Judge Advocate going home, that
if his situation was to be supplied by Mr. Garling, That the
dispute as to the admission of Convict Atornies would again
arise, and with redoubled vehemence; aware of this I endea-
voured by every argument I could use to bring Mr. Garling to a
proper view of the subject, and the more so, as he all along had
declared; He should think the admission of such Persons to
practise with himself a Breach of the Faith of Government; I
failed, however, in gaining a knowledge of his Sentiments on the
Point; But, for that time, in consequence of my Brother's re-
mainin in the Colony, those views, which his inordinate vanity
and strong temptations thrown before him had lead him to form,
were disappointed.

Upon the late melancholy Event taking place, I was not sur-
prized at Governor Macquarie's fixing upon him for the
Appointment, nor at a Man of Mr. Garling's description yielding
to the lucrative proposals, and still more splendid promises of
Governor Macquarie; And your Lordship will not be astonished
to hear that the first measure on Mr. Garling's appointment
was to procure other Members of the Governor's Court to be
ominated; and, in defiance of the Rule† unanimously made (the

* Note 101. † Note 86.
1816.  
10 March.  

Admission of ex-convicts as attorneys in governor's court.

Salary granted to F. Garling.

Fees received by F. Garling.

Allegations of corruption against L. Macquarie.

operation of which was for this purpose suspended), to open that Court to the practice of those Individuals, and to subject Mr. Moore his Brother Solicitor to an association with those Persons, to whom he himself had objected. Thus, My Lord, was that object, so long and strenuously pursued by Governor Macquarie, at last gained; and a Difference revived, which had fortunately been closed; and I have now only to state to your Lordship the unworthy means, which have been used to compass this end, and the temptations to which both Mr. Garling's Probity and His Gratitude ultimately yielded.

The first was giving to Mr. Garling a Salary from the Police Fund of £800 per annum Net money, which, being paid in Dollars by the Colonial Treasurer, for which Bills on the Treasury are immediately given by the Commissary, gives £80 a year more than the Salary paid to myself, who receive Bills to the amount of £720 net money only; and being also so much more than the late Judge Advocate enjoyed for the three first years after his arrival in this Colony. The next was the allowing him (Mr. Garling), though absolutely restrained by Law from practising as a Solicitor, to retain the Salary allowed by the Crown to the Persons sent here for that purpose; This was an addition of £300 Net money to his Salary as Judge Advocate, amounting in the whole to £1,100 net money, being £380 per annum more than the late Judge Advocate enjoyed for three years of his Services here, and £20 Pr. Annm. more, than He ever at any time received; and being £380 a year more than I receive, who am a Barrister of near 10 years standing.

It was scarcely to be expected that an Attorney of so much Vanity, as even, before his arrival here, to have assumed titles which did not belong to him, would have resisted such an offer; more especially when, in addition, he has the Fees annexed to his Office, whatever they may be, and also, is allowed, upon a Court Martial now sitting, a further Sum of a Guinea a Day; Though the late Judge Advocate, who sat on many of considerable length, never received one Farthing for so doing, nor even any allowance for the Paper furnished by him to such Courts at his own expence.

My Lord, I do not hesitate to say that Mr. Garling has been bribed by these advantages to accept this office, and that for the purpose of admitting Persons with whom any honourable Man and even he himself would refuse to act. If this were not the Secret History of the Transaction it is not to be credited that such advantages and at the same time so much greater than what had been given to the late Judge Advocate, a Barrister of 10 years standing (and who had for six years
performed his laborious Duties, with universal satisfaction),
would have been given to a mere Solicitor, after a three months' 
aquaintance; or that such a Man as Mr. Garling, who is liter-
ally unable to draw a common Indictment for Bigamy, would 
have been raised to a Judicial Office, at a time when there were 
two Persons, holding Commissions as Judges within the Colony; 
if Governor Macquarie were so dissatisfied as to pass over my-
self, Mr. Abbott, the Judge Advocate of Van Diemen's Land, 
had not offended; But the passing over that Gentleman makes 
how that it is clear that, from no other motive but that of bringing 
forward the Convict Attorneys, was the Colony deprived of one 
of the Solicitors sent out by the Crown to practise, and Mr. Gar-
ling appointed to fill the situation of Judge Advocate. The 
appointment of any other Person would not have produced the 
desired Dilemma, nor could or would the Rules of the Gover-
nor's Court in any other Circumstances have been abrogated.

My Lord, It is endeavoured to set up a Defence to this appoint-
ment by saying that the late Judge Advocate, being asked who 
should be appointed during his absence next to myself, approved 
of Mr. Garling. The late Judge Advocate had no other know-
ledge of Mr. Garling than that I had recommended him to His 
Majesty's Government to be appointed a Solicitor with a Salary 
in this Colony; and, in point of fact at the time he named him, 
he forgot the station Mr. Abbott filled, which was not surprizing 
in a Person so unwell as he was at that time, and the more so 
as the Question was asked without any time being given for his 
consideration; My Brother had in fact never had any conver-
sation with Mr. Garling whatever and could only have the same 
Ideas of his fitness for a Judicial Situation, as he had of that 
of any other Solicitor utterly unknown to him. I may here 
mention that my acquaintance with Mr. Garling is equally small; 
Gratitude to a Gentleman, who recommended him to me, and a Nomination of 
reliance upon his word and the Character he gave, was the Ind-
ucement to my recommendation of Mr. Garling to your Lord-
ship, and I must now confess that I have been extremely deceived 
in regard to His character, His Principles, and his Ability. It 
was not pleasant to me to hear that a Person, nominated by 
myself, had assumed a character at the Cape, which he had no 
title to; or that letters from respectable Persons there should be 
received, desiring to know whether he were not a mere adventurer. 
It was by no means also pleasing that the first business, he 
should be engaged in here, should produce a complaint from a 
respectable Individual of insulting language, and that Mr. Gar-
ling should on that occasion have to express his hopes to me that 
he had not forfeited my good opinion. With regard to his
1816.
16 March.

Incapacity of F. Garling in criminal court.

Permanent appointment expected by F. Garling.

Invidious position of J. H. Bent.

Advice to naval officer re schooner Traveller.

Ability, The Proceedings of a late Criminal Court sufficiently shew that he commands neither respect nor confidence.

In the Criminal Court, The late Judge Advocate had first introduced method regularity and the proper Decorum of a Court of Justice. In the Criminal Court lately held, Mr. Garling degraded the office of Judge Advocate below that of a mere Clerk; for, so far from acting as a Person to whom the Court was to look for direction on legal Points, He was under the necessity of receiving Instructions from others and of giving up the direction of the Causes before him, and even was obliged to be corrected in the Evidence taken by him by an Officer on that Court.

My Lord, It is a matter of public notoriety that the whole conduct of a Court, in consequence of whose decisions 5 Persons suffered the Punishment of death, presented a complete burlesque of a Court of Justice, and excited the contempt of the Public, while it raised the fears of the Prisoners.

My Lord, Mr. Garling flatters himself from the promise of Governor Macquarie's recommendation that he shall retain the Situation, he now fills with so little respect or satisfaction to the Colony. For my own part, I will not affront his Majesty's Government by the supposition; nor will I put my own feelings as a Barrister of long standing, as a Judge, or as a man of honourable mind, forward upon this occasion; But, convinced, as I am, that the Incompetency of Mr. Garling and his inadequacy to fill such an Appointment are sufficiently apparent, I leave it to your Lordship to say whether a Person who breathes one Sentiment, when his Interest is concerned, and adopts another from unworthy motives and in furtherance of a scheme to degrade His Majesty's Courts of Justice, is even proper to be retained as a Solicitor with a Salary from the Crown in this Colony.

Your Lordship may conceive the state of anxiety and suspense, in which at present I remain, and how much mortification and difficulty I have yet to contend with; and, with what little chance of concurrence or approval, I could submit either the Rules or Fees of the Supreme Court to Governor Macquarie.

I must now call your Lordship's attention to another Event, which marks Governor Macquarie's Determination to carry every point and his vindictiveness towards those whose honourable feelings compel them to decline an association with the Persons whose Interest he has so unaccountably espoused.

An American Schooner, called the Traveller, having arrived here a short time ago from China with a Cargo on board for this Port, I expressed to my Friend Captn. Piper, The Naval Officer,
my doubts of her liability to seizure, and recommended to him
to do nothing with regard to her Entry without authority from
the Governor; I am thus particular in this Statement, because, The Revd. Mr. Vale, an Assistant Chaplain on the establish­
ment, having made a seizure of this American, as acting in
breach of our Navigation and Plantation Laws, Governor Mac­
quarie has thought proper to state that I am at the Head of a
Cabal to oppose his measures; I do assure your Lordship most
solemnly that such a charge is totally unfounded; That I have
not in any step I may have taken consulted or communicated
with any one; and that such Cabal has no existence except in
Governor Macquarie’s assertions. With regard to the American
Vessel, I assure your Lordship I knew my Duty too well to in­
stigate any steps in any matter which might come before me
Judicially, and in fact I have had no other concern in it than
merely giving my private advice to Captn. Piper as to his own
guidance as Naval Officer in so delicate a Matter.

In consequence of this Seizure, Governor Macquarie has taken
a Step, which is the reason of my communicating with your
Lordship on this Subject. Mr. Vale employed as his Attorney
in this business Mr. Moore, one of the Solicitors appointed by
the Crown to act here, who has had no other concern in it than
as a mere Agent. Yet Governor Macquarie, feeling offended
at the circumstance, instead of leaving the validity of the
Seizure to be decided by the proper Courts, has brought Mr. Vale
a Court Martial for so doing; Though there are very great
doubts whether he is amenable to such a Jurisdiction, and, be­
fore the Court Martial had decided upon the conduct of that
Gentleman, and during the pendency of its proceedings, The
Governor has actually deprived Mr. Moore of the Salary allowed
him by the Crown in consideration of his coming to this Coun­
try, And that without any intimation of displeasure, any oppor­
tunity for explanation or any hearing, or even without consulta­
tion with myself, to whom I may say Mr. Moore is more pecu­
liarily amenable. Upon hearing of this Step being in contem­
plation, I waited on the Governor to remonstrate on its Injustice,
and I then received for answer that he had taken that Step and
He would not listen for a moment to any thing I might urge in
his favour.

My Lord, I must add that I never met with an instance of
greater oppression. Mr. Moore has had a very difficult part to
act in circumstances very trying and by no means expected by
him when he left England.

In the transaction above mentioned, He had acted entirely as
an Agent, and I cannot imagine upon what grounds Punishment,
if deserved by the Principal, is to fall upon him. I believe, however, that the real reason of this attack upon Mr. Moore is that he has objected to the suffering Convicts to practise as Attornies, and that this step is resorted to from a determination to make him feel Governor Macquarie's displeasure for that opinion. And it will be more plain, when I state, that the American Vessel thus seized was consigned to, and her Cargo was partly the Property of Mr. Riley, one of the Members of the Supreme Court, who took so active a part in endeavouring to force me to the admission of the Convict Attornies; And it is to this circumstance, and to the fact that Governor Macquarie had some articles on board for himself, that I attribute the allowance of this American Vessel to enter.

Your Lordship will now perceive what little ground I have to expect support from any one when Governor Macquarie has such advantages in his Power to bestow, by which he may allure, and such ample means to terrify.

I do think Mr. Moore so ill used in the whole of this matter, and myself so pledged by his nomination as a Solicitor to this Country, that I have felt it my Duty to offer to advance him his Salary as Solicitor out of my own (small as that is); for it was impossible for me to see him suffering from the circumstances attending the Courts of Justice and deprived of his due emolument for having done his Duty to his Client and been possessed of honourable Feelings.

I forward to your Lordship, Mr. Moore's letter to me, on this subject, to which I have to request your Lordship's attention; and I hope that your Lordship will be pleased to give directions that Mr. Moore may be reinstated in the advantages which were held out to him as an Inducement to come to this Country and which he has never done any thing to forfeit.

From the construction* which has been put by the Governor upon the words "according to the Rules and discipline of War" being to be found in Mr. Vale's Commission, and the Determination of the Court Martial assembled to try him for seizing the American Vessel, that such words in a Commission render the Person holding it amenable to a Court Martial; I beg leave to draw your Lordship's attention to the Commission held by the Provost Marshal, in which similar words appear, and to state to your Lordship, how impossible it is for that officer to do his Duty or to perform the legal Civil Functions of his Office with the terrors of a Court Martial hanging over him; or for me to expect that any Writ issued by me as Judge of the Supreme Court will be executed, if it is in any way displeasing to the

* Note 102.
Governor; I do indeed believe that, at this very time, the Governor's pleasure is asked, as to the execution of every Writ I may issue. And the Court Martial upon the Reverend Mr. Vale has awakened such fears in the mind of the Provost Marshal, as absolutely shews me that it is in vain to issue or to expect obedience to any Writ in opposition to the Governor's command or even wish; And your Lordship will see the very unpleasant situation, an Officer so circumstanced as the Provost Marshal must be placed in, liable to be attacked on the one hand for disobedience to the Writs, and on the other, from the construction that has been put upon his Commission subject to be tried by Court Martial. I trust your Lordship will from this statement see the urgent necessity that exists, that the Person who is to execute the Process of the Courts of Justice should not be amenable to Courts Martial.

I may here mention that my advice has already been asked by the Deputy Judge Advocate of Van Diemen's Land, as to the Steps to be taken where the Lieutt. Governor is a Party Defendant. Though there is no legal Exemption of any one from the Jurisdiction of the Courts, at least as to their property being liable to be taken in Execution, Yet I thought it proper to say that I could not myself take, nor could I recommend any other Person to take any steps whatever in such a case, without Instructions from Home; Being convinced It would produce a very serious difference and only serve to embroil the Courts of Law with the Executive; Indeed it was not to be expected that any Person holding a Commission, so construed as to subject him to a Court Martial, would attempt to carry into effect the Process of the Court; The Case is, here, not very likely to occur, But I should wish, that a matter of such consequence was entirely put to rest by a Declaration from your Lordship. At the first establishment of the Courts in Bengal, serious disputes arose on a similar point; and an Act* was passed in order to put a termination to them, And to that Act I beg leave to refer (21 G. III c. 70).

Having understood that an Idea prevailed at Home that I had been furnished with Apartments for my private personal use here, I beg to assure your Lordship that I have never received, since my arrival here, any accommodation from Governor Macquarie of that nature; and I can only suppose an Idea of that kind to have arisen from two Rooms being provided for the Public Offices of the Supreme Court, and which are solely devoted to the Custody of the Records, and the issuing the Writs and other Processes of the Court, and not in the least appropriated to my private use.

* Note 103.
1816.
16 March.

Reforms proposed in administration of justice.

Motives of J. H. Bent.

Before I close this address to your Lordship, I will again request your Lordship's attention to the Plan, I had the honour in my letter of Novr., 1815, to submit to your Lordship, as one which in my humble Judgment can alone give quiet and an uniform administration of Justice, both to this Settlement and to those in Van Diemen's Land. I shall most readily bear my share of the Burthen attending the carrying such a Plan into execution; and I entertain the most sanguine hopes of its success, and its affording full satisfaction to the Public in case it should be adopted.

Your Lordship, from all the details which necessarily come before you, is well able to judge of the anxieties both Public and Domestic, to which My Mind has hitherto from my first arrival been a Prey; and I may add to these the Grief, I have felt, at seeing an only Brother sink under them. Without claiming any praise for my own conduct, It is sufficient that I deny every sordid, fractious or unworthy motive that may have been imputed to me, and that I state that with regard to myself nothing that It has been in my Power to lay before Your Lordship has been kept concealed. Professing then to have been always guided by an honest Zeal for the good of His Majesty's Service, and but a fair regard for my own Character;

I have, &c.,

JEFFERY HART BENT,
Judge of the Supre. Ct., N. S. Wales.

[Enclosure.]

MR. W. H. MOORE TO MR. JUSTICE BENT.

George Street, Sydney,

Your Honor,

5th March, 1816.

I take the liberty of writing to you in consequence of an Official Letter, which I yesterday received from Mr. Secretary Campbell, informing me that the Governor had given orders to the Treasurer of the Police Fund to discontinue the payment of my Salary from the 23d Ultimo (that being the day on which my Agency for the Reverend Benjamin Vale in the Seizure of the American Schooner Traveller commenced), and that he would not fail to recommend to His Majesty's Ministers to discontinue the same. I am greatly at a loss to know upon what principle of Justice the Governor could have assumed such an extraordinary stretch of power without giving me the least previous intimation. I am acting for Vale as a mere Agent and in a Business in which the Interests of the Crown are greatly concerned; the legality of the proceeding I have not the least doubt of, and yet I am accused in Mr. Secretary Campbell's letter to
me of insolent, offensive and insulting conduct in the late false unwarrantable and vain attempt (as he is pleased to call it) to seize the Vessel in opposition to the Governor's public Measures and in contempt of his Authority. I knew nothing at the time of the seizure of the Governor's having given permission for the vessel to be entered at this Port. There was no public order to that effect issued, which is the method usually taken by the Governor to make known his Measures. I could not therefore have done it with any such view as he attributes it to, and was actuated solely by a sense of Duty and Justice that I owed to my Client Mr. Vale, and the British Government on whose behalf I considered myself as acting. I, therefore, hope you will do me the favour the first time you have occasion to write to Earl Bathurst to certify to him that I have been guilty of no crime in conducting this business as an Agent; and I trust his Lordship will be convinced that I have been no way deserving of such a punishment as the Governor has thought proper to inflict by stopping my Salary; and that he will consequently send an Order for the continuance of my Salary as heretofore, and that I may be allowed to receive all arrears that I may be entitled to.

I should not have troubled you with this Letter, but from the threat held out to me by the Governor, which I fear (if the case is not fairly represented) may be the means of depriving me of my situation.

I am, &c.,

WM. HY. MOORE.

MR. JUSTICE BENT TO SECRETARY CROKER.

Sydney, New South Wales,
16th March, 1816.

I have the honor to apprize you, for the information of my Lords Commissioners of the Admiralty, of the decease of my Brother, Mr. Ellis Bent, late Judge Advocate and Judge of the vice Admiralty Court in this Territory.

It may be proper to state that, till the appointment of my late Brother to the Office of Judge of the vice Admy. here, many illegalities existed in that Court, and such extreme Ignorance prevailed, that, till his arrival in the Colony, The distinction between the Instance and Prize Courts was not known; In order to prevent the recurrence of those mischiefs which the late Judge prevented or removed, the filling the situation now vacant become highly necessary, and I beg leave to offer myself to their Lordships to perform the duties of that office; A Disinterested Zeal for H.M. Service alone induces me to make this tender of my Services; For there is no Salary attached to the Office, and
1816.
16 March.

Profits of registrar.

the emoluments in the Space of 6 years did not amount to £20, and are certainly by no means adequate to the trouble attending it.

The Profits of the Registrar may possibly in the same space of time have amounted to double that Sum; But as the Duties of the Registrar, from the ignorance of the Persons hitherto appointed in the Colony, have been necessarily under the immediate and strict inspection of the Judge, I should think it would appear proper that the recommendation to that office should be given to the Person holding the Situation of Judge.

And, should their Lordships be pleased to attend to my proposal, I should recommend John Horsley, Esqr., a Gentleman who came to this Colony as a free Settler, as a Person very proper for the office of Registrar, and who would wish to hold it as giving him some claim to respect in the community.

I have, &c.

JEFFERY HART BENT,
Judge of the Supreme Court, N. S. Wales.

P.S.—I beg to add that, should their Lordships be pleased to grant their Warrants for the above appointments, My Friend and Agent, Henry Stokes, Esqr., Barrister at Law, No. 4 Inner Temple Lane, will upon communication being made to him of their Lordship's Pleasure, take the Steps necessary thereupon.

J.H.B.

Mr. Justice Bent to Earl Bathurst.

Sydney, New South Wales.

22 March. 1816.

Since my addressing your Lordship on the 16th Inst. The Court Martial assembled to try the Reverd. Mr. Vale, upon charges founded on the Seizure by him of the American Schooner Traveller, has closed its sittings, and the Sentence on that Gentleman has been promulgated; which was that He should be publicly and severely reprimanded and admonished; This Sentence Governor Macquarie has changed into a private admonition.

Your Lordship will from this circumstance see most plainly the Injustice of Governor Macquarie's proceeding towards Mr. Moore. For, while the Principal receives only a Simple Repri-

man, Mr. Moore, who has only acted as a mere Agent in conducting legal proceedings in a Court of Justice and in the fair execution of his Professional Duty, is deprived of every Emolu-

ment given him by the Crown, and which was the Inducement to his coming out to this Country.

Had Mr. Moore been guilty of any offence, The Disproportion observed in the measure of Punishment would have been
extremely hard towards him. But, as the Facts stand, I may venture to say That it will appear to every one manifestly unjust.

I beg leave to direct your Lordship’s attention to the Proceedings of the Court Martial on the Reverend Mr. Vale as being well worthy of consideration.

I have, &c,

JEFFERY HART BENT,
Judge of the Supreme Court, N. S. Wales.

GOVERNOR MACQUARIE TO EARL BATHURST.

23rd March, 1816.

In this despatch, Governor Macquarie reported the court-martial on the Revd. Benjamin Vale; see pages 100-101, volume IX, series I.

COMMISSION OF W. SORELL AS LIEUT.-GOVERNOR OF TASMANIA.

3rd April, 1816.

[ A copy of this commission will be found on page 183, volume II, series III.]

DEPUTY JUDGE-ADVOCATE WYLDE TO UNDER SECRETARY GOULBURN.

Sir, Cecil Lodge, Cheshunt, Herts, 11th April, 1816.

I beg leave to inclose you the Direction of Mr. Barron Field, should you be pleased immediately to address himself as to the Appointment of Judge in N.S.W., though, on your permission, I shall be most happy to save you any Trouble in communicating to him either privately or officially your Pleasure and the general Circumstances as to Salary, a Residence, etc., as made known to me. To have such a Colleague would, I am assured, secure to me constant and able Cooperation in my judicial functions and greatly uphold the legal System of the Colony.

In an official Letter, dated 19th Octr., 1811, from the present Judge Advocate, I find it recommended by him—par. 30 “That a professional person be sent out as Clerk of the Peace, whose Duty it should be to draw up all Indictments and Informations, to manage the formal parts of all Prosecutions, to draw up all the orders of the Court, to make up and to have the Custody and Charge of all its records”: may I be permitted to suggest that the Experience of my father, Mr. Thomas Wylde, would render him perfectly equal to the Duties of such an appointment with that of Solicitor generally to the Colony.

By favor of an Introduction to Captn. Young, obtained through your kind Interference from Mr. McLeay, I have been Embarkation proposed on ship Elizabeth.
1816.
11 April.

Deputy Judge-Advocate Wylde to Under Secretary Goulburn.


Mr. Wylde very respectfully and earnestly solicits the honor of Mr. Goulburn’s Attention to his Application for a payment of Salary upon his appointment as Judge Advocate of N.S.W.; for what period he must leave to the favorable Consideration of Mr. Goulburn, begging leave only to mention that he has to pay for fresh Supplies, without Wine, Spirits or Porter, during the Voyage, to the Master of the Elizabeth £200 in England, and that his outfit in furniture and necessaries will cost upwards of £1,200; while there are demands upon Mr. Wylde in this Country, which unsatisfied, though not of great amount, would render his departure seriously painful. In such a situation, Mr. Wylde trusts that he will be excused thus urging himself upon Mr. Goulburn’s Notice; as also, upon the period of his stay here drawing so near to a close of expressing his hope that Mr. Goulburn will, as soon as possible, put an End to his very painful Uncertainty of succeeding as to the appointment of his father to some civil Appointment in the Colony (to practise or not generally as a Solicitor as Government may be pleased to order) as also of Mr. Moore as his Clerk, who long since received the promise from Mr. Wylde, upon the assurance from Mr. Goulburn, that, if the former Judge Advocate had the power of appointing, it should not be taken from him.

Mr. Wylde is using his utmost Endeavors to prepare himself for the time now mentioned for the Elizabeth to sail; yet within the 26th it is impossible for him to do more scarcely than present himself to be taken on board; if any public delay give him a reprieve of a fortnight or 3 weeks, he could proceed to his Destination with perfect preparation; perhaps if only one of the two Vessels take in Convicts at Portsmouth, the Elizabeth may be ordered round and thus secure to Mr. Wylde the Indulgence of that period.
EARL BATHURST TO GOVERNOR MACQUARIE.

18th April, 1816.

[In this despatch, Earl Bathurst announced the recall of Ellis and J. H. Bent, and transmitted letters of recall to each; see page 107 et seq., volume IX, series I.]

DEPUTY JUDGE-ADVOCATE WYLDE TO UNDER SECRETARY GOULBURN.

Sir,

1 Elm Court, Temple, 2nd May, 1816.

I beg leave to mention, that Mr. Barron Field is returned to Town from the Circuit and wishes me to enquire whether the Appointment of Judge in New South Wales is still vacant, so as to allow him the opportunity of communicating with you on the subject.

I have, &c.,

JNO. WYLDE.

UNDER SECRETARY GOULBURN TO DEPUTY JUDGE-ADVOCATE WYLDE.

Mr. Goulburn presents his Compliments to Mr. Wylde, and acquaints him in answer to his letter of yesterday, which was laid before Lord Bathurst, respecting the vacant Situation of Judge in New South Wales that he has been authorized by his Lordship to make an Offer of it to Mr. Barron Field, with whom Mr. Goulburn will be happy to communicate on the Subject.

Downing Street, 3d May, 1816.

UNDER SECRETARY GOULBURN TO SECRETARY CROKER.

Sir,

Downing Street, 11th May, 1816.

His Royal Highness The Prince Regent having thought proper to recall Mr. Ellis Bent, Deputy Judge Advocate at New South Wales, and to appoint Mr. John Wylde to that Situation, I am directed by Lord Bathurst to desire that you will submit to The Lords Commissioners of the Admiralty whether it would not be advisable that Mr. Wylde should also be appointed Judge of the Vice Admiralty Court in that Settlement.

I am, &c.,

HENRY GOULBURN.

SECRETARY BARROW TO UNDER SECRETARY GOULBURN.

Sir,

Admiralty Office, 13th May, 1816.

I have received and laid before my Lords Commissioners of the Admiralty, Your Letter of the 11th Instant, submitting by direction of Earl Bathurst, whether it would not be advisable
that Mr. John Wylde (appointed Deputy Judge Advocate of New South Wales) should also be appointed Judge of the Vice Admiralty Court in that Settlement, and I am commanded by their Lordships to acquaint You that the Warrant appointing Mr. Wylde Judge of the Vice Admiralty Court in the above Settlement is ready for delivery in this Office.

I am, &c.,

JOHN BARROW.

MR. JUSTICE FIELD TO UNDER SECRETARY GOULBURN.

Sir,

Temple (3, Hare Court), 14 May, 1816.

Appointment as judge accepted by B. Field.

I beg leave to acknowledge the favour of the interval allowed me for determining whether I could avail myself of the honour proposed to me in the appointment of Judge of the Supreme Court in New South Wales. I have now to acquaint you that I do myself the honour of accepting the appointment, with the contingencies as suggested by you, namely of £800 per annum salary, a suitable House to reside in, and the allowance of rations, or a compensation in lieu thereof, not however without indulging the hope that the Salary will ere long be increased, and a pension ultimately allowed upon meritorious services.

As I can no longer practice my profession (the only source of income to me), I should trust that you would be pleased to consider that the appointment should be at least immediate, although it will be requisite for me to solicit the indulgence of two or three months to make the necessary arrangements for so long a Voyage.

I have, &c.,

BARRON FIELD.

P.S.—May I be permitted to suggest that it would be matter of most convenient arrangement to me, if it were thought proper to forward directions by my friend the Judge Advocate to have a house provided for me on my arrival.

COMMISSION FOR B. FIELD* AS JUDGE OF SUPREME COURT.

In the Name and on the Behalf of His Majesty George P.R.

GEORGE THE THIRD, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, To Our Trusty and Wellbeloved Barron Field, Esquire, Greeting. We, reposing especial Trust and Confidence in the Loyalty, Integrity and Ability of you, the said Barron Field, do by these Presents constitute and appoint You to be Our Judge of Our

* Note 104.
Supreme Court of Judicature in Our Territory of New South Wales and its Dependencies, to have, hold, exercise and enjoy the said Office during Our Pleasure and your Residence within the said Territory and its Dependencies, with full Power and Authority to hold the said Supreme Court, as established by Our Letters Patent, bearing date the fourth of February, 1814, in the room of Jeffery Hart Bent, Esquire. Given at Our Court at Carlton House, the fourteenth day of May, 1816, In the 56th Year of Our Reign.

By Command of His Royal Highness The Prince Regent, in the Name and on the Behalf of His Majesty,

BATHURST.

UNDER SECRETARY GOULBURN TO DEPUTY JUDGE-ADVOCATE WYLDE.

Sir,

Downing Street, 14th May, 1816.

I am directed by Lord Bathurst to acquaint you that the Warrant appointing you Judge of the Vice Admiralty Court in New South Wales is ready for Delivery at the Admiralty on your Application at that Office. I am, &c.,

HENRY GOULBURN.

UNDER SECRETARY GOULBURN TO MR. JUSTICE FIELD.

Sir,

Downing Street, 15th May, 1816.

I am directed by Lord Bathurst to acquaint you in reply to your letter of yesterday that he has given Instructions that the Warrant appointing you Judge of the Supreme Court in New South Wales should be prepared without Delay, and I am at the same time to express to you the hope of his Lordship that you will take Measures for enabling yourself to proceed by the next Ship that may be under Dispatch for that Settlement.

I am, &c.,

HENRY GOULBURN.

DEPUTY JUDGE-ADVOCATE WYLDE TO UNDER SECRETARY GOULBURN.

Sir,

26 Basinghall Street, 20th May, 1816.

You having been pleased to communicate to me that Mr. Garling has arrived at New South Wales, which will give to the Colony two free Solicitors, I beg to have the honor of your Instructions whether the Solicitors, who went out Convicts to the Colony, are to be permitted to plead in the Court of civil Jurisdiction* over which I am to preside, and, if not, whether the restriction is also to extend to practising in the Criminal Court.

* Note 105.
I beg leave to mention, that I leave London tomorrow at 4 P.M. to proceed to the Ship at Portsmouth and shall feel obliged by a Communication from you on the subject, if not inconvenient, previously to that time.

I have, &c.,

JNO WYLDE.

EARL BATHURST to GOVERNOR MACQUARIE.

21st May, 1816.

[This despatch contained instructions re the remission of sentences passed by the criminal court; see page 133, volume IX, series I.]

UNDER SECRETARY GOULBURN to DEPUTY JUDGE-ADVOCATE WYLDE.

Sir, Downing Street, 22d May, 1816.

In reply to your letter of the 20th Instant requesting Information respecting the Solicitors, who have proceeded originally as Convicts to New South Wales being permitted to plead in the Courts of Judicature there, I am directed by Lord Bathurst to acquaint you that you should address yourself on this subject to Governor Macquarie, to whom his Lordship has already conveyed Instructions* upon this point.

HENRY GOULBURN.

MR. JUSTICE BENT to EARL BATHURST.

My Lord, Sydney, N. S. Wales, 12th June, 1816.

I had the Honour to address your Lordship in the Months of February and March, last, to which Letters I again venture to request your Lordship’s attention, and I am sorry that I have still to state that the Supreme Court remains unopened.

I now beg leave to assure Your Lordship that I have, in all cases, preserved my personal Feelings undisturbed, notwithstanding the unparalleled manner in which they have been acted upon; and in proof I may state that, on my arrival here, finding it usual for Gentlemen high in official Rank to meet every description of Person† at the Governor’s Table without objection, and that such objection would be considered by Governor Macquarie personally affronting, I yielded to the distinction, thus drawn between the Governor’s Table, and that of every other Gentleman in the Colony, and, resting satisfied with not coming into immediate Contact with the unworthy Characters I there saw,

* Note 106. † Note 107.
in order to prevent all personal disagreement, submitted to an
association to which my repugnance was well known and in all
other Cases insurmountable, and the only alternative being pub-
lickly to withdraw myself from the Governor's Table, I should
have thought that delicacy would have prevented Governor Mac-
quarie, who had full knowledge of my sentiments, from placing
me in so unpleasant a Situation.

The Correspondence, I have already transmitted, will shew to
Your Lordship the still more degrading treatment to which I
have been subjected, and I may add That, could I as a private
Individual at home have brooked the Style and Tone of Lan-
guage, which has been used towards me as a Judge by Governor
Macquarie, I must have been scouted from the Society of Men
of Honour and my own Profession; Yet, relying upon your
Lordship's prevention of a recurrence of similar usage, and
restrained by the office I hold, I have contented myself with
simply declining from thenceforth the Hospitality of Govern-
ment House; And I trouble your Lordship with this Statement,
merely in order to counteract any impressions, which, Report
says, have been attempted to be made to my prejudice in this
respect.

I seize this opportunity to forward the Correspondence between
the Governor and myself relative to the Case of Mr. O'Connor,
who has been forcibly compelled to quit the Colony, and that
under Circumstances of considerable hardship.

From this Case, and from Depositions in others which I also
annex, Your Lordship will be able to gather of how little con-
sideration and how powerless the Law is in this Colony.

I have, &c,

JEFFERY HART BENT,
Judge of the Supreme Court, N. S. Wales.

[Enclosure No. 1.]

MR. JUSTICE BENT TO GOVERNOR MACQUARIE.

Sir,

Sydney, 21st May, 1816.

I am induced to address your Excellency in consequence
of a Petition to me from Mr. Philip O'Connor, late of the 73d
Regiment, stating that he has been refused permission to reside
in this Colony, where he had arrived for the purpose of carrying
into Effect a Marriage engagement, and had not in fact been
allowed to land till Bonds had been entered into for his depart-
ure by the Ship he came in, and praying such protection and
relief as the Law can give.
Conceiving that Your Excellency has been misinformed and ill advised as to the Extent of your Authority on this point, I feel it my Duty to state that it is the undoubted right at the Common Law of every British subject to go into every part of His Majesty’s Dominions and to abide therein without any Licence or Passport so to do, and, in no British Colony and indeed in no place in the British Dominions, is there any lawful power vested in any one to prohibit the Landing or to enforce the removal of any British Subject, except in the East Indian Presidencies, and that power is expressly given to the Governors thereof by special Clauses in the various Acts of Parliament and is subject to several limitations; But if there could be any doubt (where the Law is already so clear), a clause in the late East India Act will effectually remove it. It is there stated, “That it shall be lawful for any subjects of His Majesty to proceed to and reside at any place situate more to the Southward than (11) Eleven Degrees of South Latitude or more to the Westward than (64) Sixty four Degrees, or more to the Eastward than (150) One hundred and fifty Degrees of East Longitude from London for any lawful purposes without any Licence whatever,” Thus removing any pretence or foundation for the Governors of this Colony to assume or to exercise any power similar to that given to the Governors in the East Indies by the same Act of Parliament.

It has been said, in Justification of the Measures adopted, That the residence of Mr. Connor in this Country, from the circumstances of his Case,* might create a ferment in the Colony. I cannot conceive upon what ground it could be imagined that the residence of a person found guilty of Manslaughter in the Colony should create a Ferment; But most assuredly, Mr. Connor’s quiet residence here and at Van Dieman’s Land for some time past, and the Marriage connexion he is about to form, will sufficiently expose the futility of such a notion.

With regard to his Case, I may say, That it was the Opinion of my Brother, the late Judge Advocate, who tried the Cause, and it is also that of myself, who have attentively considered the Evidence, that had Messrs. Connor and McNaughton been tried before any Common Jury in England, they would have been acquitted, and an impression on the Minds of the Officers composing the Criminal Court, which tried them, that, if they were acquitted, the common Cry would be that it was because they were Brother Officers, and that Officers might commit Crimes with Impunity most certainly had a great perhaps an undue weight in producing that Conviction. And Mr. Connor is by every one considered as most unfortunate, and, so far from

* Note 108.
being viewed with Hostility, He has the pity of every Class of the Inhabitants. To these circumstances, I may add that the Bonds, which have been compulsorily entered into, could not (if forfeited), be recovered upon in any Court of Justice. And I beg to draw your Excellency's attention to the case of Governor Mostyn, who, for having sent a Spaniard from the Island of Minorca, a Conquered Colony, a Garrison, in time of War, and in a state of Siege, and on a charge of Mutiny, suffered very severely; it being the Opinion of every Court, up to the House of Lords before which it came, that such Conduct was illegal; and to the unpleasant consequences that must ultimately fall upon Your Excellency at home, if the Measures adopted towards Mr. Connor should be persisted in. And I have to state that Mr. Connor having applied to me for the protection of the Law, upon any illegal taking of his person, I should not be doing my duty as a Judge, if upon due application I did not discharge him. But it is my sincere hope that Your Excellency will not pursue this matter any further, and in that hope I have the Honor to write.

I should have been spared the pains of addressing your Excellency upon this subject, had not Mr. Connor, by the refusal of a Marriage Licence and the Vessel's being about to sail before the publication of the Banns could be perfected, been driven to make the application to me.

I am inclined to think that a Clergyman, who married on non publication of Banns, would be equally liable to Ecclesiastical Censure for marrying with Your Excellency's Licence, as without it. Being ignorant of any legal Authority that Your Excellency may have to grant such Licence, and Your Excellency not being the Ordinary of the Territory and having no Ecclesiastical Jurisdiction in it; and I am not aware of Your Excellency's being the Surrogate of either the Archbishop of Canterbury or the Bishop of London who claim the Ordinary Jurisdiction. But, letting that pass, I am at a loss as to the reason, upon which that Licence, which Your Excellency has undertaken to grant to others, should be refused to Mr. Connor, when any Man in England may obtain one for two Guineas, and more especially when a Licence has been granted to a Man of the Name of Burke Jackson who came out a Prisoner, and is at this Moment a prisoner on a Ticket of leave, who has been publickly whipped here, and sent to the Coal River and publickly whipped there also. Had such Licence been granted to Mr. Connor, he would have submitted to Your Excellency's Order to withdraw from the Colony.
1816.
12 June.

I have now only to express a wish that the reasons presented may appear sufficient to induce Your Excellency to retrace the steps already taken with regard to Mr. O'Connor.

There are most certainly no public Grounds upon which such an Authority should even for a time be assumed, and It is in itself absolutely illegal. I trust, therefore, that this unfortunate Gentleman, after suffering the Imprisonment and Fine affixed as a Punishment for his offence, and after being in consequence dismissed His Majesty's Service, the Profession to which he has been brought up, will not be hunted out of the Asylum he has chosen; and that Your Excellency will for your own sake prevent the natural conclusion, that will universally be drawn, That Personal Motives have induced such a line of conduct and undue exercise of power, a suspicion even, of which motives, It would in all Men be acting wisely by every means to remove.

I have, &c,

JEFFERY HART BENT,
Judge of the Supreme Court, N. S. Wales.

[Enclosure No. 2.]

ANSWER TO THE WITHIN IN GOVERNOR MACQUARIE'S OWN HAND WRITING.

GOVERNOR MACQUARIE has the honor of acknowledging the receipt of two Letters from Mr. Justice Bent, One being Public and dated 21st Instant, and the other marked Private and dated this day.

Governor Macquarie does not consider either of these Letters entitled to any particular reply, and could wish Mr. Bent had spared himself the trouble of writing them, as, his unsolicited Opinions can in no way alter the resolution of Governor Macquarie in the Case alluded to in those Letters.

Govt. House, Sydney, 22d May, 1816.

[Enclosure No. 3.]

DEPOSITION* OF W. HENSHALL.

NEW SOUTH WALES,
To Wit.

WILLIAM HENSHALL of Sydney, in the Territory aforesaid, Silver Smith, being duly sworn saith; That, on Friday, the Nineteenth April, One thousand Eight hundred and sixteen, about half past seven in the Morning, I went across the Wall that is broken down on the side of Hyde Park below the General Hospital. I had no sooner got in, I had not walked above three or four paces, before some Constables in Ambush jumped up and told me that I was their prisoner; I argued with them for what and for why, and they answered me It was an Order from the Governor to take me or any other person, High or Low, into Custody. Officers were not exempt; I argued with them on the

* Note 109.
business and told them there was no General Order that ever I saw for persons walking or being in the Park, and upon that I asked him, must I go before Mr. Wentworth, and he said, No; The Constable’s name is Wilbow. I asked him if he would take me before the Governor. He said he could not do that; I asked him where I must go to, and he said you must go the Goal. I told him I had been in the Colony Eight or Ten Years, and had never been there, and should be loath to go there; He said you must go, and it is no use to make arguments upon the business. I was taken to the Gaol and there to favour me, not to treat me as a common vagabond, they let me be in the lodge; no person was with me when I went over the Wall; I remained there in Gaol till betwixt twelve and one o’Clock; about that time Mr. Cubitt, the Gaoler, Mr. Redman, the Chief Constable, and the Deputy Gaoler Green came in; I told them they seemed to be very mute; I asked them what was the matter; The Gaoler said He was sorry to inform us That he had got a Warrant to inflict Corporal punishment upon us; There were two others also there. He said he had a Warrant to inflict Twenty five lashes upon each of us. With that I told him I thought that was impossible; He pulls it out of his pocket and reads it. I told him he might as well tell me that I was to have twelve Months’ solitary confinement as that, for I would not believe it. When he read the Warrant he said look at the back, It is written, On Government Service. I said the Governor certainly must be mistaken He don’t know me; But he said, I explained thoroughly that you wer the Person that cut the Dollars* for Government. With that the Triangles were ordered to be brought forward and he ordered Daniel Read to strip; After he was punished, I was the next that was ordered to strip, and I received Twenty five lashes by the common Hangman. I made no resistance but told them I would not be flogged; but they said I must, and, seeing so many Constables about, I saw it was no use to resist, and I received Twenty five lashes; after that Mr. Cubitt said, pay your Fees and go about your Business; I asked him what he meant by the fees; He said that the fees of the Gaol for a free Person was three shillings sterling or five shillings Currency; I paid it and came my ways. I was never taken before a Magistrate, neither the Governor, nor any body else; never had a hearing by any one whatever. All this is fact. I never saw any body besides the Turnkeys; I had been sentenced for seven years, part I served in England, and the remainder about five Years in this Colony. I arrived here in the Alexander Captain Brooks in One thousand eight hundred and six, and was free by the Expiration of my Sentence in One thousand Eight hundred and twelve; All the Colony can speak to my Character, and I was trusted by Government from time to time with near 40,000 Dollars, and both made the tools to cut them, and had about 1,000 Dollars in my possession at a time; I might have had more at a time but did not think myself safe in taking more than a day’s work, or I might have had a Box at a time. I have no more knowledge of what I was punished for than I have said, than that It was the Governor’s will. I do not know that the Warrant expressed any thing about what I was punished for, only that the Warrant was that three of us naming our names were to be punished.

WILLM. HENSHALL.

Taken and sworn before me at Sydney, in New South Wales, this Twenty Second day of April, one thousand, Eight hundred and sixteen.

JEFFERY HART BENT, Judge of the Supreme Court.

1816.
12 June.

Deposition by W. Henshall re flogging inflicted by order of L. Macquarie.

Note 110.
NEW SOUTH WALES,  

To Wit.

DANIEL READ of Sydney, Stone Mason, maketh Oath and saith, That, on the Eighteenth April, on Thursday about Nine o’Clock in the Morning going to work, I happened to get over the Wall into the Government Domain; did not know that I was doing any harm at all; up jumped a Constable from behind a Bush, came up towards me and asked me where I was going; I told him I was going to get a Stone for the use of Mr. How’s printing Office. He told me I must not go that way; which way must I go, says I to him; says he you must go this way with me; which way are you taking me, says I; he said you must go before Mr. Redman; my reply was, what have I done; he said you are to go to Gaol for coming over the Wall; whose Orders are those I said; his reply was to me, The Governor’s Orders, Rich or Poor, Free or Bond, they was ordered to take all people to Gaol by his Orders; my reply was, That was a very hard case that a Man was to be taken to Gaol without having any hearing; For these Nine Years past, I says, I always thought myself a Free Man and a British subject, but, to be sent to Gaol in this manner, I don’t understand it; he said it was a hard case, but they must do their duty, but I wish I could catch Fifty coming over in a day. We both went along to Mr. Redman’s; found him Mr. Redman in the street opposite his own house; set down upon a form; The Constable said to Mr. Redman, here is a Man for getting over the Wall; he pointed his hand towards the Gaol; says he, there is the Gaol for him; I said, Mr. Redman, you are not going to put me in the Gaol without a hearing; says he, I can’t help it, It is the Governor’s Orders, you must go in; some time after I had been in, Mr. Wentworth came in to visit a sick patient, and I informed him on the business; he is a Magistrate and Superintendent of Police; says I, Mr. Wentworth can’t you do something in this case; he said what have you been at Read? I told him for getting over the Wall of Government Domain; says he, I know nothing about it, who put you here. Cubitt the Gaoler made answer and told him it was the Governor’s Orders; Mr. Wentworth turned round to me and said, if the Governor has put in, he must take you out again, he could do nothing in it; All things rested with that, until the Nineteenth, the day following about twelve or One o’Clock, Mr. Cubitt and Mr. Redman came into the room where I was sat; knowing that Mr. Cubitt had been up with the Governor with his Morning report, we wanted to know our dooms; I asked him what was to be done with me; after some little hesitations, he told us we were to receive Twenty five lashes each upon the bare back and then to be discharged; I could not believe him; I told him so, and that he might as well tell me he was to take me up to hang me; he said he was very sorry to say it, but said I will convince you to the contrary; he took out the Warrant and held it open that we might read it; he read it himself; I can not just tell the tenor of the words, But it expressed that we were each to have Twenty five lashes. They called the Hangman to get down the Triangles, and he fixed them up in the Yard; they ordered me to strip and I received Twenty five lashes; I had no hearing at all no further than what I have said. I came into the Country in March, One thousand, Eight hundred and three, in the Glatton. I was sentenced to Seven Years and I served till the expiration of my sentence and

* Note 109.
received my Certificate from Governor Bligh in August, One thousand, Eight hundred and seven. I am a Married Man and live with my Wife in charge of Mr. Marsden's Cottage in York Street.

Daniel Read.

Taken and Sworn before me at Sydney in the Territory aforesaid, this Twenty Second day of April, One thousand, Eight hundred and sixteen.

Jeffery Hart Bent,
Judge of the Supreme Court, N. S. Wales.

[Enclosure No. 5.]

Deposition of W. Blake. Deposition by W. Blake re flogging inflicted by order of L. Macquarie.

New South Wales, To Wit.

On Thursday, the Eighteenth April One thousand Eight hundred and sixteen, about Ten o'Clock I walked down the road towards Mr. Allan's; I live near the New Hospital; as I was going along there was a Woman or two, and I wanted to do my business, and, for decency's sake, I got through the Wall of the Government Domain, seeing the Wall was down, and, no sooner than I was over, I was taken by the Constables; they said, my friend, I am sorry to inform you that it is the Governor's Orders to take every one that comes here to the Gaol; I was much alarmed for seeing every one passing there I thought it no harm; I was taken to the Gaol; this was about Ten o'Clock in the Morning, and I remained in Gaol from that time till the next day; I was not taken before a Magistrate nor the Governor; on Friday Morning about Eleven o'Clock as I believe, Mr. Cubitt came with a Warrant, which I read, and it said that I and two others were to have Twenty five lases each for getting over the Wall of the Government Domain; I was in such a fright that I did not mind exactly what was in the Warrant; I was very much alarmed and trembled very much to think of such a thing; Mr. Cubitt took back the Warrant and ordered this Execution to take place almost immediately; they ordered the Flogger to get the Triangles directly; when the Triangles were came, the other Man was flogged first, Henshall next, and I was flogged the last; We then paid the Gaol Fees and out we came.

I came into this Country in the Ship Northampton, Captain Tween, in July, One thousand, eight hundred and fifteen; I am a Blacksmith by Trade; I came out a Free Man; My Wife had been sent a Prisoner in the Ship; I was never taken before a Magistrate and had no hearing at all.

Wm. Blake.

Taken and Sworn before me at Sydney in the Territory aforesaid, this Twenty second April, One thousand, Eight Hundred and sixteen.

Jeffery Hart Bent, Judge of the Supreme Court.

Governor Macquarie to Earl Bathurst.

31st August, 1816.

[In this despatch, Governor Macquarie reported the committal to gaol of W. Broughton by Mr. Justice Bent; see page 160 et seq., volume IX, series I.]

* Note 109.
1816.
14 Oct.
Request from solicitor for permission to settle.

MR. T. S. AMOS TO EARL BATHURST.

My Lord, 76 London Wall, 14th October, 1816

Permit me respectfully to solicit your Lordship's permission to go out to the Colony of New South Wales, with my two Sons of the ages of seven and five years, as a Settler, with liberty when there of practising in my profession as a Solicitor, should it meet with your Lordship's approbation.

Should your Lordship be pleased to grant my request, it is my intention to take out Effects to the value of between six and seven hundred pounds; and I would further solicit your Lordship to grant me a passage, with permission to take with me my Baggage and a few implements of Husbandry.

I have enclosed for your Lordship's Information a certificate of my being a practising Solicitor, and two testimonials of character which I trust will prove satisfactory to your Lordship.

I have, &c.,

T. S. AMOS.

17 Oct.
Permission granted as settler.

Practise as solicitor to be decided by L. Macquarie.

UNDER SECRETARY GOULBURN TO MR. T. S. AMOS.

Sir, Downing Street, 17th October, 1816.

I am directed by Lord Bathurst to acquaint you in reply to your letter of the 14th Inst, relative to your proceeding as a Settler to New South Wales, etc., that his Lordship has not any Objection to your proceeding to that Colony and to your being furnished with the usual Letters of Recommendation to The Governor; but that the question of your practising as an Attorney there must be left entirely to Governor Macquarie, who can alone Judge of the Expediency or Necessity of granting such permission.

I am, &c.,

HENRY GOULBURN.

16 Nov.
Salary withheld from W. H. Moore.

Occupation in farming.

MR. W. H. MOORE TO EARL BATHURST.

Sydney, New South Wales, 16th November, 1816.

My Lord,

I had occasion to trouble Your Lordship* a Short time since on the Subject of my Salaries being withheld from me for having given my assistance professionally in the Seizure of the American Schooner Traveller, by which I was deprived of the only means of subsistence I then possessed, the business of the Courts of Law being suspended for a considerable time previous.

Immediately that event was made known to me, I endeavoured to provide for myself and those dependant on me by turning my mind to Agricultural pursuits; and for that purpose I built a temporary house for workmen and was proceeding to clear for

* Note 111.
cultivation a piece of Ground, which I had previously pointed out to the Governor as a Spot, which I thought would prove advantageous to me, and which he had given me permission to occupy, until the quantity of Land, he intended to give me, could be measured and the necessary Deed made out; before I had proceeded far, a Vessel arrived in port Jackson with prisoners on board. I immediately wrote to the Governor to request he would allow me from the Vessel the men, he had promised me to be victualled from his Majesty's Stores; to which I received a short answer saying my conduct in seizing the American Schooner had rendered me unworthy of any indulgence whatever from Government. On the receipt of this, I desisted from incurring any further expence, which had already been great, and which recent circumstances had made me very unable to afford to lose; and I shortly after had the mortification of seeing the ground, which I had chosen, with the building and the little improvements I had made upon it, portioned out and granted to a number of petty settlers.

I beg also to inform Your Lordship that, about April last, it was in contemplation of several merchants and Landholders in this place to petition the house of Commons with respect to certain Duties on articles imported here, and on other matters which they wished to Complain of; and, in a conversation which I had with my Brother on the subject, who was then about to make a Tour of the Country, he authorized me, if I thought proper, to put his Name to such petition when prepared in case he did not return to Sydney before it was sent to England. I accordingly signed his Name for him to such petition, and it was sent off by the ship Alexander, whilst he was up the Country. Shortly after my Brother’s return to Sydney, he was informed tho’ not officially that the Land, which was already measured for him and in his possession, was to be taken away from him in consequence of the Governor’s having heard that his name appeared to the petition alluded to, which upon inquiry we found to be the case. Driven almost to a state of desperation to think every one of the Family should be thus deprived of all resources, and in order if possible to induce the Governor to alter his determination, I sat down upon the spur of the moment and wrote his Excellency a letter* in order to induce him to believe that I had put my brother’s name to the petition without his sanction, and the words I made use of upon that occasion were these “that I took upon myself to attach his name to such petition, that he never saw it, And that every thing relating to it was transacted during his absence from Sydney.” Words in themselves strictly true, for I had his authority to use my own discretion as to signing it

* Note 112.
for him, tho' calculated to make him believe the contrary. I received such an Answer* as I might in some measure expect, charging me with unprincipled Conduct, etc., but, though my letter had the immediate effect it was intended to produce, the Governor has not thought proper to rescind the order he made to deprive my Brother of his Land.

I am conscious of never having done any thing to merit the treatment, I have experienced, since I arrived in this Colony; and I may consider my coming here the most unfortunate circumstance of my life. I do entreat Your Lordship to consider the great difficulties I am laboring under and to relieve me by restoring me to the Situation I came over here to fill, and of which Governor Macquarie has virtually deprived me.

I have, &c.,

W. H. Moore.

DEPUTY JUDGE-ADVOCATE WYLDE TO UNDER SECRETARY GOULBURN.

Sydney, New South Wales, 17th November, 1816.

Sir,

I have to acknowledge having received from Mr. Justice Bent, as used by his Brother the late Judge Advocate, one Copy of the Statutes at large from Magna Charta to the 48th Geo. III Inclusive, Rimmington's Edition Quarto, and I beg to submit the request that you will be pleased to direct that the Statutes be made up from the 48th of the King to the present time and transmitted hither for the Use of the Office, I have now the honor of filling. If permitted to me, I would also request that Hawkin's Pleas of the Crown and Chitty's Criminal Law may be added to the Books already furnished through me for the Use of the Criminal Courts in this Colony.

I have, &c.,

Jno. Wylde,
Judge Adve., N.S.W.

DEPUTY JUDGE-ADVOCATE WYLDE TO UNDER SECRETARY GOULBURN.

Sydney, New South Wales, 17th Novr. 1816.

Sir,

I beg leave to avail Myself of this first Opportunity, since my arrival in this Colony, to acknowledge my deep Sense of Obligation towards you for the very flattering and favorable Introduction to Governor Macquarie you were pleased, I am persuaded, to afford me upon my present Appointment. Allow me to assure you that it will be my constant Principle to approve the Sincerity of the Sentiment by zealous and faithful Exer­tions to uphold the due Authority of this Government and

* Note 112.
perform the functions of my own Office with Industry and Independence; it will, I trust, ever appear, that I have approved Myself at least a faithful Servant of the Crown, and in this preserved to myself the Honor and satisfaction I shall ever consider as dependent upon your private Approbation. In favor of your Introduction, I have received from the Governor from the first Day of my arrival here every thing of kindness and possible attention both public and private; nor can I refrain from justly acknowledging that, as far as my Observation, perhaps rather jealously exercised, has yet extended and made known to me, in the most full and explicit Communication between us, the general Principles and Views of his Government, I have every hope that I shall feel it as much matter of Pleasure as Duty in every respect cordially to approve and support his Measures. With regard also to the Messrs. Bents, I cannot but state my Belief that the Governor has acted towards them altogether with great Generosity, Consideration and Forbearance.

By a future Opportunity, I shall very probably think it my Duty to avail Myself of your Directions to suggest any Observations, that occurred to me upon subjects connected with the Interests of this Colony (to me now of constant and important Consideration), and to call your Attention to the state of the Colonial paper Currency,* the subject of more Suits in Court than any other, and now prevailing here in my opinion to an alarming extent at 100 pr. Ct. discount and although contrary to colonial Orders,* but which it seems impossible to put an end to or counteract the mischievous Consequences of, as a fictitious and at length ruinous Capital, unless the amount of the Sterling circulating Medium be increased by an additional Quantity of Specie or a paper Circulation of Sterling Credit in a degree equal to the demands of the Colony and for which the present legal Circulation seems to be altogether insufficient. I will only add, apologizing for intruding on you at such length, that the proceedings of the Courts in my Charge have suffered no Interruption since the time of my arrival.

I have, &c.,

JNO. WYLDE,
Judge Adve., N.S.W.

SECRETARY BARROW TO UNDER SECRETARY GOULBURN.

Sir,
Admiralty Office, 2nd Decr., 1816.

I am commanded by my Lords Commissioners of the Admiralty to send you the accompanying copy of a Letter from Mr. Jeffy. H. Bent, stating the death of his brother Mr. Ellis

* Note 113.
Bent, late Judge Advocate and judge of the Vice Admiralty Court at New South Wales, and offering his services to perform the duties of that Office; and I am to express their Lordship's desire to be informed whether Earl Bathurst has any person to recommend for the appointment of Judge of the said Vice Admiralty Court?

I am, &c.,

JNO. BARROW.

[Enclosure.]

[A copy of this letter will be found on page 198.]

MR. A. RILEY TO SECRETARY CAMPBELL.

Sir,

Hunter Str., 7 Decr., 1816.

I must not omit to thank you for your Communication of this Morn., or to say I am happy your Official opinion is correspondent with your private feeling, and the determination I had myself formed as to the line of Conduct I should pursue in notice of the very extraordinary Mandate* presented me yesterday by the Provost Marshall, Summoning and Warning me to attend the Honble. Mr. Justice Bent at his Chambers as a Member of the Supreme Court, this day at 11 o'Clock.

On the first immediate sight of this document, I momentarily considered that it might possibly be my duty to attend to its purport, from my not having received any absolute Notification that The Governor had authorised me to retire from the duties he was pleased to Command me to fulfill by his Precept* of 22nd April, 1815. A very few Minutes reflection however convinced me I should not only be warranted in declining to meet Mr. Justice Bent, but that I should be wanting in consideration to His Excellency, if I presumed to take upon me Authority, which, the more I view all the circumstances connected with the case, the more I must be persuaded The Governor considers me as virtually absolved from.

With this impression, it is incumbent on me to state to you, I shall adhere to my intention of not taking any further Notice of the Order Mr. Justice Bent has thought proper to have conveyed me.

I have, &c.,

ALEX. RILEY.

MEMORANDUM† BY GOVERNOR MACQUARIE.

Memo!

Sunday, 8 Decr., 16!

I promised Mr. Judge Advocate Wylde to recommend him to Earl Bathurst to be Knighted, in order to mark the Superiority of his Appointment and add Dignity thereto.

L.M.

* Note 114. † Note 115.
Mr. R. Bent to Earl Bathurst.
No. 88 Great Portland Street, London,

18th December, 1816.

My Lord,

Your Lordship, I presume, has been informed by my Son, Mr. Jeffery Hart Bent of Sydney, New South Wales, of the Death of My Son Mr. Ellis Bent (His Brother) late Judge Advocate of that Colony.

His Death is truly Melancholy, and distressing to his family, leaving a Wife and four Children, and pregnant of a fifth, to Mourn his Loss: and in a pecuniary way, particularly distressing, not having a sufficiency to bring them to this Country: And, I am myself (I am sorry to say) Not in a Situation able to make up that deficiency or supply their Wants.

The Exertions he made, and the heavy Duties he had to perform, has no doubt brought him to an early Grave; that shou'd your Lordship think those Duties and Exertions faithfully and ably executed, together with his Length of Service in a foreign Clime:

I trust and hope your Lordship will be so humane to recommend His poor widow and five Orphan Children, as fit Objects (None can be more so) of having something done for their Maintenance and Support.

I therefore, My Lord, most earnestly recommend them to your Lordship's feeling and humanity.

I am, &c,

Rob. Bent.

P.S.—Mr. Robert Ward, the Clerk of the Ordnance, is well acquainted with my Situation, and, sure I am, will do me the Justice to say that, was I situated, as I have been, I wou'd not trouble your Lordship upon this melancholy Occasion.

Deputy Judge-Advocate Wylde to Governor Macquarie.

26th December, 1816.

[A copy of this letter re the duties of the deputy judge-advocate will be found on page 324 et seq., volume IX, series I.]

Under Secretary Goulburn to Mr. R. Bent.

Sir,

Downing Street, 31st Decr., 1816.

I am directed by Earl Bathurst to acknowledge the receipt of your letter of the 18th instant, in which you announce the death of your Son and the destitute situation in which his family have been left, and request that some provision may be made for them; and I am to acquaint you that Governor Macquarrie had, in a dispatch, dated the 20th February, already reported the Melancholy events, which form the subject of your
1816
21 Dec.
Recommendation made by L. Macquarie.

letter, and had further stated to Lord Bathurst that, altho' he had lately differed materially from Mr. Ellis Bent, he nevertheless felt it his duty to represent the uniform integrity and ability of his conduct as Judge Advocate of the Colony, and to recommend his helpless family to the protection of His Majesty's Government. Under these circumstances, Lord Bathurst has felt it incumbent upon him to recommend the case of Mr. Bent's family to the favorable consideration of the Lords Commissioners of the Treasury.

I have, &c.,
HENRY GOULBURN.

1817
3 Jan.
Proposed pension for Mrs. E. Bent.

UNDER SECRETARY GOULBURN TO SECRETARY HARRISON.

Sir,
Downing Street, 3d Jany., 1817.

I am directed by Earl Bathurst to transmit to you an extract of a dispatch* from Governor Macquarie, dated New South Wales, 20th February, 1816, recommending that some provision should be made for the Widow and family of the late Judge Advocate of that Colony, whose death, after an uninterrupted service of eight years in the Colony, has left them in a very distressed situation without the means of support; their Lordships are no doubt aware that, since the Establishment of New South Wales as a Colony, it has been usual on account of its peculiar situation and circumstances to allow pensions on the Estimate to persons, who had for any time held situations, and to the Widows of those who have died in the Service. The change, which has latterly taken place in the circumstances of that Colony, has induced Lord Bathurst on some recent occasions to refuse such applications, nor does he consider that the Civil Servants of that Colony are any longer entitled generally to this peculiar advantage. The case of Mr. Bent's Widow appears however to stand on different Grounds,* and, in directing me to request that you would submit the inclosed paper to the consideration of the Lords Commissioners of the Treasury, he has further desired me to express his hope that, under the circumstances stated by Governor Macquarie and considering both the length of time, during which Mr. Bent officiated as Judge Advocate of the Colony and the difficulty of inducing Professional Men of Ability to accept situations of inadequate emolument in so distant a Colony, without the hope of securing for their family in case of their death after a certain length of time some provision, their Lordships will not object proposing to Parliament in the Estimate for New South Wales an Annual allowance of £200 a Year to Mrs. Bent during her Widowhood.

I am, &c.,
HENRY GOULBURN.

* Note 116.